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## FOREIGN POLICY AND HUMAN RIGHTS

- **David Petrasek**  
New Powers, New Approaches? Human Rights Diplomacy in the 21st Century
  - **Adriana Erthal Abdenur and Danilo Marcondes de Souza Neto**  
Brazil's Development Cooperation with Africa:  
What Role for Democracy and Human Rights
  - **Carlos Cerda Dueñas**  
Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations
  - **Elisa Mara Coimbra**  
Inter-American System of Human Rights:  
Challenges to Compliance with the Court's Decisions in Brazil
  - **Conor Foley**  
The Evolving Legitimacy of Humanitarian Interventions
  - **Deisy Ventura**  
Public Health and Brazilian Foreign Policy
  - **Camila Lissa Asano**  
Foreign Policy and Human Rights in Emerging Countries:  
Insights Based on the Work of an Organization from the Global South
  - **Interview with Maja Daruwala (CHRI)  
and Susan Wilding (CIVICUS)**  
Emerging Democracies' Foreign Policy: What Place for Human Rights?  
A Look at India and South Africa
- 
- **David Kinley**  
Finding Freedom in China: Human Rights in the Political Economy
  - **Laura Betancur Restrepo**  
The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia
  - **Alexandra Lopes da Costa**  
Modern-Day Inquisition: A Report on Criminal Persecution,  
Exposure of Intimacy and Violation of Rights in Brazil
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## CONTENTS

### FOREIGN POLICY AND HUMAN RIGHTS

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DAVID PETRASEK	<b>7</b>	New Powers, New Approaches? Human Rights Diplomacy in the 21st Century
ADRIANA ERTHAL ABDENUR AND DANILO MARCONDES DE SOUZA NETO	<b>17</b>	Brazil's Development Cooperation with Africa: What Role for Democracy and Human Rights?
CARLOS CERDA DUEÑAS	<b>37</b>	Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations
ELISA MARA COIMBRA	<b>57</b>	Inter-American System of Human Rights: Challenges to Compliance with the Court's Decisions in Brazil
CONOR FOLEY	<b>75</b>	The Evolving Legitimacy of Humanitarian Interventions
DEISY VENTURA	<b>95</b>	Public Health and Brazilian Foreign Policy
CAMILA LISSA ASANO	<b>115</b>	Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South
CAMILA LISSA ASANO AND LAURA TRAJBER WAISBICH (CONECTAS HUMAN RIGHTS)	<b>135</b>	Interview with Maja Daruwala (CHRI) and Susan Wilding (CIVICUS) Emerging Democracies' Foreign Policy: What Place for Human Rights? A Look at India and South Africa
DAVID KINLEY	<b>143</b>	Finding Freedom in China: Human Rights in the Political Economy
LAURA BETANCUR RESTREPO	<b>157</b>	The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia
ALEXANDRA LOPES DA COSTA	<b>175</b>	Modern-Day Inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights in Brazil
ANA CRISTINA GONZÁLEZ VÉLEZ AND VIVIANA BOHÓRQUEZ MONSALVE	<b>193</b>	Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action

# PRESENTATION



## Foreign Policy and Human Rights

The fields of human rights and foreign policy have coincided with increasing frequency in recent years. The convergence of these areas, however, has not been widely explored in academic circles of the Global South, and is often considered secondary by activists working at the national level. This issue of SUR, prepared in partnership with **Asian Forum for Human Rights and Development**, **CIVICUS: Worldwide Alliance for Citizen Participation** and **Commonwealth Human Rights Initiative**, proposes, on the one hand, to raise awareness about the different interfaces and interactions between the international activities of countries and the national *protection* of human rights, and, on the other, to examine contemporary international dynamics such as the emergence of a multipolar world and its impact on the global protection of human rights.

The thematic group of articles addresses the changes in the international system – primarily the more prominent role played by so-called emerging powers (Brazil, South Africa, India and China, among others) – and their impact on the global protection of human rights.

Reviewing the foreign policy of these countries and their impact on human rights includes, for example, analyzing their increased commitment to and engagement with regional and international human rights protection mechanisms. With respect to this point, the potential role of emerging powers in the field of human rights is examined by David Petrasek in **New Powers, New Approaches? Human Rights Diplomacy in the 21<sup>st</sup> Century**. In his article, Petrasek argues that, despite the reluctance of these new powers to adopt “traditional” tactics such as naming and shaming and the imposition of conditionalities in their bilateral relations, these countries play an important role in the international protection of human rights through standard-setting on specific human rights issues in multilateral forums.

In **Foreign Policy and Human Rights in Emerging Countries: Insights Based on the Work of an Organization from the Global South**, Camila Asano, coordinator of Foreign Policy and Human Rights at Conectas, examines the role of emerging countries,

with a focus on Brazil, in international and multi-lateral bodies. Based on the experience of Conectas, the article provides insights for other civil society organizations wishing to engage with the formulators and implementers of foreign policy to promote policies that are more respectful of human rights. SUR 19 also features a joint interview with Maja Daruwala, of the **Commonwealth Human Rights Initiative (India)**, and Susan Wilding, of **CIVICUS World Alliance for Citizen Participation (South Africa)**, two additional organizations that monitor how their countries’ activities abroad are affecting human rights. Both for Asano and for Daruwala and Wilding, the international performance of their countries leaves a lot to be desired in terms of consistency.

A subgroup of articles analyzes, more specifically, two topics of Brazilian foreign policy: health and international development cooperation. In **Public Health and Brazilian Foreign Policy**, Deisy Ventura addresses Brazilian diplomacy in the field of health – at a regional and international level – and analyzes how the human rights topic has been included in this agenda. In the article, Ventura demonstrates the solidarity that underpins Brazilian health diplomacy, but also warns of the proliferation of cross-cutting contradictions – both internal and external – that weaken, in the current context, the prevalence of human rights and the very effectiveness of Brazilian health cooperation. In **Brazil’s Development Cooperation with Africa: What Role for Democracy and Human Rights?**, Adriana Erthal Abdenur and Danilo Marcondes de Souza Neto revisit the role and presence of Brazil on the African continent, analyzing how and to what extent the “Brazilian model” of cooperation directly and indirectly impacts the dimensions of democracy and human rights on the African continent. The authors identify, despite the non-interventionist rhetoric of Brazilian foreign policy, a positive – albeit cautious – role of the country in its relationship with African nations. They point out, however, that Brazil could be a more active and decisive partner in the promotion of democracy and human rights on the continent.

This group also includes two articles on the national implementation of international norms, decisions and recommendations. These articles were

included with the aim of countering the normative analysis that usually underlies studies on this topic by including the political dimension that permeates the domestic incorporation of international instruments, given that, in the same one country, we find cases of active engagement, limited respect and even defiance of international norms. These dynamics interest us, since they have a considerable impact on the scope that victim protection systems will have in each specific context.

In this context, in **Incorporating International Human Rights Standards in the Wake of the 2011 Reform of the Mexican Constitution: Progress and Limitations**, Carlos Cerda Dueñas examines how the 2011 constitutional reform in Mexico established respect for human rights as a guiding principle of the country's foreign policy and what the impact of this has been on the incorporation of international norms by the country. Elisa Mara Coimbra, meanwhile, discusses the relationship between Brazil and the Inter-American System of Human Rights. In **Inter-American System of Human Rights: Challenges to Compliance with the Court's Decisions in Brazil**, the author comments on the implementation status of the decisions in five cases in which Brazil was condemned by the regional system.

Despite the variety of issues present in this edition, we should briefly mention the major research topics and agendas that emerged during the conception and production of this issue of SUR and that, for practical reasons, have not been fully addressed here. Prominent among them are, for example, the dynamics of transparency, accountability and citizen participation in foreign policy, and comparative studies of foreign policies of two or more countries from the Global South. As expected, and fortunately, the debate does not end with this issue, and SUR remains committed to continuing this dialogue.

## **Non-thematic articles**

This issue of SUR includes four articles in addition to the dossier. The first, **Finding Freedom in China: Human Rights in the Political Economy**, written by David Kinley, addresses human rights in China from an economic policy perspective, proposing new ways of viewing the relationship between the Chinese

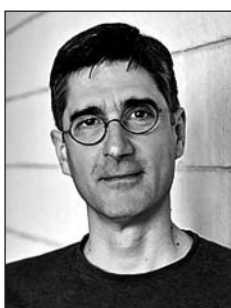
economic model and the realization of fundamental freedoms in the country.

Laura Betancur Restrepo, in **The Promotion and Protection of Human Rights through Legal Clinics and their Relationships with Social Movements: Achievements and Challenges in the Case of Conscientious Objection to Compulsory Military Service in Colombia**, presents an analysis of the work of the Constitutional Court of Colombia on the subject of conscientious objection in the specific case of mandatory military service. Based on discourse analysis, the author attempts to comprehend the legal translation of social demands and its direct and indirect impacts for social movements.

Finally, the issue contains two articles that tackle the issue of sexual and reproductive rights. The first, **Modern-day inquisition: A Report on Criminal Persecution, Exposure of Intimacy and Violation of Rights**, written by Alexandra Lopes da Costa, discusses the implications of the ban on abortion in Brazil, in a quasi-journalistic account of a case that occurred in the state of Mato Grosso do Sul.

The second, **Case Study on Colombia: Judicial Standards on Abortion to Advance the Agenda of the Cairo Programme of Action**, by Ana Cristina González Vélez and Viviana Bohórquez Monsalve, examines how Colombia and, more broadly, Latin America, have advanced in the implementation of the Cairo Programme of Action, which addresses access to abortion and the protection of other reproductive rights.

Finally, we would like to emphasize that this issue of the Sur Journal was made possible by the support of the Carlos Chagas Foundation (FCC). Conectas Human Rights is grateful for the collaboration of the partner organizations throughout the production of the thematic section of this issue. We also thank Amado Luiz Cervo, Bridget Conley-Zilkic, Celia Almeida, Daniela Riva Knauth, Deisy Ventura, Eduardo Pannunzio, Eloisa Machado de Almeida, Fernando Sciré, Gabriela Costa Chaves, Gilberto Marcos Antonio Rodrigues, Gonzalo Berrón, Guilherme Stolle Paixão e Casarões, Katia Taela, Jefferson Nascimento, Louis N. Brickford, Márcia Nina Bernardes, Renan Honório Quinalha, Renata Avelar Giannini, Salvador Tinajero Esquivel and Thomas Kellogg for reviewing the articles published in this issue.



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## ABSTRACT

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The extent to which emerging powers will pursue human rights issues in their foreign policy is more complex than commonly assumed. Although they may be less willing to pursue tactics such as public criticism and conditionality, they may embrace other tactics, including dialogue-driven approaches and thematic-specific standard-setting. As the impact of naming and shaming approaches is in any case contested, such a shift presents both risks and opportunities for the goal of maintaining and improving an effective international regime for the protection of human rights.

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## KEYWORDS

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United Nations – Foreign policy – International human rights standards – Human Rights Council – BRICS – Conditionality



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# NEW POWERS, NEW APPROACHES? HUMAN RIGHTS DIPLOMACY IN THE 21<sup>ST</sup> CENTURY\*

David Petrasek

How will the emerging powers deal with human rights in their foreign policy? The question arises for an obvious reason: the world is changing. Economic and political power is shifting from North and West to South and East; liberal democracies will increasingly share or cede global power to authoritarian regimes or emerging powers that appear to prioritize sovereignty and non-interference over raising concerns about respect for human rights in other countries. The approach to date, at least of international human rights advocates, is to simply insist that as new global powers emerge, they must – no less than existing powers – use their growing influence to pressure recalcitrant regimes to respect human rights.<sup>1</sup>

However, a recent online forum devoted to the issue of emerging powers and human rights was indicative of a range of views as to whether such a strategy makes sense.<sup>2</sup> Some of the authors approved of it, arguing that new powers ought to raise concerns about human rights abuse in other countries.<sup>3</sup> But a number of others explained why new powers would be unlikely to do so,<sup>4</sup> and a few suggested that, even if they were willing and able to do so, new powers might be unwise to prioritize human rights in their foreign policy.<sup>5</sup> Though apparently contradictory, all three positions are to some degree valid.

Why? Because there are numerous ways in which human rights can be promoted in a State's foreign policy. The most obvious and visible tactic is to make concern over human rights issues a key part of bilateral relationships, linking progress to improved trade and other relations, and, if necessary, voting in multilateral settings to express disapproval. This tactic – of public criticism

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\*An earlier version of this paper appeared as "New powers won't play by old rules". Available at: <<http://www.opendemocracy.net/openglobalrights/david-petrsek/new-powers-won't-play-by-old-rules>>. Last accessed on: Nov. 2013.

and conditionality – may be used *vis-à-vis* some States, whereas in regard to other human rights concerns, it may be dealt with in confidence, in an ongoing dialogue.

In addition to such country-specific approaches, however, States might also promote human rights globally by seeking international attention for specific human rights themes, for example in relation to certain categories of rights-holders (for example, women, migrants, the landless), or certain types of rights (for example, freedom of association, self-determination). This might result in diplomacy aimed at strengthening international legal rules or at recognizing new types of human rights (for example, a right to peace). Further, the approach taken to both country-specific and theme-specific tactics in the United Nations may differ from those deemed appropriate in regional intergovernmental organizations.

Emerging powers will embrace some of these tactics, and avoid others – sometimes for good reasons. Decisions to do so will be based both on the nature of the tactic proposed and on the State's relationship to the country whose human rights record is at issue. And in this regard, although it is likely that less attention will be given to country-specific tactics, the approach of the new powers to human rights in their foreign policy will, at least in some respects, resemble that of the old powers.

As argued elsewhere,<sup>6</sup> even if it is sensible to demand that new powers prioritize human rights in their bilateral relations (and there are doubts on this point, see below), there are several reasons why such powers might decline to do so. The most obvious reason is that many emerging powers, for example, China and Russia, are themselves open to the charge of widespread human rights abuse, and thus can hardly be expected to wield it in good faith against others. Even the democracies among the rising powers, most prominently, Brazil, India and South Africa, have serious human rights problems, and this may undermine their ability to promote abroad values they claim to be committed to at home. For this reason, many commentators argue that unless they significantly improve their domestic human rights record, new powers will be unlikely (and in any case ineffective) defenders of human rights abroad.<sup>7</sup>

Yet, the apparent contradiction between a troubled domestic human rights record and the promotion of human rights abroad is hardly new. Western democracies like the United States, France and the United Kingdom have been outspoken critics of human rights abuse in other countries even as their domestic record was far from perfect. Further, countries like India, Brazil and South Africa have already been prepared to raise human rights concerns, at least *vis-à-vis* some countries. India, for example, has been critical of Sri Lanka and voted twice in the United Nations Human Rights Council to insist that Sri Lanka properly investigate human rights abuses that occurred in the context of the war with the Liberation Tigers of Tamil Eelam (LTTE),<sup>8</sup> even though India itself stands accused of abuses in its wars against Kashmiri separatists and Maoist insurgents.<sup>9</sup>

The charge of hypocrisy is unlikely to prevent new powers from pointing fingers where they otherwise determine it is important to do so (much like the old powers). Whether they make that decision for their own political reasons, or out of a genuine concern for those whose rights are at risk, or some combination



of the two, is a separate discussion (but, again, one that is familiar as regards the old powers). Having said that, it is certainly true that new powers will increasingly seek to shape country-specific scrutiny, at least at the UN level, in ways that privilege a non-confrontational and dialogue-driven approach. There is already evidence for this in the UN Human Rights Council, where it is increasingly difficult to muster a majority for country-specific resolutions, and where many governments oppose in principle the use of name and shame resolutions. Similarly, pressure continues on the system of “special procedures” (the rapporteurs and working groups) to adopt less confrontational tactics, such as critical reporting, and to prioritise dialogue with States.

The more fundamental problem, however, with the idea that new powers should (or could) take up human rights concerns abroad is that it assumes that condemnation and pressure by any foreign government, acting via the UN or bilaterally, is or will remain an effective means for improving respect for human rights. The actual evidence on this point is inconclusive (HAFNER-BURTON, 2008). It would seem that such pressure only really works where the country under scrutiny has something to gain (or lose) from the country or countries applying pressure (FRANKLIN, 2008). This calculation may play out very differently in an increasingly multi-polar world.

Consider the record. The strategy to use foreign policy and multilateral forums to bring pressure on regimes abusing human rights found real traction for the first time in the mid-1970s and gathered pace in the 1980s, precisely at a time when Western power was ascending, and Soviet power was declining. The countries that faced this new pressure from abroad – South and Central American dictatorships, apartheid South Africa, the communist regimes of Eastern Europe – withstood this pressure, or changed their policies, as the case may be, largely based on the degree to which they needed the trade, military or aid relationships with Western powers that were applying the pressure. In the 1990s, with United States (US) (and Western) power largely unchallenged, and more countries thus dependent on such relationships, there was arguably much more scope to promote human rights through foreign policy and the UN. Hence, there was indeed a dramatic increase in both the number of countries that came under one form or another of UN scrutiny, and the available mechanisms for doing so.

Further, let us consider the cases where pressure from foreign governments has had the most tangible impact, and conversely those cases where it has been negligible. Post Cold War, the desire to join the European Union and/or North Atlantic Treaty Organization (NATO) has without doubt motivated the countries of Eastern, Central and South-eastern Europe to pay attention to human rights concerns raised by the existing members of those alliances. Similarly, small and mid-size countries heavily dependent on aid or trade and investment have in some cases improved respect for human rights under foreign pressure. But Western criticism of human rights abuse, has had a negligible impact on large powers like China or Russia, or medium and small powers who are not dependent on the west, for example, Iran and Sudan, or Sri Lanka and Zimbabwe. Many other examples could be cited.

The moral opprobrium attached to being singled out for criticism rarely, on its own, brings about change. It is the fear that criticism, whether bilateral or via UN resolutions, may signal repercussions in other areas that provide the leverage. On this point, emerging powers will likely differ from the old powers. Developing countries have been deeply hostile to such conditionality, and in a number of cases the BRICS (Brazil, Russia, India, China and South Africa) have fought attempts to link trade or aid relationships to human rights.<sup>10</sup> Whatever the basis for this hostility, we are likely to see greater reluctance to apply human rights conditionality in the policies of global institutions – the UN, World Bank, International Monetary Fund (IMF) – as the voting weight and influence of the emerging powers increases in these organisations.

Again, this is not to suggest there will be no willingness among the new powers to adopt public and critical stances regarding the human rights situation in other countries, and in some cases to use political, economic and aid levers to back up that stance. While there is little evidence of this at the UN level, new powers may act differently in regional and sub-regional inter-governmental bodies. For example, repressive regimes might be denied membership in regional organisations. The African Union, for example, has sought to exclude the participation of governments that take power through *coup d'état* or unconstitutional means. The evidence on this point is mixed, however. In the Association of Southeast Asian Nations (ASEAN) some countries like Indonesia have, at least on occasion, championed stronger human rights criteria, whereas others have not. In the Organisation of American States (OAS), some South American countries have sought to weaken the role of the Inter-American Commission on Human Rights (IACHR).<sup>11</sup>

The general reluctance of new powers to use country-specific approaches, usually dependent on forms of conditionality for their success, may not, however, signal the absence of human rights promotion in their foreign policies. Although the name and shame tactic may be the most visible, it is by no means the only way to promote human rights abroad. Much of the diplomatic work on human rights at both UN and regional levels focuses not on specific countries but on specific themes. This work may aim at identifying policy and practises to improve the protection of specific human rights, or seek to strengthen international standards to address a human rights problem. Of course, some of this work is of a bureaucratic nature, and given the many problems with the UN, it is not always very effective, timely or relevant. Nevertheless, one of the UN's greatest achievements in the human rights field has been the development of international standards, both hard law and soft law texts, and this process is far from complete. Even if major treaties are now adopted, the process of securing international agreement on their interpretation and the details of their implementation will continue. Just as domestic law reform in relation to rights is a continuous process, so too at the international level.

New powers often participate fully and with progressive positions in such standard-setting exercises. Latin American States, for example, were in the vanguard of efforts to adopt a new UN convention against enforced

disappearances, many taking positions that favoured stricter treaty protections than those of some western countries. African nations played a key role in securing the adoption of the Rome Statute establishing the International Criminal Court (although some of them now are very critical of the Court). The migrant rights convention is championed by countries like Mexico and the Philippines even as western countries refuse to sign or ratify it. South Africa has played a prominent role in securing greater attention to and protection of the rights of lesbian, gay, bisexual and transgendered people. There are many more examples that could be cited.

This work to develop international standards might appear less virtuous, and certainly attracts less attention, but in the long run it is no less impactful than country-specific lobbying. Indeed, it may even be more so. Studies have shown the important influence of international standards in altering state behaviour, especially in democratizing countries where the global standard can be used by local civil society to push for reform in domestic law and policy (SIMMONS, 2009). This may be much more impactful than condemnatory resolutions in UN bodies, or criticism from foreign governments.

Viewed this way, a more complex picture emerges regarding human rights in the foreign policy of emerging powers, one that suggests that even though there may be less of the 'old' tactics of public criticism and conditionality, other tactics, including dialogue-driven approaches and thematic-specific standard-setting may figure prominently. If true, this presents both risks and opportunities for the goal of maintaining and improving an effective international regime for the protection of human rights. A decline in country-specific attention may pose risks in situations where abuses are being committed on a mass scale and urgent enforcement action is required, including by the Security Council. On the other hand, the opportunities to secure human rights reforms through South-South dialogue or through a more effective Universal Periodic Review (UPR) process have barely been tested. The challenge might well be to focus narrowly on securing the support of new powers to take country-specific action in those extreme cases, and otherwise accepting that in a changed world the public criticism and conditionality approach has little future.

Finally, it must be pointed out that although it is important, the question of human rights diplomacy in a changed world order will hardly be determinative for the future of human rights. The rise of new powers is only one of the many momentous global shifts now underway. Dramatic gains in education, including at the secondary and post-secondary level, coupled with the exponential growth of urban populations and the diffusion of mobile access to the internet (to 5 billion people by 2020) all point to a newly empowered and growing middle-class in dozens of countries. Prominent among these will be the emerging powers: China and India, of course, but also Brazil, Indonesia, Mexico, Nigeria, South Africa, Turkey and others. This newly empowered middle-class will be a crucial engine for change, for good or ill. The approach this group takes to human rights is likely to be much more important to global human rights struggles than the foreign policy of their governments.

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## NOTES

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1. See for example Ken Roth and Peggy Hicks (2013) and Salil Shetty (2013).
2. The forum was hosted by the openGlobalRights website. Available at: <<http://www.opendemocracy.net/openglobalrights>>. Last accessed on: Nov. 2013.
3. See, for example, Meenakshi Ganguly (2013) and Nahla Valji and Dire Tladi (2013).
4. See, for example, Jeffrey Cason (2013).
5. See, for example, Ram Mashru (2013) and Aseem Prakash (2013).
6. See David Petrusek (2013).
7. See Camila Asano (2013) and Nukhet A. Sandal (2013).
8. The relevant resolutions are "Promoting reconciliation and accountability in Sri Lanka" (UNITED NATIONS, 2013; and "Promoting reconciliation and accountability in Sri Lanka" (UNITED NATIONS, 2012).
9. See for example, Human Rights Watch, *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir*, September 2006; and Human Rights Watch, *Between Two Sets of Guns: Attacks on Civil Society Activists in India's Maoist Conflict*, July 2012.
10. For example, in international trade negotiations under World Trade Organization (WTO) auspices where the BRICS and many developing countries opposed any linkage between trade and labour rights, and many developing countries have also been hostile to strong human rights criteria being adopted by the United Nations Development Program (UNDP).
11. In a review process begun in 2011, Ecuador, Venezuela, Bolivia and Nicaragua lobbied for measures that would have weakened the IACHR's independence and oversight functions. Though these were not adopted, a compromise resolution adopted by the OAS in March 2013 keeps open the possibility of re-opening the debate. For further information see <<http://www.ijrcenter.org/2013/03/24/oas-concludes-formal-inter-american-human-rights-strengthening-process-but-dialogue-continues-on-contentious-reforms/>>. Last accessed on: Nov. 2013.

## RESUMO

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Determinar em que medida potências emergentes incorporarão questões de direitos humanos à sua política externa é mais complexo do que geralmente se supõe. Embora estas potências possam estar menos dispostas a adotar estratégias tais como criticar publicamente outros países ou condicionar a sua relação com outras nações ao seu grau de proteção aos direitos humanos, elas podem usar outras táticas, como a promoção do diálogo e a elaboração de normas internacionais ligadas a determinados temas. Como o impacto de estratégias de nomear certos países e constrangê-los publicamente por sua situação de direitos humanos tem sido contestado, esta mudança traz consigo riscos e oportunidades para a manutenção e melhoria de um regime internacional eficaz para a proteção de direitos humanos.

## PALAVRAS-CHAVE

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Nações Unidas – Política externa – Parâmetros internacionais de direitos humanos – Conselho de Direitos Humanos – BRICS – Condicionais

## RESUMEN

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La forma en que las potencias emergentes tratarán las cuestiones de derechos humanos en su política exterior no resulta tan simple como se cree. Aunque tengan menos tendencia a emplear tácticas tales como la crítica pública y la condicionalidad, pueden servirse de otras tácticas, como los enfoques basados en el diálogo y la creación de normas específicas en la materia. Ante la puesta en entredicho del impacto de los enfoques de denuncia pública y descrédito *naming and shaming*, ese cambio de estrategia presenta tanto riesgos como oportunidades para el objetivo de mantener y mejorar un régimen internacional eficaz para la protección de los derechos humanos.

## PALABRAS CLAVE

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Naciones Unidas – Política exterior – Normas internacionales de derechos humanos – Consejo de Derechos Humanos – BRICS – Condicionalidad



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## ABSTRACT

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Over the past ten years, Brazil's foreign policy elites have made economic, political, and military cooperation with Africa one of the country's top priorities, as part of Brazil's emphasis on expanding relations within the Global South. While growing research literature has sought to analyze the norms and practices this cooperation entails, little of the current scholarship has examined its relevance to African politics. In this article, we consider the implications of Brazilian cooperation for democracy and human rights in Africa along three lines: the scope and content of Brazil's democracy promotion programs; the implications of its cooperation (official and non-official) for democracy and human rights; and its responses to political crises in Africa.

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## KEYWORDS

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Brazil – Africa – Cooperation – Foreign policy – Democracy – Human right



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# BRAZIL'S DEVELOPMENT COOPERATION WITH AFRICA: WHAT ROLE FOR DEMOCRACY AND HUMAN RIGHTS?

Adriana Erthal Abdenur and  
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## 1 Introduction

Over the past decade, Brazil's foreign policy elites have made economic, political, and military cooperation with Africa one of the country's top priorities abroad, as part of Brazil's emphasis on expanding relations within the Global South. Not only does the government view the continent as a promising market for Brazilian investments and exports, but it also sees to African States as key political partners in Brazil's quest to become a global player. Efforts to strengthen economic, political, and defense partnerships with Africa include a fast-growing South-South cooperation program whose discourse stresses solidarity and horizontality, as well as the promotion of Brazilian public policy experiments in areas such as agriculture, education, and health.

While growing academic and policy literature has sought to analyze the norms and practices that this cooperation entails, little of the current scholarship has examined its relevance to African politics. In this article, we consider the political implications of Brazilian cooperation for democracy and human rights in Africa along three lines: the scope and content of Brazil's democracy promotion programs; the implications of its cooperation (official and non-official) for democracy and human rights; and its responses to events in Africa that threaten democracy and human rights. The paper is exploratory in that it maps out some of the key patterns in Brazilian cooperation so as to guide a more long-term research agenda on the relevance of Brazilian cooperation to Africa's democracy and human rights landscape.

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*Notes to this text start on page 34.*

Examining Brazilian cooperation in light of African politics is important not only because Brazil's role in Africa has grown substantially over the past decade, but also because this engagement raises new questions regarding the norms and principles underpinning Brazilian cooperation. For instance, some analysts question why a democratic country with a formal commitment to human rights within its foreign policy has sought closer ties with regimes that are strongly condemned for human rights violations perpetrated by Northern States and civil society entities. Analysts also tend to stress the contrast between this foreign policy approach and the government's recent human rights efforts at home, including the creation of a Truth Commission (approved in September 2011) devoted to uncovering human rights violations perpetrated during the military period (1946–1988). Others adopt a pragmatic perspective according to which, despite Brazil's democratic identity, in foreign affairs “business is business,” suggesting a willingness to subordinate non-economic principles such as democracy and human rights to the desire to broaden Brazil's economic relations. This last perspective also emphasizes that, despite their strong rhetoric stressing democracy and human rights, liberal democracies have supported authoritarian regimes when politically or economically convenient (including Brazil's past military government).

Other defenders of Brazil's recent foreign policy orientation also insist that Brazil deals with these countries by promoting dialogue rather than through “naming and shaming,” often associated with the strategies of American and European NGOs, and that through engagement rather than isolation, it is possible to nudge authoritarian regimes in the direction of democracy and human rights.<sup>1</sup> While some Northern donors adopt a similar approach, the Brazilian government has stressed the need for diplomatic resolution of conflicts before multilateral intervention (FRAYSINET, F. 2011), noting that such interventions often yield regime change with uncertain results, or outcomes that primarily benefit NATO countries, as in the cases of Iraq and Afghanistan. This debate, sparked in part by President Luiz Inácio Lula da Silva's (2003-2011) active presidential diplomacy in Africa, reemerged as President Dilma Rousseff (2011-present) continued to boost relations with countries whose governments were associated with human rights violations and as Brazil began to more openly question military intervention, including through UN Security Council (UNSC) votes in the Libyan and Syrian crises.

Our analysis suggests that Brazil's democracy and human rights initiatives abroad, carried out under a foreign policy discourse that stresses non-intervention, are restricted to transitional regimes that have explicitly requested assistance with governance matters, and to fellow members of the Community of Portuguese Language Countries (CPLP), an organization premised in part on its members' commitment to democracy and governance cooperation. More broadly, our analysis suggests that Brazil's cooperation in Africa does have implications for local political systems, whether by boosting democratic institutions or, conversely, by supporting authoritarian regimes. In addition, Brazilian cooperation with Africa has begun attracting the attention of Brazilian civil society entities,

including those that collaborate with African counterparts, leading to increasing contestation of some Brazilian cooperation practices abroad.

The article is structured as follows. After providing a background on the intersection between development cooperation and democracy promotion, including Brazil's role, we analyze the Brazilian official discourse on democracy and human rights as it pertains to Brazil's foreign policy, including with respect to Africa. Second, we examine some of the practices of Brazilian cooperation with Africa, analyzing the extent to which they adhere to those principles. Finally, we consider the Brazilian government's positions on key political crises in Africa, and how they relate to its cooperation practices and approach to democracy and human rights. In the conclusion, we consider some of the implications of Brazil's cooperation for African politics.

## 2 Brazilian cooperation with Africa, democracy, and human rights

### 2.1 *Democracy and development cooperation in Africa*

Although there are diverging definitions of “democracy promotion,” here we draw on Carothers' (2009) view of democracy promotion as *cooperation programs that contain an element that seeks to support the spread of democracy within a given country, region, or other geographic context*. Although transition to democracy is largely endogenous, international relations can affect this process – towards democracy, or away from it (BROWN, 2005). In Africa, the scope and diversity of aid and cooperation (from Organisation for Economic Co-operation and Development - OECD donors and other partners) means that complex international elements influence regime types. The Arab Spring also shows the importance of international factors in democracy promotion at several levels, including state-led processes, civil society, and social networks that cross boundaries, and with a wide range of outcomes. Although the literature on democracy promotion focuses on Northern aid, there is a growing need to analyze the role of emerging powers. While many of these countries stress national sovereignty and non-intervention in their foreign policies, democratic emerging powers often incorporate state-building within their cooperation efforts. While these initiatives are not necessarily labeled as democracy promotion initiatives, they disseminate norms, technologies, and practices that are politically relevant.

During the Cold War, American foreign aid was more anti-communist and anti-revolutionary than it was pro-democratic (LOWENTHAL, 1991). In the post-Cold War period, US and European donors began to attach more political conditionalities to aid, and they invested significantly in programs specifically designed to promote democracy – with highly variable results (BROWN, 2005 and BRATTON; VAN DE WALLE, 1997). As Africa underwent a partial wave of democratization in the 1990s, democracy promotions yielded steps forward as well as reversals; Lynch and Crawford (2011) conclude that, “typically, though not universally, sub-Saharan African countries are more democratic today than

in the late 1980s.” However, Africa still suffers significant economic, social, and political obstacles to democratization, including colonial legacies, clientelist politics, and complex ethnopolitical dynamics. Since 2001, the US and Europe’s security interests have weighed more heavily in their aid design and allocation, with increased support for countries that agreed to cooperate in the ‘war on terror,’ independently of regime type. Over the past decade, the growing role of emerging powers, particularly China, in Africa has rendered the landscape of aid and cooperation even more complex. Although the literature on South-South cooperation has examined some of the effects that Chinese cooperation is having on African democracy (ESTEBAN, 2009), little has been written so far on the political implications of Brazil’s growing cooperation ties with Africa. Such analysis is necessary not only because of Brazil’s increasing role in Africa, but also because Brazil’s current Foreign Minister, Luiz Alberto Figueiredo, has signaled his intention to give human rights greater space within Brazil’s foreign policy.<sup>2</sup>

## *2.2 Brazilian foreign policy and human rights*

Understanding the relevance of Brazilian cooperation to democracy and human rights in Africa requires taking into account the country’s own experiences with democracy. First, Brazil has received both aid that promoted autocratic rule and aid that promoted democracy—in the case of US, from the same provider. This may help to explain the cautious tone of Brazilian foreign policy elites when addressing democracy and human rights abroad.<sup>3</sup> Second, Brazil’s own political experiences, including the gradual transition from military rule (1964-1985) back to democracy, had profound and lingering effects on Brazil’s foreign policy making (SANTORO, 2012). For instance, the role of civil society (local and international) in Brazil’s return to democracy helps to explain the emphasis placed on public policy councils at different levels of government, from federal to municipal, as well as recurring calls for broadened civil society participation. Moreover, Brazilian civil society has become an important part of Brazil-Africa cooperation, both through collaboration with official cooperation, and by contesting cooperation initiatives. The Brazilian government has acknowledged the importance of non-state actors’ connections to Africa; for instance, former Foreign Minister Antonio Patriota asserted that Africa is of genuine interest not only to the Brazilian government but also to private companies and civil society organizations (BRASIL, 2011a). Although civil society entities such as NGOs, labor unions, and trade associations have often struggled to expand the space available to them in Brazil’s foreign policy sphere, they have played a growing role in international cooperation, both through participation and through contestation of that cooperation.

The transition from military back to civilian rule also yielded a formal commitment to democracy and human rights, within and beyond Brazil’s borders. Brazil’s 1988 Constitution establishes the principles that should guide the country’s foreign policy: national independence; prevalence of human rights; self-determination of the peoples; non-intervention; equality among States;

defense of peace; peaceful settlement of conflicts; repudiation of terrorism and racism; cooperation; and granting of political asylum. Within foreign policy, Brazil's commitment to human rights has been most clearly visible in regional initiatives such as the Organization of American States, which imposes sanctions on member States where democracy is endangered (for instance, through a coup) (SANTISO, 2002 and CAROTHERS; YOUNGS, 2011).

Within its bilateral relations, Brazil has often upheld democratic principles. For example, Brazilian diplomats played a crucial role in the Paraguay crisis of April 1996, helping to maintain Paraguay's democracy (SANTISO, 2002). However, following Haitian President Jean-Bertrand Aristide's resignation in 2004, Brazil provided a veneer of legitimacy to an intervention that "had more to do with political expediency than with the protection of democracy" (BURGES; DAUDELIN, 2007). Such ambiguities and inconsistencies have often cast doubts on Brazilian foreign policy's commitment to democracy and human rights.

In 2003, when Lula began his first mandate, the government presented an additional concept that would guide Brazilian foreign policy: the idea of non-indifference. Non-indifference was meant to balance non-intervention, meaning Brazil would intervene abroad only when it was invited by the parties involved and if it believed it could play a positive role. This principle has since been evoked to justify development cooperation with African nations, as well as Brazil's involvement as a troop contributor to the UN Stabilization Mission in Haiti (MINUSTAH) in 2004.<sup>4</sup>

President Rouseff's inauguration in January 2010 raised expectations regarding the role of human rights in Brazil's foreign policy, especially in light of Rouseff's personal history as a militant against the military regime, including her experience under arrest and her subjection to torture. In 2011, Foreign Minister Antonio Patriota cast Brazil's poverty reduction achievements as a success in terms of Brazil's domestic human rights situation, but he also recognized areas that needed improvement, including urban violence, women's rights, education, and the incarcerated population.<sup>5</sup> On other occasions, the Brazilian government has rejected what it views as the stigmatization of poor nations as the only human rights violators, stressing that developed countries sometimes commit serious violations themselves. This leads to a reluctance to single out States for human rights violations, although within the UN Human Rights Council, Brazil has often backed resolutions condemning States that systematically abuse human rights.

In January 2011, Patriota stated that the government would denounce all human rights violations, no matter where they had taken place,<sup>6</sup> and Foreign Policy Advisor Marco Aurelio Garcia asserted that Rouseff's government would emphasize human rights both domestically and abroad, in part due to the president's own history.<sup>7</sup> In February 2011, Brazil, playing the role of facilitator within the UN Human Rights Council, presented a proposal in which human rights violations should be investigated without special treatment and ideological considerations. Civil society organizations called the proposal the first concrete step on the part of the Rouseff administration to make human rights a central theme within Brazilian foreign policy.<sup>8</sup> However, in evaluating Rouseff's human

rights policy, some analysts<sup>9</sup> argue that the potential for Brazil's contribution towards human rights remained underexplored in Rousseff's first year as president, and that her government's foreign policy has generally focused on the economic and commercial aspects of Brazil's international relations to the detriment of its commitment to democracy and human rights.<sup>10</sup>

Brazil's redemocratization has also shaped its foreign policy by enhancing the prominence of social policy issues within the Brazilian conception of democracy, as well as throughout its international cooperation agenda. For instance, in addition to establishing the principles meant to guide Brazil's foreign policy, the 1988 Constitution enshrined health, education, and social security as citizen rights, boosting public education and leading to the creation of institutions such as Brazil's publicly funded health care system, the *Sistema Único de Saúde* (SUS). In the mid-1990s, the creation of an electronic voting system (drawing on technological innovations by Brazilian and foreign companies) broadened political participation of illiterate and handicapped citizens during elections – another hallmark of the country's concern with accessibility as a key component of democracy.

Despite their less than adequate implementation, the rights stipulated in Brazilian legislation represented significant accomplishments in that they formally acknowledge the rights of individuals regarding access to areas such as health and education (CARDOSO JR., 2009). The expansion of income redistribution schemes (such as the conditional cash transfer program *Bolsa Família*, which started under President Fernando Henrique Cardoso and was broadened under President Lula) and the approaches developed to tackle food security and public health became hallmarks of Brazil's social development, and later of its international cooperation (SANTORO, 2012 and ABDENUR; SOUZA NETO, 2013). Thus, over the past ten years, reductions in poverty and social inequality, driven by higher economic growth and by redistributive policies, have also highlighted social and economic aspects of Brazil's democracy. Moreover, the creation (in 2011) of a Truth Commission and the Supreme Court corruption trials of high-ranking government officials are part of the efforts to consolidate Brazilian democracy. Brazil's capacity to produce fair economic results for its population is an important source of legitimacy for the Brazilian government, which helps to explain why its foreign policy tends to mention democracy alongside social and economic rights.

Examining Brazil's democracy promotion in Africa is necessary for a variety of reasons. First, this type of analysis sheds light on the extent to which rising powers contest the dominant principles of Northern development assistance. US and European governments have urged rising democracies to take a more active role in human rights and democracy promotion, as have some civil society entities within and outside States where South-South cooperation is undertaken. Second, questions about Brazil's impact on African politics have increased with Brazil's recent voting pattern in the UN Security Council. While holding a non-permanent seat, Brazil aligned with most of its fellow BRICS countries (South Africa supported resolution 1973 on Libya, but later expressed regret at having done so) and abstained on the 2011 resolution supporting military action in Libya,

although it supported the expulsion of Libya from the Human Rights Council. Explaining Brazil's behavior in issues of democracy and human rights within different spheres calls for analysis of its concrete cooperation ties.

Finally, the diversity of Brazilian actors participating in development cooperation in Africa needs further analysis, including in terms of their impact on local politics. In addition to civil society organizations, Brazilian multinationals operate in several African nations, especially in mining and infrastructure, sometimes backed by the Brazilian Development Bank (BNDES). Many such companies have reinforced their corporate social responsibility guidelines, yet in some contexts their operations have generated local tensions.<sup>11</sup> Moreover, the Brazilian government's efforts to expand Brazil's defense industry, including towards Africa, may help boost non-democratic regimes. Brazil has become the Western Hemisphere's second largest exporter of small arms,<sup>12</sup> whose use and movement, both within and across borders, are difficult to track (Brazilian-manufactured non-lethal weapons such as tear gas canisters were used against Arab Spring protesters in Bahrain).

### *2.3 Brazil's democracy and human rights initiatives*

Projects that openly seek to promote democracy and human rights are not always a highly visible part of Brazil's official cooperation efforts. Among the projects listed in the Brazilian Cooperation Agency's (ABC) project database, none mention democracy in their titles, and only one explicitly refers to human rights: a partnership between the Brazilian Human Rights Secretariat (SDH) and the ABC to collaborate in the fight against child and teenage exploitation in Togo. However, democracy and human rights sometimes appear as components of broader cooperation programs, often through the involvement of human rights-related institutions in Brazil, especially SDH. For instance, SDH and the Ministry of Justice joined efforts to strengthen human rights-related institutions such as civil registries in Guinea-Bissau. There are also broader programs related to democracy and human rights that involve agreements with countries in disparate areas of the world through South-South multilateral arrangements.

Many of these efforts target sub-national level state units, especially cities. This focus reflects the decentralized dimension of Brazil's own experience with democratization, in which municipal governments and communities played a pioneering role. Cities have also been the site of important democratic experiments, including the Participatory Budget model implemented in Porto Alegre, which was adapted in some form by 1,500 municipal governments around the world (GANUZA; BAIOCCHI, 2012 and AVRITZER, 2002). The World Social Forums, initially held in Porto Alegre, have been a crucial catalyst, enabling civil society entities and activists from around the world to receive information about Brazil's participatory budget experiences. In addition, international organizations such as the World Bank, UNDP, and UN Habitat promoted participatory budget models as a way to encourage more socially equitable forms of spending.<sup>13</sup> The ABC has coordinated several projects aimed at promoting participatory budgets

abroad, including through a partnership with the UN High Commissioner for Human Rights (ABC, 2013). Several South African cities have adapted parts of this model, inspired by the Porto Alegre case.

In addition to the role of cities, Brazilian cooperation in democracy and human rights often includes civil society entities such as NGOs, trade unions, and professional associations. These organizations have participated in projects related to Brazil's negotiations on the external debt, the creation of Mercosur, and free trade agreements. UN conferences devoted to social issues also generated new incentives for the involvement of feminists, environmental activists, and indigenous peoples movements (ALVES, 2002). More recently, civil society entities in Brazil have begun questioning Brazil's role in groupings such as the G-20 and the BRICS, including the latter's plans to finance large-scale infrastructure in Africa through the planned BRICS Development Bank.

The project's database maintained by ABC reveals that most official Brazilian cooperation programs in Africa referring to democracy or human rights focus on electoral or judicial cooperation. Brazil has helped several African countries with their elections, with the Superior Electoral Court (SEC) actively promoting the country's electronic voting system abroad. In Africa, Brazilian experts have visited Angola, Mozambique, South Africa, Tunisia, and Guinea-Bissau, and a recent workshop in Cape Town introduced the Brazilian voting system to representatives from South Africa, Namibia, Mozambique, Botswana, Zambia, Zimbabwe, Tanzania, and Madagascar.<sup>14</sup> The exact impact of this cooperation is difficult to ascertain, since the technology that is promoted is not always adopted by the cooperation partners, sometimes due to lack of resources or insufficient confidence in the integrity of the system. Nonetheless, through these exchanges, Brazil may help to spur discussions in Africa about the procedural aspects of electoral democracy.

Such exchanges have also taken place in Brazil. Cooperation with Sudan, for example, has been intense since 2010. It has included visits by officials from the Sudanese Parliament to Brazil's Superior Court (TSE) and also an agreement between the Brazilian Bar Association and its Sudanese counterpart<sup>15</sup> to promote the protection of human rights; the protection of lawyers' rights; and professional exchanges between lawyers of both countries, including professional qualification activities and a joint collaboration on guaranteeing respect for human rights legislation both domestically and internationally.<sup>16</sup>

Brazilian promotion of electronic voting is also carried out through multilateral channels. On October 3, 2011, authorities of electoral courts from Brazil, Angola, Mozambique, Cape Verde Islands, São Tomé and Príncipe, East Timor, and Portugal signed the "Carta de Brasília," which reaffirmed the States' common "commitment to democracy and their confidence in the free, just democratic process based on the norms established through their legal systems and universally accepted human rights." Through the agreement, those countries also expressed their intent to improve the management and administration of their electoral systems through cooperation programs covering civic education, capacity building for judges and electoral officials, media coverage for elections, electoral legislation, guaranteeing accountability of political parties, and electronic voting.



## *2.4 Brazilian development cooperation*

Although democracy and human rights remain niche topics in Brazil's cooperation with Africa, Brazil's broader impact on African politics may come out of cooperation programs that lack any overt reference to those principles. Within its official cooperation programs, the Brazilian government claims that it actively contributed to improving the lives of Africans, especially through the sharing of social program models that were essential in stabilizing Brazil's own democracy. The ABC's project portfolio in Africa includes dozens of projects under the rubric "Social Development," many of which are intended to boost governance and institutions. Some of these projects are carried out in collaboration with non-state actors that played a defining role in widening human and social rights in Brazil, such as the *Pastoral da Criança* (Pastoral Care for Children), a division of the Brazilian National Conference of Bishops dedicated to children's rights and well-being.

Beyond official cooperation, there are attempts to draw on Brazil's own experience with democratization, including the emergence of a robust and well-articulated civil society, to cooperate on political and social issues. Brazilian NGOs have analyzed the impact of technical cooperation projects as well as the role of Brazilian mining and construction multinationals in Africa. For example, FASE has partnered with Mozambican entities, including the National Union of Mozambican Peasants (UNAC), to question the implementation of the Triangular Cooperation Program for the Agricultural Development of Tropical Savannah (Pro-SAVANA), which Brazil is undertaking with Japan to boost agricultural productivity in Mozambique's Nacala Corridor (MELLO, 2013). Also in Mozambique, Brazilian trade unions have been collaborating with local counterparts to monitor allegations of human rights violations by Brazilian multinationals, and the São Paulo-based human rights NGO Conectas is collaborating with South African and Nigerian NGOs to strengthen their positions on human rights and foreign policy debates. In addition, there is increasing domestic scrutiny of Brazilian development cooperation by leading human rights NGOs, including Human Rights Watch and Amnesty International.

## *2.5 Brazilian positions on political issues in Africa*

Finally, Brazil has an indirect effect on democracy and human rights in Africa through the official positions that the Brazilian government adopts regarding key issues and political crises in Africa, and through the use of development cooperation (its continuation or suspension) as leverage with local authorities. In 2007, Brazil had expressed concern regarding the Zimbabwean government's lack of respect for fundamental rights, arguing that that all parties should dialogue in order to guarantee the respect for the rule of law and the harmonious development of Zimbabwean society (SITUAÇÃO..., 2007, p. 284). In 2008, former Foreign Minister Amorim was one of the first foreign dignitaries to visit Zimbabwe at the

time of the political crisis (VISITA..., 2008, p. 247), meeting with President Mugabe and representatives of political parties, including the opposition (Brazil had participated in an observer electoral mission during the first electoral round, in March 2008 and also in July 2013, by invitation of the Zimbabwean government). Through the visit, the Brazilian government proved willing to engage with Mugabe even as he was being ostracized by the international community. Brazil's attitude contrasted sharply with those of the US and the EU, which imposed sanctions that included the termination of all grants and loans to Zimbabwe's government made through bilateral and multilateral channels.<sup>17</sup>

The Brazilian government also assumed official positions regarding the Arab Spring events that took place in Tunisia, Egypt, and Libya. In February 2011, with respect to Egypt, President Rousseff stated that Brazil could not have a say on the internal affairs of another country.<sup>18</sup> The Brazilian government expressed its hopes that the crisis would end through a democratic solution involving greater social inclusion and prosperity, and former Foreign Minister Patriota noted that Egypt was an important trade partner and that, in the eyes of the Brazilian government, protests in Egypt emerged due to frustration regarding the economic situation and inadequate social inclusion (GODOY, 2011). Shortly afterwards, during the 16<sup>th</sup> session of the UN Human Rights Council, Brazilian Human Rights Minister Maria do Rosário openly criticized Middle Eastern and North African regimes for their authoritarian practices, singling out the use of force against civilian populations (O GLOBO, 2011). As of 2011, the United Nations Development Program – UNDP (2012) supported a visit by Egyptian politicians and businessman to Brazil and Chile, identifying the two countries as examples of transitions to democracy, including constitutional reform, which could inspire Egypt. During a May 2013 visit by former President Morsi to Brazil, Brazil and Egypt agreed to cooperate towards economic development in a democratic and socially just environment (BRASIL, 2013a). Brazil expressed concern after the overthrow of Morsi in early July 2013 and cooperation projects negotiated during Morsi's visit are yet to be implemented.<sup>19</sup>

In addition, Brazilian authorities have repeatedly made references to democracy in statements related to the African continent. In 2009, Lula condemned the assassination of Guinea-Bissau's president, João Bernardo "Nino" Vieira, and of the head of its Armed Forces, General Tagme Na Waié, stating that Brazil could not "remain silent before another attack against an incipient democracy that was building itself" (LUSA, 2009). During a 2011 state visit to Angola, Rousseff gave a speech at the National Assembly mentioning a future of economic progress, social justice, peace, and democracy for Angola, and cited Angola's new constitution as a key step towards deepening the country's democracy. Rousseff (BRASIL, 2011b) also referred to the joint efforts by Angola and Brazil to the stabilization process in Guinea-Bissau, praising Angola as an example of national reconstruction with democratic liberties — a very positive assessment compared to the EU's evaluation (EUROPEAN UNION, 2010). Other Brazilian government officials have openly supported democracy and human

rights in Africa. During the 50<sup>th</sup> anniversary of the African Union, in 2013, Brazilian diplomats praised the AU's contributions towards democracy in Africa, especially its zero-tolerance policy regarding coups d'état.<sup>20</sup>

However, in its bilateral relations Brazil has often proven reluctant to directly condemn or single out human rights violators, expanding cooperation as well as commercial relations with these regimes. Under Lula and Rousseff, Brazil has deepened ties with Equatorial Guinea, selling Brazilian defense equipment, importing oil, and helping Brazilian construction companies to participate in the construction of the country's new capital. Brazil also supported the country's bid to obtain full membership within the CPLP – a decision highly contested by civil society movements due to Equatorial Guinea's poor democratic and human rights credentials. In refraining from antagonizing certain countries as human rights violators, the Brazilian government has argued that violations are committed by all countries, developed and developing. As a result, the Brazilian government has refused to accept human rights reports conducted by individual countries, including those that evaluate Brazil's domestic human rights record, arguing that the UN is the only legitimate entity for monitoring and reporting on human rights.<sup>21</sup>

Brazil has also strongly favored responses to crises by local and regional actors, including during crises in the Ivory Coast, Sudan, and Mali — as long as these actions are complementary, rather than contradictory, to the UN security system. For instance, Brazil has argued that the AU can legitimately deal with crises on the continent, and that the international community should work jointly with the AU. Regarding peacekeeping missions in Africa, Brazil's most recent troop contributions were in Mozambique and Angola in the mid-1990s, but the country has observers in almost all UN missions in the continent, and in 2013 Brazilian General Santos Cruz, a former Force Commander of the mission in Haiti, was appointed force commander of the MONUC mission in the Democratic Republic of the Congo.

In early 2003, Brazil participated in the Brazzaville Group, an initiative organized by African nations and the CPLP regarding political instability in São Tomé and Príncipe. The effort led to a memorandum of understanding, signed in July 2003 between the president of STP and the leader of the Armed Forces group that had rebelled, so that the country could return to democratic government.<sup>22</sup> In November 2003, during a stop in São Tomé and Príncipe as part of his first visit to Africa, Lula offered Brazilian support for the efforts to consolidate its democracy.<sup>23</sup>

The ways in which these positions and Brazil's concrete engagement in Africa intersect are illustrated by the case of Guinea-Bissau. Brazil has long sought to bring attention to Guinea-Bissau's recurring political instability, and in 2007, Brazil became the chair of the Guinea-Bissau configuration in the UN Peacebuilding Commission. Through this position and its membership in the CPLP, Brazil has implemented a variety of cooperation initiatives to strengthen institutions in the country, for instance by training the country's police, boosting its judicial system, and supporting its parliament (ABDENUR; SOUZA NETO,

2013). In 2008, Brazil condemned an attempt by members of the Armed Forces to destabilize the government in Guinea-Bissau, reiterating its support to the elected government.<sup>24</sup> A coup in April 2012 led to an interruption of Brazilian cooperation programs in the country, and Brazil has made the return to democratic normalcy a condition for the resumption of its cooperation initiatives. In June 2013, Brazil joined other CPLP member States in calling for free and fair elections so as to restore democracy in Guinea-Bissau (BRASIL, 2013c). Although not all of Brazil's official positions on African political crises are directly linked to Brazilian cooperation programs, as in the case of Guinea-Bissau, the example shows Brazil's willingness to engage with democracy and human rights promotion in Africa by combining discursive support/condemnation with concrete actions.

### 3 Conclusion

As Brazil's ties with Africa intensify, its development cooperation has increasing implications for local politics, whether the cooperation partner is a democracy or an authoritarian regime with a record of human rights violations. In this article, we have analyzed three emerging routes for this impact: democracy and human rights promotion programs, development cooperation in general, and official positions on key political issues in Africa. The analysis suggests that, despite adopting a strong rhetoric of non-interference in its foreign policy, the Brazilian government has actively engaged with issues of democracy and human rights in Africa, directly and indirectly. The Brazilian government addresses democracy and human rights directly only when there is a clearly identifiable demand from the African partner government on such issues, or when a coup occurs in a country bound by a CPLP mechanism that stresses the importance of democracy, as in the case of Guinea-Bissau. At the same time, even when democracy and human rights are not explicit themes of cooperation, Brazil's growing role on the continent—propelled not only by the Brazilian government, but also by civil society and private sector actors—has political consequences, whether by contributing to democracy via institution-building or (in the case of Equatorial Guinea) by boosting authoritarian regimes through expanded economic cooperation.

Brazil's greater visibility in the international arena has prompted calls for greater involvement by Brazil in the promotion of democracy and human rights abroad – by both Northern donors and actors from the Global South (PATRICK, 2010). This is particularly important in Brazil's relations with Africa, because in that continent Brazil often promotes its image as a model of economic and social justice. Yet the Brazilian government's preferred mode of democracy and human rights promotion in Africa – based predominantly on discreet, back-stage diplomacy — is still marked by a cautiousness that may be disproportionate in light of Brazil's own experience with democracy. In trying to balance its commitment to human rights and the principle of non-intervention, Brazil has raised concerns not only about the coherence of its approach, but also regarding its future positions on democracy and human rights abroad. Some analysts have

voiced concerns that Brazil's growing ties with non-democratic emerging powers, particularly through the BRICS grouping, may push its foreign policy in the direction of defending unconditional sovereignty (CASTAÑEDA, 2010). Although this position may overestimate the importance attached by Brazilian foreign policy to the BRICS, it calls attention to the need for Brazil to forge a more consistent path. While a Brazilian approach to human rights and development is unlikely to entail an uncritical acceptance of American and European positions on democracy and human rights, it should also not mean siding by default with regimes that overlook those principles altogether. In the case of Africa, there are pragmatic reasons why Brazil might signal a greater willingness to support democracy and human rights, including the fact that the rupture of democratic order in African states could generate instability to the detriment of Brazilian economic interests and cooperation initiatives.

Brazil can also provide stronger support for democracy and human rights in Africa by cooperating with third parties. South Africa has provided a model for such an initiative hosting the first EU-South Africa dialogue forum on democracy and human rights.<sup>25</sup> Cross-regional summits such as the Africa-South America and the Arab-South America initiatives could also become relevant spaces for a positive Brazilian influence in African nations regarding democracy and human rights.

At the multilateral level, the India-Brazil-South Africa Dialogue Forum (IBSA), in contrast to the BRICS, is premised on the common identity of these countries as large, diverse democracies. Brazil has demonstrated a willingness to use this platform to discuss issues related to democracy, such as in the April 2013 "Deepening Democracy through Local Governance" Forum held in New Delhi.<sup>26</sup> At the Forum, the three IBSA nations acknowledged their common role as representing a "unique democratic alliance of the Global South." Within the BRICS, although discussions of human rights and democracy are hampered by the inclusion of authoritarian Russia and China, Brazil could push for norms and practices, for instance via the BRICS Development Bank initiative, that prioritize poverty and inequality reduction rather than simply infrastructure and industrial policy.

Finally, Brazil's potential to learn from African countries about democracy and human rights should not be underestimated, including reconciliation initiatives in countries such as Rwanda and South Africa. Brazil's National Truth Commission may learn from South Africa's experience addressing the role of State and non-state agents in human rights violations and memory-building. By opening up to the possibility of learning about democracy and human rights from African countries' own experiences — positive or negative — Brazil might refine its own approach to democracy and human rights, both at home and in Africa.

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## NOTES

1. This was the argument used to base Brazil's support for Equatorial Guinea to become a member of the Community of Portuguese Speaking Nations in spite of criticism by civil society organizations from Brazil and Portugal that the government of Equatorial Guinea was not democratic and violated human rights. At the moment, EG still remains an observer state of the CPLP and has not obtained full membership status.
2. See *O Globo* (2013, p. 8)
3. Although democracy and human rights are not coterminous, Brazil's stance towards human rights overlaps significantly with its positions and discourse on democracy abroad.
4. Brazil's involvement in Haiti was also justified by Brazilian authorities as part of a shared African heritage. Brazilian authorities argued that, since Brazil was already being non-indifferent towards African nations, it could not abstain from doing the same with Haiti.
5. See interview with Antonio Patriota published at *O Estado de São Paulo* (NOGUEIRA; PARAGUASSU, 2011).
6. See interview with Antonio Patriota published at *Veja* (PEREIRA, 2011).
7. On this subject see Interview with Professor Marco Aurélio Garcia entitled "*O que muda e o que não muda na política externa com Dilma*" (2011) published at *Revista de Ciências Sociais Aplicadas do CCJE/UFRJ*.
8. On this subject see article signed by Eliane Oliveira (2011) published at *O Globo*.
9. See interview with Matias Spektor by Cristian Klein (2012), entitled "*O Brasil precisa aprender a manipular a China*", published at *Valor Econômico*.
10. Rousseff's intentions to focus on the economic and commercial aspects of Brazil's foreign policy agenda can be exemplified by Foreign Minister Patriota's announcement that more diplomats and resources from the ministry would be concentrated on issues such as commercial disputes and the creation of new markets for Brazilian products. Patriota announced that Brazil would double the number of diplomats allocated to the Commercial Disputes Section of the Foreign Ministry as well as the creation of training opportunities at Brazil's Mission to the WTO and seminars and studies on economic and commercial dispute. See: "*Onde o Itamaraty acerta*", *O Estado de São Paulo* (2011).
11. Brazilian mining company Vale and the Mozambican government have been criticized by Human Rights Watch and local actors for its actions in the Tete region of Mozambique, especially regarding resettlement policies (HUMAN RIGHTS WATCH, 2013).
12. See Special Report by Dreyfus et al. (2010).
13. See International Budget Partnership (n.d.).
14. About the Brazilian voting system see Brasil (2013d).
15. For the full text of the agreement see Ordem dos Advogados do Brasil – OAB (2010).
16. Ibid.
17. On this subject see Foley (2011).
18. On this subject see Figueiredo and Fabrini (2011) on article entitled "*Dilma: Brasil não pode ter opinião sobre tudo*" published at *O Globo*.
19. The July 3, 2013 statement by the Brazilian Foreign Ministry (BRASIL, 2013b) can be found at: <<http://www.itamaraty.gov.br/sala-de-imprensa/notas-a-imprensa/situacao-no-egito-2>>. Last accessed on: Nov. 2013.
20. On this subject see article by Adriana Giraldo (2013).
21. See "*Relatório da chancelaria da Suécia...*" (2007).
22. See "*Comunicado à imprensa sobre o fim da sublevação militar em São Tomé e Príncipe...*" (2003).
23. See "*Discurso do Presidente da República, Luiz Inácio Lula da Silva, por ocasião do almoço oferecido pelo Presidente da República Democrática de São Tomé e Príncipe, em 2 de novembro de 2003*" (2003).
24. See "*Situação na Guiné-Bissau 11/08/2008*" (2008).
25. See Sapa (2013).
26. See India (2013).

## RESUMO

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Nos últimos dez anos, as elites responsáveis pela política externa brasileira puseram cooperação econômica, política e militar com a África entre as prioridades máximas do país, como parte da política de estreitar suas relações com o Sul Global. Embora uma crescente literatura especializada tenha tentado analisar as normas e práticas que esta cooperação implica, apenas uma pequena parcela da literatura atual tem escrutinado a relevância desta cooperação para a política africana. Neste artigo, consideramos os efeitos da cooperação brasileira para a democracia e os direitos humanos na África em três aspectos: o alcance e o conteúdo dos programas brasileiros para promoção da democracia; as consequências desta cooperação (oficial e não-oficial) para a democracia e para os direitos humanos; e as respostas do Brasil a crises políticas na África.

## PALAVRAS-CHAVE

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Brasil – África – Cooperação – Política externa – Democracia – Direitos humanos

## RESUMEN

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En los últimos diez años, las élites de la política exterior de Brasil le dieron un lugar prioritario a la cooperación económica, política y militar con África, como parte del énfasis puesto por Brasil en la expansión de las relaciones dentro del Sur Global. Si bien hay cada vez más estudios que analizan las normas y prácticas que implica esta cooperación, es poca la investigación que actualmente se centra en examinar su relevancia para la política africana. En el presente artículo, consideramos las implicancias que tiene la cooperación de Brasil para la democracia y los derechos humanos en África haciendo eje en tres aspectos: el alcance y contenido de los programas brasileños de promoción de la democracia; las implicancias de la cooperación (oficial y no oficial) de Brasil para la democracia y los derechos humanos; y sus respuestas a las crisis políticas de África.

## PALABRAS CLAVE

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Brasil – África – Cooperación – Política exterior – Democracia – Derechos humanos



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#### ABSTRACT

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A major overhaul of the human rights provisions of the Mexican Constitution led to the incorporation in the revised Constitution of a series of key amendments that have been in force since June 2011. As a result, it is now clearer to see how international human rights standards dovetail with the Mexican legal system's hierarchy of norms. This article aims to analyze and discuss the implications of the constitutional reform, highlighting its significance on the domestic and international fronts while drawing attention to a number of pending issues, and reviewing the prospects for the future application of these new human rights standards in Mexico.

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#### KEYWORDS

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Incorporation of standards – Human rights – Constitutional reform – Foreign policy – Mexico



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# INCORPORATING INTERNATIONAL HUMAN RIGHTS STANDARDS IN THE WAKE OF THE 2011 REFORM OF THE MEXICAN CONSTITUTION: PROGRESS AND LIMITATIONS

Carlos Cerda Dueñas

## 1 Introduction

On June 10, 2011, a set of amendments to the 1917 Political Constitution of the United Mexican States referring to human rights was published in Mexico's Official Gazette. Representing a wide-ranging reform of Mexico's approach to human rights, the constitutional amendments for the first time made definitive and explicit reference to human rights, renamed the key Chapter 1, established the supremacy of treaties in domestic law, and incorporated other important human rights provisions.<sup>1</sup>

While it is true that a chapter on fundamental individual rights was inserted following the 1847 Reform Act, it was not until the 1992 reform of the 1917 Constitution (still in force) that a National Human Rights Commission (CDH) was formally established, and powers were devolved to the Mexican states to set up their own autonomous human rights commissions. By pointing this out, we do not mean to say that the fundamental rights were not included in the highest constitutional instrument; they have been since the Reform Act of 1847, which created a chapter on individual rights that includes a catalogue of fundamental rights.

According to certain scholars, the lack of clarity regarding specific human rights standards and their indeterminate status within the country's legal structure denoted an incomplete and ill-defined system for addressing human rights issues in Mexico. The issues involved included a lack of definition of human rights and of the international human rights law that applied, and regulatory weaknesses (GUERRERO, 2008, p. 43).

While the modifications published in June 2011 resolved some of these

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*Notes to this text start on page 54.*

issues, consolidation of the constitutional changes will take time. Many outstanding problems remain because, as Alejandro Anaya (2013, p. 786) argues, these positive developments “have not coincided with an encouraging change in the levels of respect for human rights in the country.” However, regardless of setbacks and inauspicious signs, the current efforts to build on the 2011 reform cannot be disregarded.

## 2 The emergence of human rights in Mexico’s governmental and social agenda

Mexican governments have traditionally considered human rights to be a domestic matter, invariably declaring that any scrutiny by foreigners of Mexico’s observance of human rights would constitute meddling in the country’s internal affairs.

*The nationalist, defensive position which valued the protection of sovereignty over and above the international human rights regime has been slowly and gradually giving way to the internationalist and collaborative approach that characterizes Mexico’s foreign policy today.*

(SALTALAMACCHIA ZUCCARDI; COVARRUBIAS VELASCO, 2011, p. 3).

Moreover,

*... regardless of the real human rights situation in Mexico during the Cold War, it is true that this was not a matter of international concern largely due to the lack of a credible source of information on the subject, i.e. not the Mexican government.*

(COVARRUBIAS, 1999, p. 437)

Under President José López Portillo’s administration (1976-1982), important human rights accords were signed and ratified.<sup>2</sup> However, it was not until Carlos Salinas de Gortari took office in 1988 that the government’s human rights policies began to substantially change course. This was probably not *motu proprio*, but more plausibly driven by concerns about the negative impact that Mexico’s human rights record could have had in the run-up to the North American Free Trade Agreement (NAFTA) or in the negotiations for Mexican membership in the Asia-Pacific Economic Cooperation Forum (APEC) and the Organization for Economic Cooperation and Development (OECD). The outcome was the creation, as mentioned above, of the National Human Rights Commission and local counterparts in each state.

It is interesting to note that:

*Up to the early 1990s human rights formed part of Mexico’s foreign policy agenda, primarily anchored in the country’s participation in specialized international human rights organizations. The Mexican government only very rarely tackled the subject as a bilateral relations issue with other countries and interacted little with international non-state actors concerned with human rights.*

(SALTALAMACCHIA ZUCCARDI; COVARRUBIAS VELASCO, 2011, p. 4).

Later in the 1990s, especially during the first three years of Ernesto Zedillo Ponce de León's (1994-2000) six-year term, human rights issues were again relegated to the back-burner because of the major economic crisis that beset Mexico in December 1994. The crisis forced the Zedillo government to focus on tackling the country's economic problems rather than on other important issues, including human rights. It was not until the second half of Zedillo's term that attention began to turn again to the subject.

Rosario Green (Foreign Minister in the second half of the Zedillo administration), highlighted Mexico's delays in signing international agreements in her memoirs:

*...when I took over at the Foreign Ministry I was surprised to discover that Mexico had failed to sign or ratify international instruments which to me seemed essential for nurturing the country's image abroad. To remedy this situation I chose a step by step strategy, first submitting to the President treaties such as the UN Convention on the Protection of Human Rights of All Migrant Workers and Members of their Families, which had been drafted in response to a Mexican proposal, and had been signed by Mexico but which simply awaited final ratification by our Senate.*

(GREEN, 2013, p. 266).

It has also been argued that the government's renewed interest in human rights in the later 1990s was primarily stimulated by the continuing armed conflict in the southern state of Chiapas, where international human rights NGOs, the UN, the OAS, human rights organizations, and a number of foreign governments, were systematically monitoring the situation on the ground and were increasing pressure on the Mexican government to respect the human rights of those involved.

Susana Núñez (2001) considers that the reports the Inter-American Commission on Human Rights issued in 1996 also played a key role, especially those excoriating the Aguas Blancas (Guerrero) incident in which State police attacked members of the Southern Sierra Peasant Organization and killed 17. A further case was that of one General Gallardo, cold-shouldered by the army high command, put on trial and imprisoned with no evidence presented to prove his responsibility for the crimes of which he was accused.

Alejandro Anaya also argues that:

*Transnational pressure on the Mexican government tended to intensify considerably after December 1997, when a group of armed civilians allegedly linked to the PRI, then in power in Chiapas as well as in Central Government, perpetrated the most brutal act of violence of the Southeast Mexico conflict: the massacre of 45 Tzotzil Indians (mostly women and children) in the community of Acteal, Chenalhó, Chiapas. The Acteal incident attracted a great deal of attention from the international community on the human rights situation in Mexico, leading to an unqualified and unanimous outcry worldwide.*

(ANAYA, 2012, p. 52).

The above scenarios almost certainly prompted the Zedillo government's decision to invite international organizations to observe the human rights situation for themselves. A series of visits followed, including by the Inter-American Commission on Human Rights, the UN High Commissioner on Human Rights (Mary Robinson), and the UN Special Rapporteur on Torture. Arguably of greater importance was the government's decision to take steps towards recognizing the jurisdiction of the Inter-American Court of Human Rights. On this, Rosario Green (2013, p. 266-267) commented, "with the authorization of the President, and after thorough discussions with the Interior and Defence Ministers, [Mexico] accepted the adjudicatory jurisdiction of the Inter-American Court of Human Rights, the Court of San José".<sup>3</sup>

The election of a different party to government in 2000, after 69 years of consecutive rule by the PRI (Institutional Revolutionary Party), signaled a substantive change in human rights policy:

*It was obvious that Mexico had problems related to human rights and was now willing to accept unconditionally and without constraints a higher level of monitoring, scrutiny and cooperation from international actors, including both domestic and foreign non-governmental organizations.*

(ANAYA, 2012, p. 61).

In 2003, the Office of the UN High Commissioner for Human Rights (OHCHR), through its representative Anders Kompass, presented a report entitled *Diagnosis of the Human Rights Situation in Mexico* prepared by academics, expert practitioners, and civil society representatives. This assessment's main proposal highlighted the need to reform the Constitution in order to raise the protection of human rights to constitutional rank, to incorporate the concept of human rights as a fundamental pillar of the Constitution, and to recognize international human rights treaties as taking precedence over federal and local norms and directives. An important recommendation in this respect was that all Mexican public authorities should be subject to the international human rights architecture if the Constitution or the government ordinances associated with it were unable to provide the requisite level of protection for individuals against human rights abuses. In addition, the report proposed that a mechanism should be established to ensure the withdrawal of reservations and interpretative declarations and to speed up ratification of pending international human rights accords. The second recommendation called for the enactment of general laws to regulate all the human rights enshrined in the Constitution and to ensure their application, guarantee and protection to the same standards by the federal and local governments for all citizens (NACIONES UNIDAS, 2003, p. VII).

The *Diagnosis* also recommended:

*continuing the policy of openness that has been a feature of the current administration [of President Vicente Fox] on human rights. In this regard, to promote visits by rapporteurs and working groups specialized in local human rights issues.*

(NACIONES UNIDAS, 2003, p. 3).



Under the Calderón government (2006-2012), while the process of work towards constitutional reform targeted on human rights continued, substantial setbacks arose as a result of the so-called “war on drugs,” including perpetuation of the “*arraigo*” procedure (arbitrary detention), the increased number of disappeared people, and the recurrent and growing human rights violations committed by the armed forces.

According to Anaya, the “openness” policy on human rights still applied because reverting to “policies [which put national] sovereignty over human rights considerations . . . would have incurred too great a cost to the Calderón government and would have led to even more external pressure being applied on Mexico” (ANAYA, 2013, p.784).

The same would apply to the present government. President Enrique Peña Nieto (of the PRI) is well aware of the high domestic political cost as well as the damage that could be caused to Mexico’s international image if the constitutional pledges on human rights were reversed. Although human rights appears to have lost some of its aura during the current administration, given that the new government is focused more on boosting education, housing and energy reforms, Peña Nieto knows that the issue still strikes a major chord domestically and abroad. For this reason, he has made a point during the visit to Mexico of the Inter-American Court of Rights (IACHR) justices’s visit to Mexico in October 2013 of robustly re-stating Mexico’s commitment to fully implement the constitutional amendments w, promising full cooperation with the Court and praising the vital role played by the IACHR in Mexico and the wider region (PEÑA NIETO, 2013B).

### 3 2011 Constitutional amendments on Human Rights

The current Mexican Constitution formerly contained a chapter listing individual agrarian and labor rights. This list gradually lengthened over the years (and due to various reforms) to include, for example, the Right to Health and Decent Housing (1983), Indigenous Rights (January 28, 1992 and substantially expanded in 2001), the Right to a Healthy Environment (1999), the Right to Access to Culture “and the Exercise of Cultural Rights” (2009), the Right to Physical Exercise and Sport, and the Right to Food (2011) and Water (2012).

However, the 2011 constitutional reform exhaustively expanded the catalog of human rights by taking into account all the rights contained in the treaties signed by Mexico. The reform resulted in Chapter 1 of Title 1 henceforth being named “Human Rights and their Guarantees.” The articles under Title 1 describe a series of other measures of relevance to human rights, including the State’s responsibility to prevent, investigate, penalize and redress violations to human rights, a task that involves implementing specific regulatory legislation; the promotion of human rights in public education; respect for human rights in the prison system; a person’s right to seek refuge or political asylum; the restriction of certain rights to be prohibited in the event of a suspension of rights enacted by the competent authority, pending further legislation; foreigners

granted the opportunity to challenge deportation; the normative principle of foreign policy introduced with a view to ensuring respect for and protection and promotion of human rights; public employees to justify any refusal to accept the recommendations of the National Human Rights Commission; the CNDH given powers to investigate serious human rights violations and to pursue legal proceedings through actions of unconstitutionality.

The reform made it an obligation of the State to prevent, investigate, and punish human rights violations by taking legal measures through the courts. It also foreshadowed the issuance of a set of secondary laws to give legal force to the amendments as well as laws of a political and administrative nature to ensure appropriate treatment of victims. The reform was well received by Mexican public opinion, with the exception of certain groups who argued that with these amendments the country was ceding sovereignty, with the interpretation of the new provisions subject to criteria imposed by supranational bodies such as the UN (SCALA, 2011, p. 1). Criticism was also forthcoming from some sectors of the federal judiciary, which will be discussed below.

#### 4 The Supreme Court (SCJ) and human rights standards

The human rights-related constitutional reform throws new light on the hierarchical position occupied by the relevant treaties within the Mexican legal system. While the original article 133 of the Constitution established that all current and future treaties would constitute the supreme law of the State and were therefore considered to be valid, then the absence of an established treaty hierarchy within the country's legal structure involved a risk of them inadvertently clashing with other laws.

For example, in a case that came before the SCJ on May 11, 1999, the Court resolved the question of the writ of *amparo* appeal 1475/98 lodged by the National Union of Air Traffic Controllers (MÉXICO, 1999) concerning the social right of individuals to freely join unions of their choice. This involved addressing a series of discrepancies between Federal Law and a treaty signed by Mexico under the auspices of the International Labour Organization. The outcome of the case was ruling 192.867, which established that "international treaties come second place immediately below the fundamental law and above federal and local law" (MÉXICO, 1999 b). This was ratified in *Amparo* 815/2006 (MÉXICO, 2007) and in 13 others in which the Supreme Court upheld (on February 13, 2007) the thesis that, while from a hierarchical standpoint international treaties are subject to the Constitution, they nevertheless take precedence over federal, state and Federal District laws.

On the other hand, the Inter-American Court of Human Rights in November 2009 ruled against Mexico in the Rosendo Radilla case (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2009). This was the same case that the Supreme Court analyzed (in full session) following alleged disagreements over the relevance of Inter-American Court rulings in the Mexican legal system. The SCJ unanimously ruled on July 14, 2011 that it was possible for the Court to take account of international treaties even in cases where the plaintiff had not

had recourse to such treaties. The ruling was issued only thirteen days after the constitutional reform on human rights was enacted. In the judgment confirming the Court's decision (MÉXICO, 2011 b), the Supreme Court Plenary ruled that: a) The sentences of the Inter-American Court of Human Rights are binding on all bodies and branches of government; b) all Mexico's judges are under an obligation to exercise conventionality control; c) interpretative criteria contained in the IACHR jurisprudence are "guidelines" to be followed by the Judicial Power of the Federation.<sup>4</sup> The question arises at this point: what would have happened if the Supreme Court had decided on the opposite course of action? Could Mexico simply have argued that it would not accept the judgment because the Court had established that it was not a binding obligation? Note that this is an issue involving the Mexican state and all its constituent bodies (not exclusively the administrative branch), meaning that everyone concerned has a responsibility to contribute to ensuring compliance with, and the effectiveness of, human rights.

As of July 2011, there was no longer any doubt that international human rights standards contained in treaties to which Mexico was a signatory formed part of the Mexican legal system and enjoyed the same rank in the hierarchy as the norms established in the Constitution. However, it was not until September 3, 2013 in Case 293/2011 that the Supreme Court Plenary resolved this contradiction (MÉXICO, 2013). The Court defined the criteria that were henceforth to prevail regarding the constitutional position of international human rights treaties, and thus finally providing an unequivocal benchmark for Mexican judges to proceed with executing the new constitutional human rights reforms. The Full Court decided by a majority of ten votes that article 1 of the Constitution generated a set of human rights standards, of both a constitutional and conventional origin, governed by interpretative principles, among which no distinction could be made regarding the source from which the said rights were derived. It was overwhelmingly decided that internationally-framed human rights based on amended article 1 of the Mexican Constitution possessed the same normative efficacy as the rights set forth in the Constitution. In other words, they were henceforth acknowledged as enjoying the same constitutional status. In this way it was fully recognized that the substantially expanded list of human rights contained in the 2011 amended version of the Constitution would lead to enhanced harmonization of national and international human rights based on the *pro personae* principle, thus paving the way for the broadest possible protection for individuals.

At the same time, the SCJ determined that was an explicit constitutional restriction limiting the exercise of human rights existed this should follow the constitutional norm i.e. acknowledging constraints on the exercise of human rights and restoring the supremacy of constitutional norms. This provision has not been well received by civil society organizations, which have criticized it as regressive. As it happens, the Full Court fortunately confirmed later that it was mandatory for Mexican judges to abide by the case law of the Inter-American Court of Human Rights, including in cases of disputes to which Mexico was not a party, provided that it was more advantageous to the individual.

## 5 Outstanding issues from the Constitutional reform

The reform as a whole undoubtedly represents an important step forward in terms of human rights observance in Mexico. However, certain issues remain unresolved, failing which it would be difficult for Mexico to project an upbeat human rights message domestically and to the wider world.

The 2011 reform provided that the State should meet its obligation to issue a set of regulatory laws aimed at improving implementation of the new standards contained in the Constitution. Although a June 10, 2012 deadline was set to, the authorities failed to adhere to it. The pending items of legislation are as follows:

a) Compensation for violations of human rights

Paragraph 3 of article 1 now states that all authorities, in the exercise of their respective functions, have the obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressive realization. As a consequence of this obligation, the State must prevent, investigate and sanction human rights violations within the limits established by law. No law has yet been issued.

b) Law of Asylum

The Law on Refugees and Complementary Protection has so far formed the basis for addressing asylum cases.<sup>5</sup> Committed to complying with the third transitory article of the decree related to human rights constitutional reform, President Felipe Calderón submitted a bill to the Senate on October 9, 2012 calling for asylum questions to be incorporated in this law, to be known henceforth as “The Refugee, Complementary Protection and Asylum Law.” While the Senate Committees debated and supported this Presidential initiative throughout April 2013, including taking account of the recommendations of the Office of the UN High Commissioner for Refugees, the final version of law still awaits approval by the legislature.

c) Suspension or restriction on the exercise of rights and guarantees

Article 29 of the Constitution relating to the suspension or restriction of guarantees is also subject to a regulatory law (still pending). It should be noted that not all the rights and guarantees are subject to restriction or suspension, and that those that are not are clearly defined as such. A further point is that restrictions on the exercise of rights and guarantees must be founded and justified under the terms established by the Constitution and be “proportionate to the threat in hand,” while being consistent at all times with the principles of legality, rationality, proclamation, publicity and nondiscrimination.

Finally, as part of the constitutional reform, transitory article 8 asserts that Congress shall regulate the National Human Rights Commission Law within a period of one year commencing from the date of entry into force of the reform decree published on June 10, 2011. The relevant amendments to the law were published on June 15, 2012

and gave the CNDH full authority to investigate acts involving serious violations of human rights when this was judged appropriate, or requested by the Federal Government, a State Governor, the Head of the Federal District, one of the Houses of Congress or the State legislative chambers.<sup>6</sup> It was also decided that if CNDH's recommendations were not being accepted or complied with, the authorized person or public servant concerned would be required to establish, actuate, and make public the reason for this refusal and respond to calls by the legislature to appear before it to present a satisfactory explanation. In the event of persistent failure to offer the latter, the CNDH may report those judged to be responsible to the Public Prosecutor or another appropriate administrative body. This law has been the most widely complied with of all the measures listed in the reform decree.

Speaking at the ceremony to mark the 96<sup>th</sup> Anniversary of the Promulgation of the Constitution on February 5, 2013, President Enrique Peña said:

*Finally, the most important aspect of this commemoration is to comply with the Constitution. The best tribute we can and must make to our Supreme Law is precisely to do what those who have spoken before me: comply with the Constitution, and observe and enforce the provisions contained therein.*

(PEÑA NIETO, 2013a).

Adding that it was vital:

*...to recognize that laws exist to regulate constitutional articles that have not yet been submitted, approved and published. Core subjects such as human rights, security and criminal justice, protection, crimes against journalists, education, water, or children's best interests, are still awaiting regulation in secondary law. We authorities have an obligation to work towards completing these outstanding tasks.*

(PEÑA NIETO, 2013a).

In similar terms, Javier Hernández Valencia, an Office of the High Commissioner for Human Rights representative in Mexico, speaking on the 2nd anniversary of the constitutional reform, urged Mexican legislators to prepare the long overdue regulatory legislation on the subject, saying that the mandatory one-year deadline for the new regulations to be published had already expired. It was crucial to note that human rights reform:

*...did not come to a standstill simply with the publication of the law in the Official Gazette. Temporary articles with deadlines attached for producing secondary legislation have not progressed. Deadlines have expired. We therefore call upon everyone concerned to join together and make abundantly clear that we are committed to finalizing and consolidating this reform.*

(OTERO, June 10, 2013).

In the Mexican legislative process, the executive branch, federal legislators, and state legislators can propose and submit bills. In other words, this is not solely a

prerogative of the executive (since the transitory clauses of the reform did not grant it explicit responsibility for this). Consequently, any one of the 500 deputies, 128 senators, or representatives of the 31 local legislatures can submit bills that could reduce legislative delay. However, it is clear that no sanctions exist to penalize non-compliance with deadlines.

Another pending issue in the legal arena is the signature and/or ratification of human rights-related treaties to which the Mexican government is not yet a party, and the withdrawal of Mexico's reservations to agreements which have already been ratified but which contradict or impede full compliance with human rights (a reservation in international law is a caveat to a state's acceptance of a treaty). For example, in the first case, the UN Optional Protocol of the International Covenant on Economic, Cultural and Social Rights adopted by Resolution A/RES/63/117 of December 10, 2008 (NACIONES UNIDAS, 2008), which Mexico has yet to ratify despite the Mexican government's active participation in the negotiating and adoption process. As for the question of withdrawal of reservations, a prime example is that of the above-mentioned mechanism covering deportation of foreigners that, notwithstanding the constitutional reform, has yet to be withdrawn. Since the amendments introduced in 2007, withdrawing reservations currently requires Senate approval.

Finally, it should be noted that:

*The system for incorporating international human rights norms and standards is especially weak because only those treaties are recognized as a source of the same (human rights), while neglecting other international law sources such as customs, general principles of law or the rulings of international legal bodies.*

(GUERRERO, 2008, p. 43).

In order to avoid leaving out other sources of law, it would have been a good idea (in the reformed constitution) to refer to "international instruments" instead of referring exclusively to "treaties," which the Bolivian Constitution provides.<sup>7</sup> This restrictive approach to treaties adopted in the reformed Mexican constitution could well have negative consequences, e.g. it could be argued that the Declaration of the UN Convention on the Rights of Indigenous Peoples (NACIONES UNIDAS, 2007a) possesses the legal form of a "resolution," and, given that it is not an "international treaty" it would not be considered valid in the event of a constitutional interpretation under the Supreme Law of the Union according to article 133 of the Constitution.

There is also the case of the International Criminal Court (ICC). Mexico became a State-Party in October 2005, after a lengthy period which began with negotiations before the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in June-July 1998) (NACIONES UNIDAS, 1998).

However, by constitutional provision, recognition of the ICC's jurisdiction has been subject to Mexico's executive branch's authority, which must deliberate on a case-by-case basis. ICC jurisdiction also requires Senate ratification. This can be summed up as follows: "The Federal Government may, with the approval of the Senate in each case, recognize the jurisdiction of the International Criminal Court." This kind of

arrangement is unfortunate, since it goes against the spirit of the Rome Statute that declares, “the State which becomes a Party to this Statute hereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”<sup>8</sup> The Mexican procedure complicates submission of a case to the ICC, and undermines the permanent criminal court’s authority to inhibit conduct that the court will sanction. By allowing a body to intervene that depends on the correlation of forces existing at the time a particular case is being addressed politicizes ICC jurisdiction in Mexico’s case.

The argument that this formula was adopted to safeguard the legal status of Mexican nationals is unfounded. Furthermore, it is shortsighted and demonstrates ignorance of the ICC’s role, since Mexico should hand over alleged international criminals regardless of their nationality. If Mexico’s aim is to confirm and safeguard the rights of both Mexican and non-Mexican citizens responsible for committing this type of crime that in theory should be handed over to the ICC, it is worth asking why this should be done in Mexico by a political rather than judicial body.

The reference to the ICC in the Constitution is a kind of “hidden reservation” according to Manuel Becerra Ramirez who argues that the Statute does not accommodate reservations because the practice is inconsistent with its aims and purpose (BECERRA, 2006, p. 951-954). While this situation remains unresolved it would be interesting to see whether, in the event of a case being presented to it, the Mexican Senate would apply the same rigour to combat impunity and punish crimes as the ICC.

## 6 The Inter-American Court of Human Rights

The Inter-American Court of Human Rights’ jurisdiction should be understood as an “external” procedure with inevitable “domestic” impacts that are not necessarily favorable in cases where the State is called upon to acknowledge its role in violating human rights (COVARRUBIAS, 1999, p. 451).

Since recognizing the jurisdiction of the IACHR in 2012, the Mexican government has been condemned in five cases. Highlighting the fact that the preliminary temporal jurisdiction objection (*ratione temporis*) presented in Mexico’s first case at the court, *Martín del Campo Dodd vs. Estados Unidos Mexicanos* (CORTE INTERAMERICANA DE DERECHOS HUMANOS, 2004), ruled in favour of Mexico and, in the second case (Jorge Castañeda Gutman), was acquitted of some of the charges that concerned political rights rather than access to justice, the Mexican government’s stated position is that it has at no time refused to acquiesce to summonses and has acknowledged the errors of officials who have violated human rights. Its aim has been to achieve a favorable judgment, especially to avoid undermining the prestige and image of the country. For example, it has sought to fully acknowledge the facts of cases in order to demonstrate that Mexico is committed to safeguarding human rights. It is worth noting however that Mexico’s experience with the IACHR leaves much to be desired: procedures are complex, long, and drawn out in cases where Mexican officials are alleged to have violated the human rights of Mexican citizens. Moreover, Mexico has lost most of the cases and has thus been forced to pay

compensation to victims or their families. This is money that could be better allocated to programs for promoting and protecting human rights. In a number of previous cases (e.g. Chiapas), negotiations with victims took place before the trials, but this approach was at the behest of the Oaxaca state government and not the federal government. In October 2012, the head of the Attorney General's Office (AGO), publicly apologized on behalf of the Mexican government to the families of Jesús Ángel Gutiérrez Olivera, who was "disappeared" in March 2002 due to actions undertaken by members of the former Federal Investigation Agency (AFI) and the AGO in Mexico City. Admission of liability by the government for Gutiérrez Olivera's disappearance was resolved by the Friendly Settlement Agreement negotiated in the seat of the IAHRC (San José) by government representatives and the victim's relatives. The latter, supported by the Federal District Human Rights Commission (CDHDF), appealed to the IAHRC to denounce the impunity that allegedly characterised the case. With the exception of these two cases, Mexico has tended to distrust the actions and recommendations of both the Inter-American Court and the Commission. The Mexican government has on at least two occasions accused the former of partiality.

## 7 Universal Periodic Review

The Working Group on the Universal Periodic Review (UPR), established in conformity with Resolution 5/1 of the UN Human Rights Council on June 18, 2007 (NACIONES UNIDAS, 2007 b), reviewed the situation in Mexico at its 4th session (February 2-13, 2009). On February 10, 2009, the Minister of the Interior, Fernando Gómez Montt, presented the Mexican National Report, adding *inter alia* that Mexico participated in the UPR because it was convinced that the promotion and protection of human rights was a "universal and inalienable obligation and universal moral imperative" and that cooperation with international human rights mechanisms was an invaluable tool for promoting internal structural changes (NACIONES UNIDAS, 2009, p. 3).

Certain recommended changes to the general legislation on human rights offered by UPR Working Group members included:

1. To consider gradually withdrawing reservations to international human rights instruments (Brazil);
2. To continue the reforms undertaken so far to enable all citizens to enjoy full human rights and fundamental freedoms, and to ensure the harmonization of domestic legislation with the country's international commitments (Morocco);
3. To complete institutional efforts for international human rights standards adopted by Mexico to enjoy constitutional status and to be applied as supreme law in legal proceedings (Spain);
4. To effectively incorporate into domestic national legislation the provisions of international human rights instruments (Azerbaijan);



5. To harmonize federal and state legislation with international human rights instruments (Bolivia, Spain, Guatemala, Turkey, Uruguay) and to ensure the effective implementation of these instruments (Turkey) (NACIONES UNIDAS, 2009, p. 21-22).

Finally, it should be noted that the war against drugs waged by the Calderón government, which still affects the present administration, generated an as-yet-undisclosed number of missing persons. Furthermore, Mexico is now considered to be one of the world's most dangerous countries for journalists. In this regard, Special Prosecutors' Offices and the Missing Persons Search Unit have recently been set up to investigate crimes against freedom of expression. It is still too early to evaluate the results.

## 8 Conclusions

There is no doubt that the June 2011 constitutional reform raised the profile of human rights standards in Mexico. It elevates the rights enshrined in international treaties signed by Mexico to equal footing alongside the rights guaranteed by the Mexican Constitution. The fact that human rights are now mainstreamed in the Constitution constitutes a significant breakthrough, and their position in the hierarchy of the Mexican legal system serves to clarify the Mexican State's human rights obligations. While there are still critics and detractors who are reluctant to accept the new approach, the constitutional provisions on human rights are nevertheless a key step towards improving Mexico's image as an observer of fundamental rights. However, much work needs to be urgently undertaken to render them more precise and comprehensive.

Finalizing the pending issues outlined above would reinforce Mexico's human rights policies, and would substantially improve the country's image regarding respect, promotion and protection of these rights. At the same time, further disseminating the country's human rights agenda in multilateral and bilateral forums would be an invaluable way of embracing a variety of other issues, while providing opportunities for creating partnerships and securing support for Mexico's views (PADILLA RODRIGUEZ; FERNÁNDEZ LUDLOW, 2012, p. 91-92).

Today, the basic challenge is to ensure that observance of human rights on the domestic front is consistent with Mexico's discourse in the international arena. A sound human rights policy involves commitments both internally and externally. The current President's statement in his address marking the 96th anniversary of the Constitution that "for large numbers of Mexicans rights only exist on paper" (PEÑA NIETO, 2013a) could well be applied not only to "rights" but to all the other regulatory provisions contained in the Constitution as guiding principles of our foreign policy. The newly incorporated principle of respect for, and protection and promotion of, human rights, will turn out to be a dead letter unless Mexico adopts a firm policy to finalize the domestic and international aspects of the aforementioned three outstanding items in the reform process.

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## NOTES

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1. The constitutional reforms regarding human rights and protection led the Supreme Court to consider that these regulatory revisions establishing new obligations regarding respect and protection of rights were a paradigm for Mexico. In view of the importance of the issue, the Supreme Court decided that October 4, 2011 would mark the beginning of its Tenth Jurisprudential Epoch, publication of the judicial review procedures of the Plenary and Chambers (Salas) of the Supreme Court, together with the Federal Collegiate Courts.

2. In the late 1980s the Mexican Senate ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Political Rights of Women, the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on Territorial Asylum, the American Convention on the Granting of Political Rights to Women.

3. Note that some reports of the Inter-American Commission on Human Rights recognized the compulsory jurisdiction of the Inter-American Court.

4. In its legal opinion on the Rosendo Radilla case, the Supreme Court Plenary (2011 b) also ruled

that where a civilian has had his/her human rights violated by the armed forces, ordinary case law and not military jurisdiction shall apply.

5. The Law on Refugees and Complementary Protection was published in the Official Gazette on January 27, 2011. It entered into force the following day and was regulated on February 21, 2011.

6. This facility was previously exercised by the Supreme Court of Justice but was effectively devoid of status because the SCJ considered that it was confined to issuing a statement, thereby failing to implement specific actions to respond directly to the circumstances which had generated the serious rights violation.

7. The Bolivian Constitution (Paragraph 1, Article 256) provides that "Treaties and other human rights 'international instruments' that have been signed, ratified or acceded to by the State and which contain provisions that are more favorable to the Constitution, shall apply preferentially to the relevant constitutional provision" (BOLIVIA, 2009).

8. Paragraph 1, Article 12 of the Rome Statute of the International Criminal Court (REVISTA JURÍDICA DE BUENOS AIRES, 1998, p. 176).

## RESUMO

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A Constituição Política dos Estados Unidos Mexicanos foi objeto de uma reforma integral no que se refere aos direitos humanos e se encontra vigente desde junho de 2011. Com essa emenda, estabeleceu-se de forma mais nítida como as normas internacionais de direitos humanos se posicionam na pirâmide hierárquica das normas do sistema jurídico mexicano. Este artigo pretende analisar e comentar as implicações que essa reforma acarreta, com especial ênfase no devir histórico para o reconhecimento dessas normas, bem como a reforma constitucional e suas pendências, abordando também sua dimensão tanto no cenário doméstico como no internacional.

## PALAVRAS-CHAVE

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Incorporação de normas – Direitos humanos – Reforma constitucional – Política exterior – México

## RESUMEN

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La Constitución Política de los Estados Unidos Mexicanos fue objeto de una reforma integral en materia de derechos humanos que se encuentra vigente desde junio de 2011. Con dicha enmienda, se estableció de forma más nítida cómo las normas internacionales de derechos humanos quedan posicionadas en la pirámide jerárquica de las normas dentro del sistema jurídico mexicano. Este artículo pretende analizar y comentar las implicancias que conlleva la reforma señalada, haciendo especial énfasis en el devenir histórico para el reconocimiento de dichas normas; la reforma constitucional y sus pendientes, visualizando también su dimensión tanto en lo doméstico como en el escenario internacional.

## PALABRAS CLAVE

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Incorporación de normas – Derechos humanos – Reforma constitucional – Política exterior – México



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## ABSTRACT

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The study analyzes compliance with legal decisions made by the Inter-American Human Rights System (IAHRS), particularly those of the Inter-American Court of Human Rights (Court) in Brazil. In light of prior findings of generalized shortcomings in the execution of Court sentences, sentences against the Brazilian State are considered and, through comparative analysis, the internal institutional process of sentence implementation is evaluated. In this undertaking, the difficulties of classic Law are problematic in attending to expectations of legal efficacy in the context of plural norm implementation and production.

Original in Portuguese. Translated by Murphy McMahon.

## KEYWORDS

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Compliance – Sentences – Inter-American Court of Human Rights – Brazil



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# INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: CHALLENGES TO COMPLIANCE WITH THE COURT'S DECISIONS IN BRAZIL\*

Elisa Mara Coimbra\*\*

## 1 Introduction

The reciprocal interactions between the Inter-American Human Rights System (IAHRS) and the National Legal System, more than a promise, currently constitute a reality, which must, however, be perfected. With the growing profusion of legal norms and modification of classic legal structures, human rights represent an effort toward a “truly common law” (DELMAS-MARTY, 2004), whose purpose is not to compromise the cultural and legal identity of each State, nor empty them entirely of sovereignty, since important global actors are involved. On the contrary, a “truly common law” responds to the need to coordinate regulation imposed by globalization, safeguarding pluralism and prioritizing the protective character of human rights in raising the visibility of groups marginalized by national structures. Thus, “the IAHRS offers institutional bases for the construction of a transnational public sphere<sup>1</sup> that can contribute to the broadening of Brazilian democracy” (BERNARDES, 2011, p. 137).

In this way, the improvement of mechanisms for complying with decisions of the IAHRS corresponds to a movement at the heart of the formal structures of the State, to make viable public policies affecting the most vulnerable groups, oftentimes invisible on the internal plane, whoever they are. “Subjects that haven’t found

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space in the national political agenda can be highlighted in these transnational spaces and, afterwards, included in the domestic political debate within a new configuration of power” (BERNARDES, 2011, p. 137). It is the boomerang method of influence, in which, for a national political objective to be met, it may be necessary, when opportunities are blocked in the national sphere, to launch mobilizations in international spheres which can apply pressure to national States (KECK et al., 1998, p. 12).

The enforcement of the decisions of the IAHRs, however, represents a challenge. Two important quantitative studies can be cited on the effectiveness of the IAHRs (BASH et al., 2010; GONZÁLEZ-SALZBERG, 2010). The first includes in its analysis the enforcement of decisions by both the Inter-American Commission on Human Rights (IACHR) as well as the Court, while the second focuses on just compliance with Court decisions, especially on refining (or improving) national mechanisms for implementing decisions, mainly in the current context of IAHRs reform discussions.<sup>2</sup>

With that in mind, the aim of this text is to investigate future impediments to the execution or implementation of decisions, by way of a comparative analysis of five cases related to Brazil heard by the Court, identifying, afterwards, potential institutional partnerships capable of effectively implementing them. Therefore, a documentary analysis of the Court's judgments of merit and eventual supervisions of the corresponding sentences was realized.

To have an adequate understanding of the problem, the work is divided in two moments. In the first, an initial discussion is presented about the needs and tendencies of a globalized, modern law – which, if not observed, will hamper interaction between internal law and the IAHRs even more. Based on articles 68.1 and 68.2 of the Pact of San José, Costa Rica, it presupposes that in some situations or circumstances, certain agents will be better situated for decision-making than others. In this discussion, national States would be better situated than an international judge to determine enforcement mechanisms for a ruling, in this case, of the Court. In the second moment the question is this: how to apply this criterion so that it bolsters the implementation of IAHRs rulings, considering recent legal trends? To that end, two cases are comparatively described, in an attempt to identify possible difficulties for enforcement and, finally, with this in mind, Law 4.667-C of 2004, which went through the Congress and currently sits in the Senate, under the number 170 of 2011, is evaluated.

## 2 National and international jurisdictions

In her work *Pour un Droit Commun* or *Towards a Truly Common Law*, Mireille Delmas-Marty (2004) defends the necessity of overcoming classic Law, or non-globalized state law, based on the premise of singularity and hierarchical organization. This need is due to alterations to the global environment caused by globalization, which shortened time and space, introducing a reality incompatible with an orthodox notion of the Nation-State, the mode of organization that is key to classic Law. In this sense, the Nation-State was no longer self-sufficient in

solving traditional state problems, such as environmental and economic issues, which led, according to the author, to a “denationalised” space, where supranational organisms and civil society act, and a “destabilised time”, in which permanent and temporary sources co-exist simultaneously (in contrast to past codes, whose main claim was stability). These two factors derailed the classic Kelsian pyramidal legal organization. Thus discussions on prevalence, whether of international law over internal law (monist theories), or internal law over international law (dualist theories) came to be outdated.

How then would a new legal organization be structured? It is a question later developed by Delmas-Marty (2012) in the text *Résister, responsabiliser, anticiper*. According to the author, the legal fragmentation resulting from the globalisation process would demand an interactive effort, whether vertical (national and international system) or horizontal (Penal Law, Constitutional Law, among others), increasingly accentuated and complex, in order to minimally guarantee normative coherence. The proposal is to consider human rights as politico-democratic tools in the globalization process, capable of re-balancing the forces among States, through identification of contradictions, in terms of these rights, in the performance of States (economic and social rights, environmental and development rights, among others), leading to the attribution of responsibility and the anticipation of risks inherent to the process.

Herein lies the challenge of co-existence among distinct legal systems that are relatively autonomous, that is, not based on any classic hierarchical pyramidal structure, undertaking a partnership that is not always harmonious, but necessary to strengthen democratic guarantees, until recently non-existent and ineffective in the history of Latin America. That is the case of the relationship observed between the IAHRs and the internal legal order.

The IAHRs is composed of the IACHR and the Court, specialized organs linked to the Organization of American States (OAS). This is a regional system that follows an inter-state logic. The IACHR originated from a resolution, not a treaty: Resolution VIII of the 5th Meeting of Consultation of Ministers, approved in Santiago in 1959, despite only later gaining conventional status. The Court, on the other hand, grew out of a signed international treaty in 1969 – the American Convention on Human Rights, or “Pact of San Jose, Costa Rica” – which went into effect in 1978, when the eleventh instrument of ratification was enacted. Despite their different constitutional trajectories, both organs enjoy autonomy in relation to national legal systems. And despite the States having been responsible for their creation, it is they who, in the majority of cases, are the promoters and the violators of human rights condemned by these organs. On the one hand, they are promoters because they ratify human rights protection treaties and take responsibility for the enforcement of IAHRs decisions. On the other hand, they are violators because convictions for human rights violations fall on them. This is not, therefore, a discussion of the prevalence of one system over the other, but rather of complimentary structures that, on their own, have not made effective the basic rights for a democratic society.

The creation of the IAHRs coincides with an authoritarian era in Latin

American history, representing a contradictory initiative in the midst of repeated human rights violations in the national scope. As these contradictions were not only identified but became banner issues for social movements, the closure of national and regional spheres were challenged, bringing into question the notion of margin, based on article 68.1 of the Pact of San José, Costa Rica. That is, the criteria through which an exclusive space for action is attributed to individuals who are members of a state, fomenting a process of co-determination. Co-determination is understood as the process of consolidating the normative content of the sentence through the participation of individuals, who collaborate not only to identify the institutional mechanisms necessary to provide a full reparation, but also to evaluate the results reached through the reparation mechanisms, that is, whether the human rights violation was fully redressed.

The State and civil society thus presumably occupy a privileged place in the American Regional System, which means that the State must seek out an adequate institutional structure, without, however, refraining from or ignoring international interpretation.

Bearing this in mind, and with the objective of identifying existent institutional barriers, it is appropriate to analyze the cases taken to the Court against the Brazilian State.

### 3 Anamnesis of the five cases

The first Brazilian conviction issued by the Court came in a case known as *Ximenes Lopes vs. Brasil*. In October 2004, the IACHR submitted a complaint against the Federative Republic of Brazil to the Court, owing to alleged attacks by employees of the Guararapes Rest Home, a psychiatric clinic accredited by the Single Health System (SUS) in Sobral, Ceará, against Damião Ximenes Lopes, a mentally handicapped person, which resulted in his death. On July 4, 2006, a ruling was rendered, condemning Brazil for violations of Articles 1.1 (Obligation to Respect Rights) in relation to Article 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Inter-American Convention on Human Rights. Among other measures, the State should: a) guarantee, within a reasonable period, that the internal process to investigate and sanction those responsible for the facts of the case is duly accomplished; b) publish parts of the sentence in the Official Gazette or another amply circulated publication; c) develop a training and competency program for medical personnel, in psychiatry and psychology, nursing and other areas, especially with regard to the principles that should guide the treatment of persons with mental deficiency, according to international standards on the matter and those referenced in the sentence; d) pay indemnities to the injured parties. On May 2, 2008, as part of the supervisory procedure stemming from the sentence, the Court released a sentence, declaring the publication and indemnity measures to be fulfilled, and all others, unfulfilled.

On September 21, also during the supervisory procedure, but in a different resolution, the remaining measures continued to be declared unfulfilled. Finally,

in the last resolution, dated May 17, 2010, the Court decided to maintain the supervisory procedure in relation to the two aspects of the sentence still considered unfulfilled.

The second case, known as *Nogueira de Carvalho e outros vs. Brasil*, resulted from the submission, in January, 2005, of a complaint from Jaurídice Nogueira de Carvalho and Geraldo Cruz de Carvalho about a supposed lack of diligence in the investigation and sanction of those responsible for the death of Francisco Nogueira de Carvalho, a lawyer and human rights defender who dedicated himself to exposing the crimes of a supposed extermination group composed of off-duty police officers in Rio Grande do Norte, known as the “golden boys.” On November 28, 2006, the case was archived owing to insufficient factual evidence to demonstrate the alleged violations of the rights. For this reason, the case will not be compared to the rest.

The third case, *Escher e outros vs. Brasil*, was submitted by the IACHR to the Court on December 20, 2007, against the Federative Republic of Brazil, on behalf of members of several organizations including COANA (an agricultural cooperative) and ADECON (Community Association of Rural Workers), among them Arlei José Escher, Dalton Luciano de Vargas, Luciano Vargas and 32 others, for supposed illegal intercepts of telephone calls by these members. These actions would, in theory, violate Articles 1.1 (Obligation to Respect Rights) in relation to Article 11 (Right to Privacy), 16 (Freedom of Association), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), in addition to violation of Article 28 (federal clause, not recognized by the sentence) of the American Convention on Human Rights. On November 20, 2009, the sentence was handed down. Among the adjudicatory mandates, the State was obliged to: a) investigate the facts that generated the violations in the present case; b) publish parts of the sentence in the Official Gazette or another widely circulated publication in the state of Paraná; c) pay indemnities to the aggrieved parties. In relation to the first item, there was a request for interpretation of the sentence, made by Brazil, in order to clarify the extent of the investigation of the facts. Furthermore, on May 17, 2010, in a supervisory procedure, there was a declaration of the absence of any error in the description of the sentence and how the State should publish it, and thus the State was required to fulfill its obligation in the mold prescribed by the court order. Thus, the publication of the sentence occurred in the newspaper *O Globo* on July 23, 2010, issue number 28.109.

On December 24, 2007, the IACHR submitted a complaint against the Federative Republic of Brazil to the Court on behalf of Iracema Cioato Garibaldi, widow of Sétimo Garibaldi, and their six children (*Garibaldi vs. Brasil*), for the failure to fulfill its obligation to investigate and sanction those responsible for the death of Sétimo Garibaldi on November 27, 1998. The event occurred as a result of an extrajudicial operation to remove families of landless workers who had been occupying a farm located in the town of Querência, in the north of Paraná, in violation of Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention on Human Rights. In this fourth case, on September 23, 2009, a ruling was delivered, which stipulated, among its adjudicatory measures,

that the Brazilian State must: a) publish parts of the sentence in the Official Gazette or a widely circulated publication in the state of Paraná; b) conduct, effectively and within a reasonable time period, an inquiry and any consequent legal process to identify, judge and, eventually, sanction those responsible for the death of Mr. Garibaldi; c) indemnify the aggrieved parties.

On February 22, 2011, during the supervisory process of the sentence, the obligation of reparations was declared fulfilled, while the duties to investigate and pay indemnities were declared unfulfilled. In the resolution of February 20, 2012, on the other hand, the obligation of indemnities was declared fulfilled, while the investigation, despite progress realized in its development, was not.

The final case, known as *Gomes Lund e outros* (“Guerrilha do Araguaia”) *vs. Brasil*, involves the submission from the IACHR to the Court, against the Federative Republic of Brazil, on behalf of the families of those who disappeared during the Araguaia guerrilla conflict during the Brazilian dictatorship, due to supposed arbitrary detentions, torture and the forced disappearances of 70 people, among them, members of the Communist Party and local peasants, occurred on March 26, 2009. It alleged violations of Articles 1.1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 4 (Right to Life), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) of the American Convention on Human Rights. On November 24, 2010, the verdict was delivered, condemning Brazil to: a) investigate the facts, judge and, if necessary, punish those responsible and to determine the whereabouts of the victims; b) take rehabilitation measures (medical and psychological assistance for the families of disappeared or executed victims), apology (publication of the verdict, public, international recognition of responsibility, institution of a special day and memorial for political activists who have disappeared in Brazil) and guarantees to avoid repeating the outcome (education in human rights for the Armed Forces; classification of the crime of forced disappearance; access to, systematization and publication of documents held by the State; creation of a truth commission); c) pay indemnities, costs and legal fees. Being the most recent of the cases, there still has not been a supervisory procedure following the verdict.

#### 4 Possibilities for comparison

According to the González-Salzberg study (2011) previously mentioned, the difficulty of internal institutional coordination to guarantee that adjudicatory sentences are followed is not only a Brazilian problem, but generalized, since it is left to national States to choose how they will execute the decisions of the IAHRs. In fact, a comparative analysis of the cases reveals that in none of them was there complete compliance with the Court's decisions, though some measures were more commonly acted upon than others. The hypothesis of the current text is that current internal institutional coordination does not make the complete execution of Court sentences possible, by failing to consider the co-determination inherent in the implementation of the decision in the internal legal structure.

To begin with, consider the least problematic measures: those of indemnity and publication, since they are the most frequently enacted. Both are present in all cases, except *Nogueira de Carvalho e outros vs. Brasil* which, having been archived, did not result in a condemnation of the Brazilian State. In the *Ximenes Lopes vs. Brasil* case, the Court declared that the indemnity and publication measures had been met in its first supervisory procedure (Resolution 2 of May 2, 2008). In the *Garibaldi vs. Brasil* case, there was also a similar declaration. In the *Escher e outros vs. Brasil* case, despite the Court not having expressly proffered on the payment of indemnities, these were realized via order 7.158/10. Finally, in the *Gomes Lund e outros vs. Brasil* case, which also was not the target of an expressed declaration of enactment, there was payment of indemnities, even prior to the sentence, as materialized in Law 9.140/95, which was taken into account by the Court, which imposed only certain complements to these indemnities. As for publication of parts of the sentence, there has also been widespread implementation of the measures.

These two obligations commonly levied on condemned States, publication and indemnification must be executed directly by the Union; this is the aspect they share. In these cases, a more hierarchical internal institutional coordination is sufficient to guarantee that the measures are enacted, since they are of a more normatively dense degree. Therefore a more complex coordination involving participation of organs of distinct legal nature, as well as civil society, is not necessary for the definition of the content and scope of the obligation proffered in the sentence. This does not mean, however, that the State has a choice between a classic model and a model of relatively autonomous systems, since the latter better fits the possibilities afforded by contemporary conditions. Indemnification and publication measures are more often met because they do not depend on a more complex institutional structure.

Despite the obligation of publication not being difficult in relation to the institutional capacity to generate its enactment, the procedure can still be prone to disturbances. Imagine, then, when implementation of a measure is more complex and depends on joint efforts; the necessity of management grows in order to ensure the full reparation of the violation.

The measures of prevention of repeated instances of the violation, beyond publication, are the most complex to realize, both in terms of investigation and with regard to public policies. And the reason for this is that absence of any internal institutional mechanism capable of bolstering the normative content of what would be the full reparation of the human rights violation in each obligation imposed by the Court's sentence. The immediate consequence is the necessity of relativization of rigidly hierarchical structures, since they cannot be made flexible enough to allow for co-determination. The measures that require the formation of public policies, especially, depend, in order to be effective, on coordination between different organs, both in terms of their competencies and their organization and structure, which vary in accordance with the policy to be implemented.

The Ximenes Lopes case is illustrative in this respect, since it involves the right to health, provided in Article 23, Item II of the Federal Constitution, as a common

competency of federative entities. These duties demand the coordination of a range of institutions that often have never worked together and, when they associate, do so through cooperation agreements or accords, fragile mechanisms that complicate the process of determination of the reparation content imposed by the sentence.

Coordination through cooperation agreements or accords, despite the advantage of permitting institutional interaction without the need for complex legislative or administrative reforms, is based on the political will of the organ to participate, as well as acceptance of commitments, which can be insufficient to fulfil the determinations of the IAHRs. To execute the decision of the Court, the association of organs may be necessary, and not discretionary, as is the present status of Brazilian legal organization. Thus, guaranteeing this association is an internal challenge that complicates even the attribution of responsibility to each organ, in cases of non-compliance with the measures provided in the sentence. Despite referring to a measure related to the duty of investigation, in the scope of the sentence for the *Gomes Lund e outros vs. Brasil* case, the Inter-ministerial Decree number 1 MD/MJ/SDH-PR, from 5/5/2011, created in order to coordinate and execute the activities necessary to locate and systematize information and the identification of bodies of the deceased in the Araguaia guerrilla conflict, exemplifies the absence of institutionalized mechanisms capable of investigating the facts in a cooperative manner, since it had to demand political, discretionary action.

As for the duty to investigate, another measure meant to prevent repetition, one observes that in all cases, Brazil violated the legal guarantees and legal protection rights provided in the American Convention on Human Rights and, in all, did not wholly comply with the corresponding duty to investigate, which reveals structural gaps in the interaction among organs that, traditionally, in classic law, work together: police, public prosecutors and the judiciary. In this case, besides the problems relative to the absence of institutional paths responsible for the co-determination of the norm, emanating from the Court, problems theorized long ago emerge, such as the separation of powers, the impartiality of criminal prosecution, among others.

In the Ximenes Lopes case, the criminal suit, begun in February, 2000, is still inconclusive at the present time.<sup>3</sup> In fact, this process highlights a peculiarity in relation to the other cases heard by the Court. It was brought to the IAHRs prior to exhausting all internal legal resources, contrary to Article 46.1 of the American Convention on Human Rights. Meanwhile, since this requirement of admissibility was not argued by Brazil at the opportune procedural moment, contradicting the alleged situation, the process followed its course until the pronouncement of the adjudicatory sentence, which demonstrates the technical and administrative lack of preparation in dealing with IAHRs issues. Despite this peculiarity, the fact is that Brazil was sentenced to investigate and sanction those responsible for the events, but still has not been able to meet this requirement. According to Irene Ximenes, Damião Ximenes Lopes' sister, who was responsible for taking the case to the IACHR, in accounts taken from the work of Nadine Borges (2009), it is possible to identify a series of irregular procedures in the investigations, which disrespected the rule of impartiality in favor of local political power.<sup>4</sup>



*The chronological order of the facts recounted by Irene was impressive, and for this reason, when she spoke about the antics of the clinic owner to put off any legal decisions, Damião's sister had full conviction of what she was affirming. "In 2002 he began to sell everything he had, including an aquatic park, half of a mansion and other things." Irene's repulsion was so great in describing these facts. According to her lawyer, the judge in Sobral authorized the sale, expediting nine permits, even as the lawsuits against Mr. Sérgio were underway. At this point in the conversation, Irene explained that seven months passed before she was able to hire the first lawyer for the Damião case.*

(BORGES, 2009, p. 36-37)

In the *Escher e outros vs. Brasil* and *Garibaldi vs. Brasil* cases, similar difficulties can be identified. In the first, the investigation of how the data obtained through illegal telephone intercepts was divulged on television news was never conclusive. Furthermore, state agents responsible for the intercepts never responded for their actions, despite their solicitation having originated with a military police officer without ties to the district of Loanda and who, therefore, was not presiding over criminal investigations of the supposed crimes of Landless Movement (MST) workers. In the *Garibaldi* case, the Court's sentence pointed to a series of failures and omissions in relation to Inquiry number 179/98, which disrupted the collection of facts and investigation of those responsible for the same: lack of indispensable prima facie witness testimony, absence of clarification of contradictions in the testimony, non-use of and omissions in relation to evidence, lost evidence, non-compliance with mandated diligence, error in the petition of Inquiry archival. Even with the re-opening of the Inquiry in 2009, in an attempt to meet the IACHR recommendations, the investigation of those responsible was not conclusive. Finally, the *Gomes Lund e outros vs. Brasil* case also points to the institutional difficulty of the State in investigating facts related to supposed infractions by State agents.

In all of these cases, the Court, attentive to the co-determination process, does not specify which particular institutional mechanisms should implement its decisions in Brazil. Now it is necessary to reflect on which mechanisms would be most efficient, and who should be the recipient of the decision, in order to build an institutional structure capable of honoring international commitments, through joint, coordinated action by various organs and branches.

There is yet another difficulty especially related to one of the potential recipients of Court decisions, the Brazilian judiciary, which ignores its role in executing Court decisions, to the negligence of international interpretations of the treaties. This reinforces the classic, hierarchical legal structure, impervious to current trends, especially by neglecting to systematically control the conventionality of all its decisions, that is, the verification of conformance of internal norms to international treaties that were ratified by the government and valid in the country. Understanding this reality, the Court dedicated numerous pages of its sentence in the *Gomes Lund* case to discussing the incongruity of the Amnesty Law in relation to the American Convention on Human Rights, despite the declaration of its constitutionality by the Federal Supreme Court (STF).

In this sense, thinking about an internal bureaucratic structure capable of

meeting these new necessities is extremely complex. Therefore later discussions study the current legal framework and the attempts to obtain greater efficiency in sentence execution promised by Law 4.667 of 2004.

## 5 Internal process

According to Article 21 of the Brazilian Federal Constitution, the Union is responsible for maintaining relations with foreign States and participating in international organizations. In this sense, the competent organs for the representation of the Brazilian State at the IAHRs, the elaboration of documents in response to solicitations by the IACHR or Court and for the initiation of compliance with IAHRs decisions, more specifically those of the Court, are composed of, in particular, the Foreign Ministry (MRE), the Attorney General of the Union (AGU) and the Secretariat of Human Rights (SDH), connected to the Presidency of the Republic since 1999, with Ministry status, according to the law and respective statutes 7.304/10, 7.392/10 and 7.256/10.

Despite the SDH being the competent organ to promote internal institutional coordination – according to statute 7.256/10, which establishes the competency to take initiative and support projects on human rights issues in national affairs – it has only meagre tools to institutionally coordinate all the bodies involved.

Firstly, the SDH cannot attribute responsibility to instances of government (both federal state and the legislative and judiciary branches) who might be the only competent bodies to meet the conditions laid out in Court sentences.

Furthermore, the diversity of eventual obligatory actions imposed by a Court decision hampers the elaboration of a list of prior procedures, demanding constant debate case by case, as broadly as possible, so that the sentence's adjudicatory measures are complied with.

The structure described above, highly hierarchical, works well for compliance with measures that do not depend on a gamut of recipients collaborating in the co-determination process in order to be effectively implemented. However, when full compliance of a particular IAHRs decision goes beyond the competency of any one of these organs, which occurs in the majority of cases, especially in terms of obligations requiring action, successive impasses are created.

In this context, it is necessary to look more closely at Law 4.667-C of 2004, the main initiative whose aim is to meet the continuing need for the Brazilian State to comply with Court sentences and uphold international commitments.

### 5.1 *Law 4.667-C of 2004*

Authored by Congressman José Eduardo Martins Cardozo, the normative proposal sought to provide for the legal effects of decisions by International Human Rights Protection Organizations, and represented, in truth, an attempt to rescue Law 3.214 of 2000 by then-Congressman Marcos Rolim, archived before it was voted on.

The project by Marcos Rolim basically sought to regulate the nature of executive legal actions against the Federal Treasury, relative to the indemnities

set by IAHRs decisions. José Eduardo Cardozo, in turn, repeated the tenor of the original bill, adding the possibility of the Union interposing regressive actions against any persons or corporations responsible for the offenses that might give rise to a condemnation by the Court.

It is noteworthy that neither bill mentions other modalities of obligations arising from condemnations against Brazil, especially obligations to prevent the repetition of offenses, which are predominately obligations involving “dos” and “don’ts.” Due to this gap, congressman Orlando Fantazzini, the Human Rights and Minority Commission’s rapporteur, proposed a global amendment-by-substitution, the result of debates with the legal community connected to human rights.

The amendment’s main innovation refers to the creation of an organ to accompany the implementation of decisions and recommendations made by international human rights protection organizations (thus broadening the scope of application of the eventual law to go beyond just decisions of the IAHRs), containing inter-ministerial representation and civil society representation. Among the attributions provided was that of accompanying negotiations among the federal entities involved and the plaintiffs; that of management together with the organs of the judiciary, public prosecutor and police, to give greater agility to investigations and findings in cases being examined by international human rights protection organizations; and to oversee the proceedings of legal actions.

However, the novelty of the measure is not merely the creation of an organ to manage the implementation of decisions, since many attributions provided in the bill are already covered by the SDH. The innovation comes from the 5th Article of the amendment-by-substitution, which institutes the necessity of notification of the competent organ for the execution of the obligation mentioned in the adjudicatory decision, so that a plan of compliance is created with a preview of the actions and identification of the authorities responsible for its execution. This is because the identification of the competent organs can facilitate the future identification of those responsible for non-compliance with the international decision, even including attribution of penalties for those guilty of retrogressions. Meanwhile, there are doubts about the constitutionality of the proposal, since the initiative to create a new administrative structure should belong to the executive branch.

Another of the bill’s innovations concerns the participation of civil society in the process of decision implementation and specification of necessary measures for compliance with the sentence, democratizing the co-determination space set in Article 68.1 of the Pact of San José, Costa Rica, since compliance with the Court’s sentences and, consequently, compliance with human rights treaties, is associated with intense activity of non-governmental organizations (NGO). Cases where a person individually secured the protection of the IAHRs without legal assistance from these organizations are rare. Even the Ximenes Lopes case, in which there was more expressly individual action, because Irene Ximenes without assistance sent a petition to the IACHR, she later received support from the NGO *Justiça Global* (Global Justice). Still, as the *Ximenes Lopes vs. Brasil* case progressed, the NGO solicited its inclusion in the suit as co-plaintiff, which was

important for the success of the complaint and for the individual case to take on a collective aspect, mainly in relation to the condemnation of preventative measures. In all other cases, NGOs participated since the initial petition, creating the practice of strategic litigation, which seeks, through the “use of the judiciary and paradigmatic cases, to achieve social change,” as theorized by Cardoso (2008 p. 366), since the non-profit sector relies on a privileged cognitive perspective, in relation to the bureaucracy, on the obstacles to the protection of human rights.

However, despite the bill having been approved unanimously by the Human Rights and Minorities Commission, it was rejected by the Constitution, Justice and Citizenship Commission, even with the immediate prior approval by the Foreign Relations and National Defense Commission, which blocked the execution of the draft. The justification for the rejection of the amendment-by-substitution was that it would harm the sovereignty of the country in contradiction with the Constitution, considering the inexistence of a provision on the necessity of the Brazilian State to recognize the purview of international organizations, which occurred in the original bill proposed by congressman Eduardo Cardoso.

There were still small alteration proposals presented to the Constitution, Justice and Citizenship Commission, approved and introduced into the bill. That way, the draft that entered the Senate was practically identical to the initial proposal, ignoring the proposals of then congressman Orlando Fantazzini:

THE NATIONAL CONGRESS decrees:

*1st Art. The decisions of International Human Rights Protection Organizations whose competency is recognized by the Brazilian State will produce immediate legal effects in the scope of the respective internal order.*

*2nd Art. It will be left to the federal entity responsible for the human rights violation to comply with the obligation of reparation for its victims.*

*Single paragraph. To avoid the non-compliance with the obligations of monetary character, it will be left to the Union to provide the due reparation, with the originating obligation remaining that of the violating entity.*

*3rd Art. The Union will assess regressive action against persons or corporations, public or private, responsible directly or indirectly for the acts that caused the decision of monetary character.*

*4th Art. This Law becomes valid on the date of its publication.*

(BRASIL. Projeto de lei da Câmara dos Deputados nº4.667-D de 2004)

Thus, if the bill is approved on these terms, the central legislative measures to enable full compliance with IAHRS decisions would not be implemented, especially those related to making compliance with active obligations possible.

## 6 Conclusion

Studying the cases decided by the Court against the Brazilian State, it was possible, through comparative analysis, to evaluate the internal institutional process of compliance with these decisions. In this sense, reasons that justify the compliance, to a greater or lesser degree, with measures set in the Court sentence were sought, allowing for the identification of deficiencies in internal administrative organization.

First, the text pointed out the inexistence of an internal institutional path to consolidate the content of obligations imposed by Court sentences, which, currently, is necessary to obtain the relativisation of rigidly hierarchical structures, since these cannot be flexible enough to reach the co-determination norm expected by the Court. The effectiveness of measures that demand the formulation of public policies depends on coordination between organs that differ both in their competencies and their organization and structure, varying in accordance with the policy to be implemented – entity or federation, courts, legislature, state governments, among others.

Moreover, classic institutional difficulties still have not been resolved. Repeated non-compliance with obligations to investigate, present in all of the rulings analyzed, indicates an ineffective police and investigative apparatus, as well as a lagging judiciary and deficient training program for State human rights agents.

Also to be pointed out are the repeated omission of the judiciary in recognizing the binding character of decisions by the IAHRs, which hinders even more the formation of an institutional network capable of adequately complying with the adjudicatory measures laid out in the sentences. The *Gomes Lund* case is definitive evidence of this conclusion.

In this sense, it is noted that the same institutional collaborations that failed to block human rights violations now jeopardize compliance with Court decisions, mainly those of repetition prevention which denotes the necessity of institutional reforms, especially with the participation of civil society, holder of a privileged cognitive position, facilitating the choice of efficient public policies for compliance with Court decisions.

Regrettably, the congressional bill 4.667-D of 2004, if the draft sent to the Senate is approved, wastes the opportunity to take central legislative provisions, in the sense of enabling full compliance with IAHRs decisions, particularly related to making possible compliance with obligations to act.

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## Jurisprudence

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## NOTES

1. The public sphere is understood as the “non-state loci for deliberation, where collective formation of will, justification of previously settled decisions and the forging of new identities are possible” (BERNARDES, 2011, p. 137).

2. The start of this process is associated with the creation of a Special Workgroup for the study of Inter-American Commission on Human Rights,

during the General Assembly of San Salvador on June 29, 2011.

3. The penal action (suit number 2000.0172.9186-1/0) began in March of 2000.

4. The only clinic accredited by the SUS for treatment of persons with mental deficiencies belonged to a cousin of the mayor of the city of Sobral (BORGES, 2009, p. 25).



## RESUMO

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O objetivo do estudo é analisar o processo de cumprimento das decisões do Sistema Interamericano de Direitos Humanos (SIDH), particularmente as decisões da Corte Interamericana de Direitos Humanos (Corte IDH) no Brasil. Diante da constatação prévia da existência de *deficits* generalizados nas execuções das sentenças da Corte IDH, tomam-se os casos sentenciados por ela em desfavor do Estado brasileiro e, a partir de análise comparativa, avalia-se o processo institucional interno de cumprimento das sentenças. Nessa empreitada, problematizam-se as dificuldades do Direito clássico em atender às expectativas de eficácia jurídica em um contexto de produção e implementação plurais da norma.

## PALAVRAS-CHAVE

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Cumprimento – Sentenças – Corte IDH – Brasil

## RESUMEN

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El objetivo del presente estudio es analizar el proceso de cumplimiento de las decisiones del Sistema Interamericano de Derechos Humanos (SIDH), particularmente las decisiones de la Corte Interamericana de Derechos Humanos (Corte IDH), en Brasil. Ante la previa constatación de la existencia de *déficits* generalizados en las ejecuciones de las sentencias de la Corte IDH, se abordan los casos en los que fuera emitida sentencia contra el Estado brasileño y, a partir del análisis comparativo de los mismos, se evalúa el proceso institucional interno para su cumplimiento. En este contexto, se problematizan las dificultades del derecho clásico para responder a las expectativas de eficacia jurídica, en un contexto de producción e implementación plurales de la norma.

## PALABRAS CLAVE

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Cumplimiento – Sentencias – Corte IDH – Brasil



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## ABSTRACT

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Debates about humanitarian action in complex emergencies raise fundamental problems about the protection of human rights under international law. As UN peacekeeping missions become increasingly more complex and multifaceted, for example, they face accountability deficits. Many of the largest UN missions have authority under Chapter VII of the UN Charter to use force to protect civilians under imminent threat of physical violence. This raises a number of issues related to the UN's negative and positive obligations under international law. The UN Charter itself contains no express basis for peacekeeping, which has developed in an *ad hoc* manner in response to different crises. Some States have also acted outside the framework of the UN Charter justifying military action in the name of 'humanitarian intervention'. This paper explores some of the principled and practical dilemmas related to the extraterritorial protection of civilians through both unilateral and multilateral action within the framework of international law.

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## KEYWORDS

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Protection – Humanitarian intervention - R2P – UN Charter – Complex emergencies



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## THE EVOLVING LEGITIMACY OF HUMANITARIAN INTERVENTIONS

Conor Foley

When can armed soldiers from one country lawfully enter into the territory of another country in order to protect the citizens of that State from grave violations of international human rights or International Humanitarian Law (IHL)? Article 2 of the UN Charter prohibits the use of force and interference in States' internal affairs, even by the UN itself. According to the Charter, there are only two permissible bases for the use of force: the inherent right of self-defence or authorisation by the UN Security Council, acting under its Chapter VII powers, in response to a threat to international peace and security.

Some scholars argue that a third basis may be emerging in customary international law, the right to 'humanitarian intervention', although there is little State practice to justify this claim. In the aftermath of NATO's intervention in Kosovo, carried out without UN Security Council authority, an International Commission on Intervention and State Sovereignty (ICISS) was established, which published a report, "The Responsibility to Protect", in 2001. Initially heralded as 'an emerging international norm', some language associated with R2P was included in the UN World Summit Outcome document, but the attempts to reach this consensus largely gutted the concept of its normative content. In the aftermath of the invasion of Iraq few were prepared to allow individual powerful States to take upon themselves the role of judge, jury and executioner in deciding when such interventions could take place.

Recent years have, however, seen the deployment of increasing numbers of soldiers in UN peacekeeping missions, authorised under Chapter VII mandate to use force to protect civilians under imminent threat of physical violence. There are currently well over 100,000 troops deployed on missions in various parts of the world. Given that Chapter VII contains no references to human rights, IHL or the protection of civilians, and that the UN Charter itself provides no basis for peacekeeping, this is a significant development in international law and international relations.

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*Notes to this text start on page 92.*

There appear to be three possible arguments which could be used to justify this practice. The first is that there is a necessary causal connection between grave violations of human rights and IHL and threats to international peace and security – through, for example, the spill-over effects of a conflict or cross border flows of refugees. The second is that powers of the Security Council are so unbound that there is nothing to prevent it declaring any situation to be a ‘threat to international peace and security’, thus allowing it to invoke Chapter VII in order to circumvent article 2 of the Charter. The third, which this author favours, is that there is an emerging international agreement that the UN, by virtue of its certain legal personality, increasingly regards itself as subject to the positive and negative obligations of international law. Accepting this argument fully, however, will require some hard thinking about the hierarchy of international legal norms in relation to Security Council decisions and the immunities with which the UN has used until now to shield its peacekeeping missions.

## 1 An Experience from Sri Lanka

In the spring of 2009, while I was conducting an evaluation for a humanitarian agency in Sri Lanka, government forces stormed the final hold-out of the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) in the north of the country.<sup>1</sup> The LTTE forces had compelled civilians to accompany them as they retreated into an ever smaller area of territory, often shooting those that tried to escape (UNITED NATIONS, 2011). Between January and May of that year, around 300,000 civilians, along with the remnants of the LTTE’s forces, were blockaded into an area around the size of New York City’s Central Park, where up to 40,000 of them may have been killed (INTERNATIONAL CRISIS GROUP, 2010). The so-called ‘no fire zone’, area was shelled incessantly by government forces, and hospitals and food-distribution points appear to have been deliberately targeted (STEIN, 2010). Many more people died from starvation and disease, because the government blocked humanitarian access and consistently under-estimated the number of civilians in the area. Others were summarily, either executed during the final assault or after they had been identified as LTTE members during the screening process (THE TIMES, 2009). Videos have since emerged of bound prisoners being shot in the head and the corpses of naked women who appear to have been sexually assaulted.<sup>2</sup>

Aid organizations attempting to help the affected population were systematically harassed and intimidated (FOLEY, 2009a). National staff members were arrested on trumped-up charges. The pro-government media repeatedly accused these organizations of giving support to the LTTE (DAILY MIRROR, 2009), and similar accusations were made against the United Nations mission in the country (ECONOMIST, 2010). Most international humanitarian agencies did not speak out publicly about the massacres that their staff members were witnessing. Some also agreed to help in the construction of what were de facto internment camps into which survivors of the massacre were herded for screening and detention. International aid workers who did speak out were expelled when their visas ran out and agencies that remained argued that it was better to retain a presence in the

country than to abandon it. A similar argument was made to justify involvement in the construction of the camps (FOLEY, 2009c).

After the conflict ended the government blocked all calls for an independent inquiry and mounted a campaign of overt physical intimidation of the United Nations (UN) mission in the country (ECONOMIST, 2010). Yet, although the available evidence suggests that the Sri Lankan government may be guilty of a far larger crime than the massacre at Srebrenica in 1995, it has faced little of the international opprobrium that attached itself to the Bosnian Serbs in the 1990s (FOLEY, 2009b). In May 2009, the UN Human Rights Council adopted a resolution praising its victory and humanitarian assistance efforts. Brazil joined China, Cuba, Egypt and Pakistan in voting down calls for an international investigation into possible war crimes.

Thirteen years before this massacre, in 1996, the BBC foreign correspondent, Fergal Keane, recorded a letter to his new-born son, Daniel, which became the most requested broadcast in the corporation's history. He told him that:

*I am pained, perhaps haunted is a better word, by the memory, suddenly so vivid now, of each suffering child I have come across on my journeys. To tell you the truth, it's nearly too much to bear at this moment to even think of children being hurt and abused and killed. And yet looking at you, the images come flooding back [...] There is one last memory. Of Rwanda, and the churchyard of the parish of Nyarabuye where, in a ransacked classroom, I found a mother and her three young children huddled together where they'd been beaten to death. The children had died holding onto their mother, that instinct we all learn from birth and in one way or another cling to until we die.*

(BRITISH BROADCASTING CORPORATION, 1996).

I remember listening to the broadcast at the time and thinking about it again when I was in Sri Lanka because my own wife was pregnant at the time, and we subsequently named our son Daniel. The genocides of Rwanda and Srebrenica had shaped the attitudes of my generation. Civilians had been massacred while UN peacekeepers looked on and aid workers proved powerless to help since, as an advertisement by *Medicins sans Frontieres* (MSF) put it pithily, 'one cannot stop genocide with doctors' (CROSSLINES GLOBAL REPORT. 1994).

## 2 The Birth of the Responsibility to Protect

At the end of the 1990s, the North Atlantic Treaty Organization (NATO) took direct military action against Serbian forces in Kosovo, an Australian-led force intervened in East Timor and British paratroopers helped to beat back a rebel advance in Sierra Leone. While the latter two interventions had UN approval, the one in Kosovo did not. A subsequent report by the International Commission on Intervention and State Sovereignty (ICISS) argued that international human rights and humanitarian law created positive obligations on States to intervene when the rights that these protected were being violated in a large-scale or systematic

way (INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, 2001). The UN itself was bound by some of these obligations, the report's authors argued, and if the Security Council failed to fulfil its 'Responsibility to Protect' (R2P), these obligations could pass on to others. The concept of R2P was embraced in influential UN reports (UNITED NATIONS, 2004 and 2005b) and a reference to it was incorporated into the outcome document of the high-level meeting of the General Assembly in September 2005 (UNITED NATIONS, 2005a).

However, a closer look at the wording of this document shows that the claims of those who argue that R2P is an emerging international legal norm, sometimes described as a 're-characterization of sovereignty', are somewhat overblown.<sup>3</sup> The actual text adopted says little more than that States have a responsibility to protect their own citizens and that the UN Security Council should support them in these efforts. The furthest it goes on the subject of direct interventions in other countries is in a rather convoluted commitment 'to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter (UNITED NATIONS, 1945), including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (UNITED NATIONS, 2005a, para. 139). As one observer has noted, this amounts to saying little more than that the Security Council should continue authorizing, on an *ad hoc* basis, the type of interventions that it has been authorizing for many years (CHESTERMAN, 2011).

Bellamy has described the agreed wording as 'R2P lite' arguing that it differed from the proposals brought forward by the ICISS 'by (among other things) emphasizing international assistance to States (pillar two), downplaying the role of armed intervention, and rejecting criteria to guide decision-making on the use of force and the prospect of intervention not authorized by the UN Security Council' (BELLAMY, 2006b). This has been rejected by others such as Evans, a co-chair of the ICISS, who argues that 'the agreed text differs little from all the previous formulations in the ICISS, High Level Panel and secretary general's reports' (EVANS, 2008a, p. 47).<sup>4</sup> Weiss, who served as Research Director of the ICISS, also rejects Bellamy's description, although his view of what was in fact endorsed is revealing:

*the proverbial new bottom-line is clear: when a State is unable or unwilling to safeguard its own citizens and peaceful means fail, the resort to outside intervention, including military force (preferably with Security Council approval) remains a distinct possibility.*

(WEISS, 2008, p. 142).

In a highly critical account of R2Ps significance, Orford argues that the 'responsibility to protect concept can best be understood as offering a normative grounding to the practices of international executive action that were initiated in the era of decolonisation and that have been gradually expanding ever since' (ORFORD, 2011, p. 10).

Plainly, two years after the invasion of Iraq, however, the majority of the UN's members were not prepared to allow powerful States to brush away the constraints of international law as it currently stands. But the fudge also represented a deeper clash over the recent history of what are commonly referred to as humanitarian interventions.

### 3 From humanitarian access to humanitarian interventions

To paraphrase a Balkan's dictum about Kosovo, it all started in Iraq and perhaps it finished in Iraq as well. At the end of the first Gulf War, in 1991, over two million Kurds fled their homes after their uprising against Saddam Hussein collapsed when the Western backing that they were expecting failed to materialise. Fearing another chemical weapons attack, like the one at Halabja in 1988, they headed for the Turkish border, but found it sealed off by the Turkish government.<sup>5</sup> By April 1991, up to 1,000 people were starving or freezing to death every day (FREEDMAN; BOREN, 1992, p. 48). The world had just seen United States (US) airpower annihilate the Iraqi armed forces, and Western public opinion refused to accept that nothing could be done to save the Kurds from another act of genocide. When the UN Security Council passed Security Council Resolution 688 (1991), calling for 'humanitarian access', Britain, France and the US deployed ground troops to turn back the Iraqi army and persuade the refugees that it was safe to come down from the mountains.<sup>6</sup>

Several thousand ground troops were deployed and a 'no-fly zone' was subsequently declared over northern Iraq, in what became known as 'Operation Provide Comfort'. Apart from the military forces used, 30 other countries contributed relief supplies and some 50 humanitarian non-governmental organisations (NGOs) either offered assistance or participated in this operation (TESON, 1996). The humanitarians attended regular military briefings and had access to military telecommunications and transportation, while heavily armed troops rode with the trucks on which displaced people were returning (COOK, 1995, p. 42), setting controversial precedents for future cooperation.<sup>7</sup>

The history of what happened next largely depends on who is telling it. Two broad narratives have emerged, which, while they converge around the same events, do so from diametrically opposed perspectives. What is not disputed is that Operation Provide Comfort was the first of a series of interventions in which international armed soldiers and civilian aid workers were deployed in what are commonly referred to as 'complex emergencies', with the aim of 'protecting' threatened populations.<sup>8</sup> The best known of these were in: Somalia, Haiti, Bosnia-Herzegovina, Rwanda, Sierra Leone, Kosovo, East Timor, Liberia, the Democratic Republic of Congo, Côte d'Ivoire, Darfur and South Sudan. About the only other thing on which everyone can agree is that their results can best be described as 'mixed'.

For some, these 'humanitarian interventions' have happened in a period of misguided folly that has seen the weakening of both national sovereignty and international law. The interventions have gone far beyond the 'traditional principles'

of UN peacekeeping – deployment with the consent of the parties, on the basis of strict impartiality and limited use of force – and the neutral model of delivering humanitarian aid pioneered by the International Committee of the Red Cross (ICRC). By undermining these principles, many argue, the interventions have needlessly politicised the humanitarian field and provided cover for regime-change invasions and counter-insurgency strategies.<sup>9</sup>

For others, they simply exposed that the traditional model itself was long-broken, based on an outdated ‘Westphalian’ deference to inviolable national sovereignty. These argue that the humanitarian crises of the 1990s showed that the UN-based system of collective security had become an excuse for indifference to and inertia in the face of mass global suffering and crimes against humanity.<sup>10</sup> The principle of ‘non-interference’ in a State’s domestic affairs, enshrined in article 2 of the UN Charter and ‘humanitarian neutrality’, contained in the ICRC’s statute, need to be reconceptualised in the light of the development of international human rights law, which provide a concrete point of reference against which to judge state conduct (INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, 2001, para. 2.15). Preserving neutrality in the face of mass atrocities was tantamount to ‘complicity with evil’.<sup>11</sup>

During the 1990s these arguments were mainly confined to discussions amongst human rights and humanitarian practitioners, but they spilled dramatically into mainstream debate during the arguments surrounding the invasion of Iraq in 2003. Britain’s then prime minister, Tony Blair, explicitly placed his actions within the context of R2P when he argued that it was international law which was at fault in not permitting such invasions because:

*a regime can systematically brutalise and oppress its people and there is nothing anyone can do, when dialogue, diplomacy and even sanctions fail, unless it comes within the definition of a humanitarian catastrophe (though the 300,000 remains in mass graves already found in Iraq might be thought by some to be something of a catastrophe). This may be the law, but should it be?*

(BLAIR, 2004).

In arguing for an expansion the ‘right’ to military intervention during an emergency humanitarian crisis to non-emergency contexts, Blair was using a double sleight-of-hand. Although some States have occasionally asserted they are legally justified in taking such actions – including Britain in relation to Operation Provide Comfort in Northern Iraq and NATO’s actions during the Kosovo crisis – there is little State practice to show its emergence as a customary rule of international law (GRAY, 2008; DUFFY, 2006). As a Foreign Office policy paper has put it ‘the best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal [...] But the overwhelming majority of contemporary legal opinion comes down against [it]’ (UK Foreign Office Policy Document, No. 148, quoted in HARRIS, 1998, p. 918).

The UN Charter (1945) contains no such ‘humanitarian’ exception to its explicit prohibition on the use of force save in self-defence or with the authorisation



of the Security Council acting under Chapter VII. Blair's Attorney General had also explicitly advised him that there was no basis for using the right to humanitarian intervention as a basis for the invasion and that the best argument that could be made was around the 'revival' of claims that Iraq was still in breach of its cease-fire obligations from the first Gulf War.<sup>12</sup>

Membership of the UN is open to all 'peace-loving nations' irrespective of the nature of their government providing that they accept the obligations of the Charter. The primary purpose of the UN is to 'maintain international peace and security'.<sup>13</sup> Its other purposes include: developing friendly relations amongst nations based on respect for the principle of equal rights and self-determination of peoples, promoting economic, social, cultural and humanitarian cooperation, and respect for human rights.<sup>14</sup> The respective weight of these objectives have been the subject of much international jurisprudence and legal debate and it is now widely accepted that by virtue of their membership of the UN, States are bound by some restrictions on their actions and how they treat their own people.

Certain crimes, such as genocide, war crimes, and crimes against humanity are now recognised as being so serious that they can be prosecuted regardless of who committed them or where they took place and international criminal tribunals have been established to bring the perpetrators to justice. Former heads of State have been arrested and charged notwithstanding their claims to state or diplomatic immunity. It is also now widely accepted that some of the most basic human rights have attained the status of *jus cogens*, which is a 'peremptory norm' (UNITED NATIONS, 1969, art. 53) of general international law that can only be overridden by another peremptory norm (HUMAN RIGHTS COMMITTEE, 1994, para. 10).<sup>15</sup> However, the extent to which these rights impose positive and negative extraterritorial obligations remains disputed and there is no general acceptance that States can resort to unilateral force to protect them in other States. Indeed such an action would also be a clear violation of the most basic norms of international law and could amount to a crime of aggression.

Advocates of 'humanitarian intervention' have long protested at the association of their cause with operations such as the invasion of Iraq. During discussions on Darfur in 2007, the International Crisis Group (ICG) dubbed Blair a 'false friend' of the R2P doctrine (EVANS, 2007) for his attempts to re-package the invasion of Iraq as a humanitarian intervention (BLAIR, 2003a, 2003b, 2004). Yet this is the logic of allowing powerful States discretion to decide unilaterally when and where to take military action in defence of human rights. Shortly after R2P's 'adoption' by the UN General Assembly Russia's foreign minister cited it in justification of military action in South Ossetia,<sup>16</sup> France did so in relation to a proposed forcible intervention to deliver food aid in Myanmar (FRANCE, 2008). Britain's minister of defence even reached for the concept when arguing for a weakening of the protections of the Geneva Conventions for the inmates in Guantanamo Bay (REID, 2006a).<sup>17</sup> Given that Britain, France and Russia are all permanent members of the Security Council, such assertions can be rejected as opportunistic, but they cannot be dismissed as irrelevant.

Some international non-governmental organizations (INGO) have lobbied for military intervention in certain circumstances. As discussed above, MSF did

so during the conflict in Rwanda in 1994. CARE called for military intervention in Somalia in 1991. Oxfam supported these calls and also called for military intervention in eastern Zaire in 1996, and Sierra Leone in 2000. In 1998, it called on the British Government to make a 'credible threat of force' against the Serbs in Kosovo, although once the intervention started it decided not to take a position and resisted calls from its Belgrade office to condemn attacks on civilian targets by NATO, arguing that as an organization whose international headquarters was in one of the countries doing the bombing, this was too controversial a position to take (VAUX, 2001, p. 21).

By the time I reached Sri Lanka in 2009, however, most had backed away from such liberal muscularity. The humanitarian narrative, epitomised by the powerful imagery in Keane's Letter to Daniel, had been largely eclipsed by another set of images associated with the US military presence in Afghanistan and Iraq: the phosphorous attacks in Fallujah, torture in Abu Ghraib and the spiralling number of children killed by drone strikes. My own views on the subject had changed considerably and the massacres in Sri Lanka brought them close to full circle.

#### 4 Protection of civilians

I had first gone to Northern Iraq as a journalist in 1994. I joined the staff of Amnesty International UK shortly afterwards and had responsibility in the Section for our work on impunity during the Pinochet case. I delivered some training to refugees in Kosovo during the war in 1999 and was subsequently seconded there as a Protection Officer for the UN High Commissioner for Refugees (UNHCR). I spent a year and half in Afghanistan, managing a legal aid project helping returning Afghan refugees. After Afghanistan, I took a series of shorter posts in other field missions until my wife found out that she was pregnant.

Sri Lanka was, therefore, my last field mission and I came home exhausted, burnt-out and ready to put both humanitarian aid and the debates about it behind me for some time. For the next couple of years I worked as a home-based consultant, carrying out research, doing evaluations and delivering training, while learning the far more challenging skills of fatherhood. Towards the end of 2010 I was hired by the UN Department of Peacekeeping Operations (DPKO) to write a scenario-based training course on the protection of civilians (POC). Although I had been involved in debates about 'protection' for many years, the concept was new to me, which possibly reflects its emerging status in international law. In February 1999 the UN Security Council had requested that the Secretary General submit 'a report with recommendations on how it could act to improve both the physical and legal protection of civilians in situations of armed conflict' (UNITED NATIONS, 1999d). The report was published in September 1999 and contained a series of recommendations on how the Security Council could 'compel parties to conflict to respect the rights guaranteed to civilians by international law and convention' (UNITED NATIONS, 1999c). The following month the Security Council authorized a peacekeeping operation in Sierra Leone, UN Mission in Sierra Leone - UNAMSIL, which specifically stated that:

*Acting under Chapter VII of the Charter of the United Nations, decides that in the discharge of its mandate UNAMSIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence taking into account the responsibilities of the Government of Sierra Leone.*

(UNITED NATIONS, 1999e, para. 14).

The wording is a model of legal caution but it goes far beyond that contained in the Summit Outcome document on R2P. Most importantly, it gives a Chapter VII mandate to missions so that they can use force to carry out 'protection' tasks. The following year the UN published its Report of the Panel on United Nations Peace Operations (the Brahimi Report), which explicitly stated that UN peacekeepers:

*must be able to carry out their mandate professionally and successfully. This means that United Nations military units must be capable of defending themselves, other mission components and the mission's mandate. Rules of engagement should not limit contingents to stroke-for-stroke responses but should allow ripostes sufficient to silence a source of deadly fire that is directed at United Nations troops or at the people they are charged to protect.*

(UNITED NATIONS, 2000, para. 49).

Similar language to the UNAMSIL resolution has since appeared in the mandates of other UN peacekeeping missions and there are now over 100,000 soldiers deployed in the field in POC-mandated missions. POC is also now debated at an open bi-annual session of the Security Council and this has resulted in a steady stream of statements, resolutions and reports (HOLT; TAYLOR, 2009; DEPARTMENT OF PEACEKEEPING OPERATIONS/DEPARTMENT OF FIELD SUPPORT, 2010a, 2010b; 2010c; 2010d, 2010e). When the Security Council revised the mandate of the UN mission to the Democratic Republic of Congo (DRC) in 2007 it stated that 'the protection of civilians must be given a priority in decisions about the use of available capacity and resources' (UNITED NATIONS, 2007, para. 5). Security Council mandates have become increasingly detailed in spelling out the tasks of UN peacekeeping missions, yet most have continued to use a similar set of formulations and language regarding the POC-related tasks.

We presented the first draft of the training package to all the African field missions at a seminar in the UN base in Entebbe in March 2011. This coincided with the Security Council decision to invoke POC as justification for authorizing military intervention in Libya, and was just before the UN mission in Côte d'Ivoire took military action to protect civilians against the forces of the incumbent President. The following year I was re-hired by DPKO to work on some mission-specific training using a similar model. A whistle-stop tour brought me to Goma in the Democratic Republic of Congo, shortly before rebels of the M23 movement invaded the town, out to the border between Liberia and Côte d'Ivoire a few weeks after a group of UN peacekeepers had been killed in a rebel ambush and then to newly-independent South Sudan.

POC is quite distinct from the R2P doctrine. As the UN Secretary General's report *Responsibility to protect: timely and decisive response*, of July 2012 noted, 'While the work of peacekeepers may contribute to the achievement of R2P goals, the two concepts of the responsibility to protect and the protection of civilians have separate and distinct prerequisites and objectives' (INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, 2001, para. 16). A briefing from the Global Centre for the Responsibility to Protect, in 2009, also explained:

*Open debates on POC have indeed been the only occasions within the formal [Security] Council agenda to reflect on the development of the R2P norm and its practice. Yet the sensitivities around the inclusion of R2P within the protection of civilians' agenda have increased in recent months. There are concerns that the POC agenda is being needlessly politicized by the introduction of R2P into the Council's work and resolutions on the protection of civilians, as those who seek to roll back the 2005 endorsement of R2P raise questions about the protection of civilians in the attempt to challenge hard-won consensus reached on both issues.*

(GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, 2009).

The main textual differences between POC and R2P are that the latter appears to be only intended to protect people against certain specified 'mass crimes' and when the State in which they are taking place is 'manifestly failing' to do so (GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, 2009). This makes it considerably narrower in scope than a POC mandate, which provides protection to all 'civilians under imminent threat of physical violence', subject to the conditions discussed above. However, R2P also remains associated in many minds both with the non-UN Security Council sanctioned military action undertaken by NATO during the Kosovo crisis and previous debates surrounding the legality of 'humanitarian interventions'.<sup>18</sup>

POC changes the debate about the UN's responsibilities to protect people in complex emergencies in a number of ways. Most obviously, the implementation of a POC mandate will require missions to reassess the rules of engagement that they give to their soldiers and the powers of arrest and detention of the international military and police deployments.

## 5 Conclusion

Peacekeeping soldiers have often been criticised for their reluctance to open fire when civilians around them are being threatened, but clearly such life and death decisions cannot be taken lightly or in the absence of a clear legal regime. What exactly constitutes an 'imminent threat' and should this be based on the rules of international human rights law or the, more permissive, laws of armed conflict? Most mission mandates clearly state the primary of the host State government responsibility to protect its own people, but what happens when it is these forces that constitute the most serious threat to them? What is the status of the peacekeepers themselves? How can UN commanders exercise effective control over their own forces given that disciplinary issues are the exclusive

preserve of troop contributing countries and these often also impose national caveats over where, when and how their soldiers can be deployed? How should UN peacekeepers deal with people who have been indicted by the International Criminal Court?

The answers to these questions are not obvious and confronting them takes UN missions into new and uncertain areas. Unlike R2P, it does not start from a position that the UN is 'obliged' to intervene in humanitarian crises. Indeed the Brahimi Report quite explicitly states that: 'There are many tasks which United Nations peacekeeping forces should not be asked to undertake and many places they should not go' (UNITED NATIONS, 2000, para. 1). However, the notion that the UN can use Chapter VII mandates to protect individuals in purely internal conflicts involves a significant reappraisal of its powers under international law.

As well as prohibiting the unilateral use of force; article 2 of the Charter also specifically prohibits intervention by the UN in 'matters which are essentially within the domestic jurisdiction of any State' (UNITED NATIONS, 1945, art. 2) but 'this principle shall not prejudice the application of enforcement measures under Chapter VII' (UNITED NATIONS, 1945, principle 7). This Chapter contains no reference to human rights or humanitarian law, or indeed the protection of civilians, and is specifically related to the preservation of international peace and security. While the UN has occasionally used its Chapter VII powers to authorise interventions in internal conflicts involving widespread violations of human rights and humanitarian law, previous mandates all grounded themselves on threats to international peace and security, if only through the potentially destabilizing impact of a refugee crisis on the wider region.

One could argue that there is nothing in the Charter to prevent the Security Council declaring any situation a threat to international peace and security, which, therefore unlocks its Chapter VII powers. This has already happened in relation to international terrorism, allowing the Security Council to make extradition demands, impose travel bans and seize the assets of named individuals. However, given the primacy of the UN Charter over other international treaties, including human rights conventions, this has worrying implications.

The blanket legal immunities with which UN missions cover themselves has also prevented courts from allowing the people that these have been sent to serve holding them accountable for the most basic human rights issues. The European Court of Human Rights has declared alleged violations of the right to life and freedom from arbitrary detention by the UN mission in Kosovo inadmissible, while the UN mission in Haiti stated that a compensation claim brought on behalf of victims of a cholera outbreak in Haiti was 'not receivable' (UNITED NATIONS, 2013), despite the fact that its own Special Envoy to Haiti had already publicly admitted that peacekeepers were the likely cause of the disease, which has so far claimed more than 7,000 lives (DOYLE, 2012).

For all the drawbacks in allowing individual States to act as judge, jury and executioner, in carrying out 'humanitarian interventions', most of these at least have clear lines of legal and political accountability by which their actions can be challenged. UN missions by contrast are often responding to the problems they encounter through improvisation in the field, limited resources and in areas of opaque and still largely unexplored law.

The oft-asserted, but empirically unsupported, truism, that the main reason for a failure to end mass atrocities has been a ‘lack of political will’ is sometimes relied upon by advocates of ‘humanitarian intervention’ to argue that the UN Security Council should not have the last word on authorising such actions. Its critics point that the body is neither democratic nor representative and argue that its vetoes – and potential vetoes – may have prevented interventions which could have saved lives. While the former claim strengthens long-standing arguments for UN reform, the latter belongs to the ‘what if’ school of history. Powerful members of the UN, or those will powerful friends, will continue to get away with murder because that is the reality of the world balance of power. This should not stop human rights organisations from documenting and denouncing violations wherever they occur or humanitarian organisations attempting to get access to areas where they can alleviate the suffering.

Where new thinking is required is not whether international law should be ‘reformed’, to make it easier for States to invade one another, but on how we apply existing principles for a world in which States increasingly act extraterritorially and through transnational actors. No one who has seen a massacre up close would argue with the proposition of international intervention to save lives. But we still need to discuss how we can tame the Leviathan that we wish to create.

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## NOTES

1. The following paragraphs are based on media reports, interviews and first hand observations.

2. BBC News UK presses Sri Lanka over Channel 4's 'war crimes' film 15 June 2011

3. For accounts of the negotiations that led to the wording adopted at the summit see Bellamy, 2009, p. 66-97; Evans, 2008b, p. 288; and Bellamy, 2006.

4. For similar views see also Thakur, 2011 and 2006; Weiss and Thakur, 2010; Evans, 2006/07 and 2008.

5. Turkey had ratified the 1951 Convention Relating to the Status of Refugees, but not the 1967 Protocol which extends the scope of the Convention beyond Europe.

6. For details see Cooke, 1995.

7. Weiss and Collins, 2000, p. 79 note that the humanitarians 'perceived the international military as an ally in their efforts to assist a persecuted minority group'. See also Randel, 1994, p. 336; Barry with Jefferys, 2002; Stoddard, Harmer and Di Domenico, 2008.

8. Complex humanitarian emergencies are generally defined by: the deterioration or collapse of central government authority; conflict and widespread human rights abuses; food insecurity; macroeconomic collapse; and mass forced displacement of people. See Natsios, 1996, p. 67.

9. See Hehir, 1998, p. 29-53; see also Abiew, 1999; Chandler, 2002; Orford, 2011.

10. Evans and Sahnoun (Co-Chairs), 2001, p. 11-18 for an overview of the debate. See also Simma, 1999; Lillich, 1969, p. 210; Lillich, 1974, p. 240; Lillich, 1973 and Fonteyne, 1974, p. 203.

11. See United Nations, 1999a; 1999b.

12. Opinion of the Attorney General, "Iraq", 7 March 2003.

13. United Nations, 1945, article 1(1) 'To maintain international peace and security, and to that end: to take effective collective measures for the prevention and

removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.

14. United Nations, 1945, article 1(2): 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.'

15. The Committee on the Elimination of Racial Discrimination, in its Statement on racial discrimination and measures to combat terrorism, has confirmed that the prohibition of racial discrimination is a norm of jus cogens (UNITED NATIONS, 2002, chap. XI, sect. C, para. 4). See also, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Delalic and Others*, 1998a, paras 452, 454; *Prosecutor v. Furundzija*, 1998b, paras. 139 and 143; *Prosecutor v. Kunarac and Others*, 1988c para. 466.

16. Interview by Min. of Foreign Affairs of the Russian Federation Sergey Lavrov to BBC, Moscow, August 9, 2008.

17. See also Reid, 2006b.

18. See Beyerlin, 1995, p. 926, Tsagourias, 2000, p. 5-41, Murphy, 1996, p. 7-20. The traditional meaning of the term 'humanitarian intervention' focuses on the use or threat of military force by a state or group of states against another State for humanitarian purposes, a 'right to humanitarian assistance' implies that there is a legal basis to provide emergency relief across borders, even when this is carried out without the authority, or against the wishes, of the central government of the State concerned.

## RESUMO

Debates sobre ação humanitária em emergências complexas levantam questões fundamentais sobre a proteção de direitos humanos no âmbito do direito internacional. Como as missões de paz da ONU têm se tornado cada vez mais complexas e multifacetadas, por exemplo, elas enfrentam déficits no que diz respeito à prestação de contas. Muitas das maiores missões da ONU têm autoridade nos termos do Capítulo VII da Carta da ONU para fazer uso da força para proteger civis de ameaça iminente de violência física. Isto levanta uma série de questões relacionadas a obrigações negativas e positivas da ONU perante o direito internacional. A Carta das Nações Unidas não prevê expressamente operações de manutenção da paz, que se desenvolveram de forma *ad hoc* como reação a diferentes crises. Alguns Estados também têm agido fora do escopo da Carta das Nações Unidas, justificando ação militar em nome da “intervenção humanitária”. Este artigo explora alguns dos dilemas em termos de princípios e práticas relativos à proteção extraterritorial de civis, tanto por meio de ação unilateral, quanto multilateral no âmbito do direito internacional.

## PALAVRAS-CHAVE

Proteção – Intervenção humanitária – R2P – Carta da ONU – Emergências complexas

## RESUMEN

Los debates sobre la acción humanitaria en situaciones de emergencia complejas plantean problemas fundamentales acerca de la protección de los derechos humanos con arreglo al derecho internacional. Así, por ejemplo, a medida que las misiones de mantenimiento de la paz de la ONU se vuelven más complejas y heterogéneas, se enfrentan a déficits en materia de rendición de cuentas. Esto plantea una serie de cuestiones relacionadas con las obligaciones positivas y negativas de las Naciones Unidas en virtud del derecho internacional. La Carta de las Naciones Unidas no contiene ningún fundamento expreso para el mantenimiento de la paz, que se ha desarrollado de manera *ad hoc* en respuesta a las diferentes crisis. Algunos Estados también han actuado fuera del marco de la Carta de las Naciones Unidas para justificar una acción militar en nombre de una “intervención humanitaria”. Este artículo explora algunos de los dilemas prácticos y de principios correspondientes a la protección extraterritorial de la población civil tanto a través de la acción unilateral como multilateral en el marco del derecho internacional.

## PALABRAS CLAVE

Protección – Intervención humanitaria – RdP – Carta de las Naciones Unidas – Situaciones complejas de emergencias.



Photo: Renato Parada

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#### ABSTRACT

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This article provides a non-exhaustive overview of Brazil's international activities in the field of public health, in order to determine whether the country actually has a foreign policy in health per se. The first part of the text aims to distinguish Brazilian cooperation from what is practiced by the developed world, by giving a brief review of South-South cooperation in health, with a special emphasis on the Community of Portuguese-Speaking Countries (CPLP) and the Union of South American Nations (UNASUR). The second part of the text is devoted to Brazilian action in multilateral fora, where the country has proposed a "new governance" of global health. The article concludes that a Brazilian foreign policy does indeed exist in the field of public health and that the tensions found therein are cross-cutting, encompassing the internal and external spheres. Its future depends on the arbitration of numerous contradictions, using as a reference the principles of the Brazilian public health system, known as the Unified Health System (SUS).

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#### KEYWORDS

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Public health – Foreign policy – Global health – Brazil



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# PUBLIC HEALTH AND BRAZILIAN FOREIGN POLICY\*

Deisy Ventura

## 1 Introduction: health as a topic of international relations

Health first became a challenge for diplomacy around the time of the first International Sanitary Conference, held in 1851, in Paris. The conference, however, was not concerned with the health of populations: the real objective of the meeting was the need to reduce the duration of quarantine requirements, which were considered excessive and harmful to commerce (KEROUEDAN, 2013a, p. 28). Consequently, the tension between health and commerce, between human and economic interests, between science and profit, is “constitutive of the paradox of international health” (KEROUEDAN, 2013b, p. 1).

Since then, international health has undergone an extraordinary evolution whose pinnacle was the creation of the World Health Organization (WHO), in 1946, as the “directing and coordinating authority on international health work” (ORGANIZAÇÃO MUNDIAL DA SAÚDE, 1946). Nevertheless, criticized for its eminently scientific and technical character (GOSTIN, 2007, p. 226), the WHO has been overshadowed in recent decades by the prominence of powerful institutions in the financing of international projects, notably the World Bank and other private and philanthropic agencies. Moreover, the influenza A (H1N1) pandemic, in 2009 and 2010, raised doubts about the independence of the WHO in relation to the pharmaceutical industry (VENTURA, 2013).

A key point in the evolution of international health was the outbreak of the HIV/AIDS epidemic, which not only gave rise to a new type of transnational activism in support of access to treatment, but also influenced research and science, clinical practices, public policies and social behavior (BRANDT, 2013). Meanwhile, the fear of bioterrorism has elevated public health into the realm of international security, under the leadership of the United States, for which the concept of national security includes the field of public health (ZYLBERMAN, 2013, p. 126).

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In other words, health has gained ground on the agenda of numerous fora, namely the United Nations Security Council, the World Trade Organization (WTO) and the alliances between developed countries, such as the Group of Eight (G8), and between emerging countries, such as the BRICS (Brazil, Russia, India, China and South Africa).

The expression “international health” has gradually been replaced by the controversial and polysemic term “global health”. While the former is generally used to refer to agreements and cooperation projects between States, the latter encompasses new actors and innovative topics. There is also more widespread use of the expression “global health diplomacy”, which consists of public health negotiations across borders and in health fora and other similar areas, global health governance, foreign policy and health, and the development of national and global health strategies (KICKBUSH; BERGER, 2010, p. 20).

Many doubts surround these new concepts. Three billion human beings – nearly half the population of the planet – still live in perilous sanitary conditions, frequently aggravated by a situation of extreme poverty (KOURISLSKY, 2011, p. 15). Are we dealing, therefore, with naively descriptive slogans that attempt to stress the similarity of problems and solutions that transcend borders, or with a North American or Eurocentric hegemonic universalism that promotes the dissemination of goods, technology and financial products beyond its own internal security? (BIRN, 2012, p. 101). Dominique Kerouedan warns of the risk that our culture of public health and development cooperation may be taken over by the dominant notion of *global health*, or the *Global South*, which she considers relatively unresponsive to the real local concerns of poorer countries (KEROUEDAN, 2013a, p. 22).

But what does Brazil have to say about global health? This article proposes to provide an overview (that is, therefore, not exhaustive) of Brazil’s international actions in the field of public health. Does Brazil even have a foreign policy in health?

There is no doubt that Brazil’s position in relation to the global governance of intellectual property is directly related to its response to the HIV/AIDS epidemic (SOUZA, 2012, p. 204). Neither is there any doubt that, since 2003, with the rise of Luiz Inácio Lula da Silva to power, Brazil gave a new boost to South-South cooperation – between developing countries – exploring, among other things, the potential of health as a social topic at the heart of foreign policy (PEREZ, 2012, p. 79). Expressions such as “prestige diplomacy” or “soft imperialism” began to be used to identify this period of Brazilian foreign policy (VISENTINI, 2010).

Much of the criticism levelled at this foreign policy is due to the fact that our diplomacy sought to reconcile two largely incompatible identities (LIMA, 2005): one of a country dissatisfied with the global order, a skillful mediator of the interests of countries from the South in multilateral and regional spheres; and one of a major emerging market, eager to receive international investments and stage global events. At the same time, Brazil became an international benchmark on the subject of combating poverty.

According to the official discourse, Brazilian technical cooperation is demand-driven and governed by the principles of solidarity diplomacy, the recognition of local experience, the non-imposition of conditionalities, non-interference in the internal



affairs of the partner countries and unbounded by commercial interests or profit seeking (LEITE et al, 2013). The expression solidarity diplomacy emerged primarily after Brazil assumed unprecedented responsibilities in relation to Haiti (SEITENFUS, 2006).

The first part of this article aims to distinguish Brazilian health cooperation from what is practiced by the developed world. A brief review of South-South cooperation shall be presented, with special attention paid to the Community of Portuguese-Speaking Countries (CPLP) and the Union of South American Nations (UNASUR). The second part of the text is devoted to Brazilian action in multilateral fora, where Brazil has proposed a “new governance” of global health. The article concludes that Brazil does indeed have a solidary foreign policy in the field of public health, whose future depends on overcoming limits and contradictions that result from cross-cutting tensions, with internal and external interfaces.

For the purposes of this article, foreign policy is conceived simply as the action of the State, through the government, on the international stage (PINHEIRO; MILANI, 2012, p. 334). The choice of this concept is justified by the necessary emphasis on the *politicization* of foreign policy, i.e. the perception that the choices made by the government, frequently devoid of systemic coherence, reflect the coalitions, alliances, disputes and bargaining between different sectors of the government itself and of political parties, groups and actors.

Finally, references to solidarity – an enigmatic, complex and ambiguous notion (SUPIOT, 2013a) – carry an elementary definition of public international law, according to which solidarity can mean both instruments of compensation, like the systems of preferential tariffs or redistribution, and instruments for the protection of collective interests, including human rights and sustainable development (BOURICHE, 2012).

## 2 *Structural* cooperation in health

The Lula da Silva government quickly realized the role that public health could play in diplomacy. Together with professional training and agriculture, it represents two thirds of Brazilian cooperation with developing countries (VAZ; INOUE, 2007).

Federal investment in health cooperation increased from 2.78 million reais in 2005 to 13.8 million in 2009; as such, 9% of all Brazilian investments in cooperation between 2005 and 2009 were allocated to health (BRASIL, 2010, p. 38). In 2012, of the 107 health cooperation projects in progress, 66 were with Latin America and the Caribbean, 38 with Africa and 9 with the Middle East and Asia; 24 of these projects involved breast milk banks, 17 HIV/AIDS, 10 health surveillance and 10 blood and hemoderivatives (BRASIL, 2012a).

The actors of Brazilian cooperation in health are numerous, each of them contributing their values and their institutional culture, and also their demands. Considered by foreign analysts as “an essential element of Brazil’s solidarity diplomacy” (VENTURA, 2010), health cooperation prompted an unprecedented proximity between the Ministry of Health and the Ministry of Foreign Relations (BRASIL, 2012b, p. 26). Foremost among the bodies linked to the Ministry of Health are the Office of International Affairs of the Ministry (Aisa/MS), the National STD and AIDS Program (PN-DST/Aids), the National Cancer Institute (Inca), the

National Health Foundation (Funasa), the National Health Surveillance Agency (Anvisa) and the Oswaldo Cruz Foundation (Fiocruz) (CEPIK; SOUSA, 2011). In the area of foreign relations, the most prominent is the Brazilian Cooperation Agency (ABC), which oversees the negotiation, coordination and follow-up of the group of technical assistance projects.

This list is by no means exhaustive. It would be impossible, in a single article, to identify and classify all the different forms of international action by Brazilian public bodies that have repercussions on public health. But the complexity of this task is not a monopoly of the health sector: “the fact that nearly 50% of the bodies of the Presidency and the Ministries can engage with foreign policy demonstrates an important internationalization of the structure of the federal executive branch” (SANCHEZ-BADIN; FRANÇA, 2010).

After identifying the origin of the concept of “structural” cooperation in health, the article shall examine the CPLP and UNASUR, given that South-South cooperation occurs, primarily, through agendas established by regional alliances and through strategic plans (BUSS; FERREIRA; HOIRISCH, 2011).

## *2.1 The origin of the concept*

Solidarity constitutes one of the key fundamentals of Brazilian foreign policy (AMORIM, 2010). But it is also the *alma mater* of the country’s public health system, known as the Unified Health System (SUS), which was created by the Federal Constitution of 1988. The Constitution guarantees universal and free access to health care, which is recognized as a right of all and a duty of the State. Considered the world’s most far-reaching public health system (FORTES; ZOBOLI, 2005, p. 22), with a potential public of almost 200 million citizens, the SUS is based on five fundamental principles: universality, integrality, equality, decentralization and social control. The health councils that operate on federal, state and municipal levels are formed by users, health professionals and administrators, and are responsible for approving health programs, monitoring their performance and controlling their budgets, while also organizing health conferences that are held periodically (FERREIRA NETO; ARAÚJO, 2012). Despite the underfunding of the SUS, the growth of private health insurance, the increasing prominence of private entities within the public system and the serious dysfunctions that are caused by these factors, Brazil can boast progress in its health indicators. The United Nations Millennium Development Goals (MDGs), for example, were reached three years before their deadline (2015) in the field of reducing infant and maternal mortality, as well in combating malaria and other diseases (BRASIL, 2013).

It is the doctrine of the SUS, which advocates universal, equal and integral health coverage, that is the primary inspiration for the concept of “structural cooperation in health” developed by Brazil over the past decade. It is doubly innovative in relation to the paradigm of international cooperation. First, because it is intended to break with the tradition of the passive transfer of knowledge and technology. Second, because its fundamental objective is to create or strengthen the principal fundamental institutions of the health systems in the beneficiary countries, exploring local capacities to the full (ALMEIDA, 2010, p. 25).

While the international cooperation offered by the developed world is, in general, aimed at tackling diseases or specific vulnerabilities, Brazil's structural cooperation is geared towards supporting the health authorities, developing schools of professional training and confronting the weaknesses of national health systems. In other words, structural elements prevail over cyclical, isolated and temporary aid. This results in the primacy of the permanent national interests of the partners, breaking with the "hegemony of supply" – i.e. the construction of a cooperation agenda based essentially on the interests of the donor, which does not always correspond to the primary needs of the recipient – that characterizes traditional development cooperation (FONSECA et al., 2013).

Paulo Buss, coordinator of the International Relations Center of the influential organization Fiocruz, explains Brazil's vocation for cooperation with the South: "twenty years ago, we were in the same situation that these countries find themselves in today. We can understand their situation" (PINCOCK, 2011, p.1738).

## 2.2 CPLP

Created in 1996, the CPLP is currently formed by eight States: Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Portugal, São Tomé and Príncipe, and East Timor. The CPLP supports cooperation in all fields, including health; the promotion and dissemination of the Portuguese language; and diplomatic coordination among its members, with a view to strengthening its presence on the international stage (COMUNIDADE DOS PAÍSES DA LÍNGUA PORTUGUESA, 2007). It is a "phonic space", institutionalized on the image of the francosphere or the hispanosphere, which until now has evoked no more than a "polished indifference" from multilateral bodies and the international media (FERRA, 2007, p. 98). Nevertheless, cooperation in health with the CPLP was a "natural choice" for Brazil, since the majority of professionals from the Portuguese-Speaking African Countries (PALOP), all of which are members of the CPLP, speak only Portuguese and local languages. The "political, ideological and cultural identities" (BUSS; FERREIRA, 2010a, p. 109) shared by Brazil and the PALOP countries also favor this cooperation.

A full 12 years passed after the creation of the CPLP before the 1<sup>st</sup> Meeting of Ministers of Health was held, in Praia, Cape Verde. Before then, cooperation in health within the CPLP was focused primarily on combating HIV/AIDS, malaria and tuberculosis. Later on, it became part of the CPLP's Strategic Plan for Cooperation in Health (PECS) for 2009-2012.

Adopted in Estoril, in 2009, at the 2<sup>nd</sup> Meeting of Ministers of Health, the PECS was allocated a modest budget of 14 million euros. It establishes seven strategic topics: creation and development of a "workforce in health", which receives 67% of the total PECS budget; information and communication; health research; development of production chains; epidemiological surveillance; natural disasters and emergencies; and health promotion and protection. A technical group is responsible for the coordination and application of PECS.

The priority given to the training of health personnel permits a better understanding of the notion of "structural" cooperation. It is about supporting

national health authorities, so they can manage their respective health systems in an efficient, effective and lasting manner; providing training to health professionals; producing or generating useful data for the political decision-making process; and promoting research and development (BUSS; FERREIRA, 2010a, p. 117). The result has been that specific programs to combat diseases have been substituted by investments in the elements of potential structural change in the partner countries.

In the absence of an official report on the results of PECS, it is worth referring to a study that examined 167 bilateral legal acts related to cooperation in health between Brazil and the PALOP countries that were in effect in Brazil in 2009, including memoranda and working plans (TORRONTÉGUY, 2010). The author concludes that this cooperation does indeed exclude both the conditionalities and the notion of indebtedness that are characteristic of North-South cooperation. However, the activities established by these instruments are still “one way”, in that the beneficiary State maintains a passive position: of a recipient of aid. The study also reveals that these instruments do not, in general, include accountability mechanisms.

But Brazilian cooperation in health is not limited to the PALOP countries. According to the ABC, projects are currently in progress in Algeria, Benin, Botswana, Burkina-Faso, Republic of Congo, Ghana, Kenya, Senegal and Tanzania. Grouped together, Brazil’s “African policy” has been the target of numerous criticisms. As a new priority of foreign policy, it reflects a concerted strategy between the public sector and the business community to expand Brazilian capitalism, since the government has, via the National Development Bank (BNDES), broadly encouraged the internationalization of Brazilian companies in Africa (SARAIVA, 2012, p. 98 e 129). Although closer relations with Africa is portrayed as solidarity diplomacy, the Brazilian strategy follows an economic logic that is common to so-called emerging powers, namely the search for strategic raw materials and markets for its industrial production (VENTURA, 2010). The international expansion of Brazilian companies has, in some cases, had negative effects on countries and on relations with workers and local governments; some projects financed by the BNDES, which have increased social and environmental vulnerability, have generated conflicts in the recipient countries (GARCIA, 2012, p. 240). As such, publicly-run initiatives in the field of health come across as compensation for the type of South-South cooperation that is based on market interests.

### *2.3 UNASUR-Health*

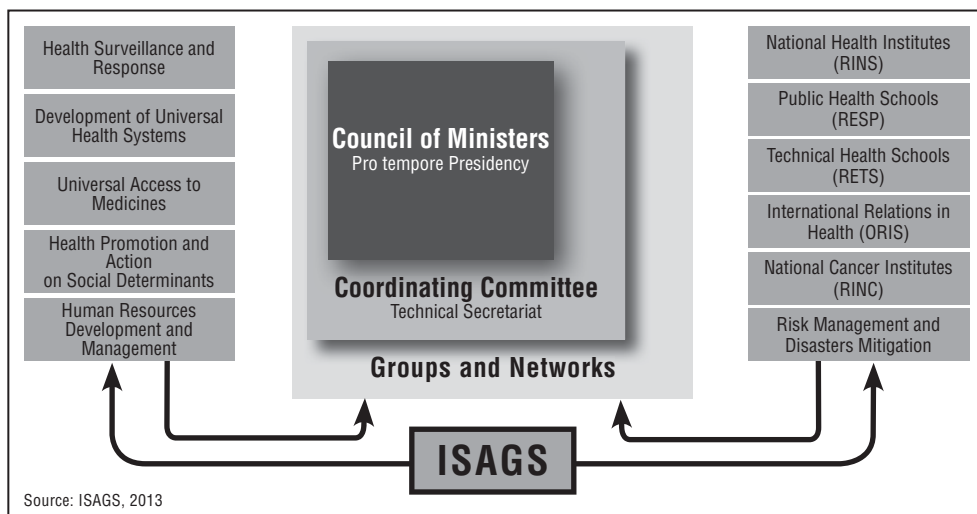
Within the scope of UNASUR, cooperation in health draws on the experience of the Andean Health Organization - Hipolito Unanue Agreement (ORAS-CONHU), in place since 1971; the Common Market of the South – Health (MERCOSUR-Health), focused specifically on health issues related to the circulation of goods and merchandise; and the Health Coordination Office of the Amazon Cooperation Treaty Organization (OTCA), which since 1978 has promoted health cooperation in the Amazon region. Unlike these initiatives, however, UNASUR proposes to cover the entire subcontinent.

Created by the Treaty of Brasília, in May 2008, UNASUR remains loyal to Brazil’s long-standing ambition to develop a regional integration that encompasses all of South America and that is not focused only on trade (DABENE, 2010). One of

the specific goals of the organization is universal access to social security and health services. The efforts of the member states have turned health into one of the most dynamic fields of regional integration.

The UNASUR treaty, while reflecting Latin America's progressive orientation of the 2000s, reveals an institutional modesty that betrays the hesitancy of the left on the subject of regional integration (DABENE, 2012, p. 392). Entirely intergovernmental, its organic structure is comprised of three higher councils – of Heads of State, of Foreign Ministers and of National Delegates; an office of the Secretary General, based in Quito, Ecuador; a one year pro tempore presidency; and 12 councils devoted to specific sectors of cooperation.

One of these sectoral councils is the South American Health Council, also known as UNASUR-Health, which was established just months after the creation of UNASUR itself, in December 2008. The only sectoral council with its own permanent headquarters is the energy council, which is located in Venezuela. There are also two secondary bodies that are permanent: the Center for Strategic Defense Studies (CEED), based in Buenos Aires; and the South American Institute of Government Health (ISAGS). The structure of UNASUR-Health is illustrated in the figure below.



UNASUR-Health is guided by a Five-Year Plan (2010-2015) (UNASUL, 2010), which contains 28 cooperation goals, organized into five fields that are listed on the left of the figure. From a total budget of 14.4 million U.S. dollars, 10.5 million (nearly 70%) are allocated to the first field, referring to the South American health surveillance policy, which includes, among other things, cooperation between member states for implementing the International Health Regulation (RSI).

In UNASUR-Health, public policies are conceived regionally, in order to develop joint responses to common problems. Paulo Buss and José Roberto Ferreira, in a seminal paper on the topic, refer to medicines, vaccines and diagnostic reagents as “regional public goods” (BUSS; FERREIRA, 2011, p. 2705).

Furthermore, at the heart of UNASUR's minimalist structure is ISAGS, created by Resolution CSS 05/2009 in November 2009 and installed in Rio de

Janeiro on July 25, 2011. Although still young, ISAGS is extremely dynamic and has become a mouthpiece for UNASUR-Health, heading up numerous initiatives. Boasting an institutional innovation not found in other regional integration processes (TEMPORÃO, 2013), ISAGS emerged from a consensus among the Ministers of Health in the region that the most serious problems facing their public health systems are associated with governance (BUSS, 2012). According to article 2 of its Statute, the goal of ISAGS is to become a center of advanced studies and debate on policies for the development of leaders and strategic human resources in health (CONSELHO SUL-AMERICANO DE SAÚDE, 2011), by promoting and offering inputs for health governance in South American countries and its regional articulation in global health. In addition to the formation of a “new generation” of managers, the institute contributes to the adoption of concerted measures on the organization of health services (PADILHA, 2011). UNASUR-Health is also a means of coordinating the positions of the States, both in multilateral fora and with transnational actors.

On the other hand, UNASUR-Health has no mechanisms of social control or participation. This omission is surprising given not only the principles of the SUS, but also the characteristics of UNASUR itself: it is unlikely that another international organization’s constitutive treaty will mention social participation so many times, going so far as to recognize it as a specific goal of the bloc (VENTURA; BARALDI, 2008, p. 15).

Besides UNASUR, Brazil develops health cooperation projects with other Latin American countries. In Haiti, for example, it is leading the reconstruction of the country’s health system, allocating 85 million U.S. dollars for the construction of hospitals, primary health care and training personnel (TEMPORÃO, 2012). Nonetheless, there is a growing conviction that “if proof exists of the failure of international aid, Haiti is it” (SEITENFUS, 2010).

In general, however, this structural South-South cooperation in health is considered positive, despite there being a certain discrepancy between the grandiloquence of the intent and the realization of the gesture (BUSS; FERREIRA, 2010b, p. 102). The health cooperation actors themselves consider it necessary to better coordinate all the agencies and bodies involved. The high-level actors support the adoption of a law in Brazil on international cooperation (BUSS; FERREIRA, 2012, p. 262), in order to better clarify the role of each body of the Brazilian State, guarantee its submission to the principles contained in the Federal Constitution (and, in the case of health, the SUS) and institute accountability mechanisms, which are currently non-existent.

### 3 For a new global health governance

Among the numerous areas of Brazilian action in the field of health, this article addresses the HIV/AIDS program and the policy of access to medicine, the coordination of the BRICS countries in the health sector and the positions of Brazil – and UNASUR – in relation to the process of reforming the WHO. Given the space constraints, the article overlooks some important topics, such as the leading role played by Brazil in the process of drafting the WHO Framework Convention on Tobacco Control, among many others.

### 3.1 *The Brazilian model of response to the HIV/AIDS epidemic*

As the epicenter of the HIV/AIDS epidemic in Latin America (BIEHL, 2009, p. 17), Brazil was the first developing country to offer, starting in 1996, free treatment to infected people. As such, universal access to antiretroviral drugs constitutes a key element of the Brazilian position on global health governance, particularly concerning the aspects related to intellectual property. Within the framework of the WHO, Brazil and India were frontrunners among developing countries when the Declaration on the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and Public Health, known as the Doha Declaration, was adopted on November 14, 2001.

Nevertheless, there is still a long way to go before public health can take precedence over the economic interests of the pharmaceutical industry. Between 2008 and 2009, for example, European customs authorities seized several shipments of legitimate generic drugs in transit through its ports, in particular a consignment of the generic drug *Losartan Potassium*, used for hypertension, which was produced in India and en route to Brazil. India and Brazil appealed to the WTO, considering that the conduct of the European authorities violated, among other agreements, the Doha Declaration, by creating obstacles to the legitimate trade of generic drugs (ORGANIZAÇÃO MUNDIAL DO COMÉRCIO, 2009). Brazil has defended the production of generic drugs in other fora, in particular the WHO and the UN General Assembly.

An important study by André de Mello e Souza (2012) on Brazilian foreign policy in light of the AIDS epidemic reveals that Brazil's policy was formulated in a context of strong opposition from developed States and some large companies and, similarly, in contrast from what was being advocated at the time by the WHO, the United Nations Programme on HIV/AIDS (UNAIDS), the Pan-American Health Organization (PAHO), the World Bank and the Gates Foundation, among others. Souza considers that one possible explanation for the Brazilian position is the convergence between governments (national and local) and civil society organizations, all heavily influenced by the ideas of the aforementioned movement for health reform.

Considered a model response to the HIV/AIDS epidemic, the Brazilian program closely combines the policy of free distribution of medicines and, given the high price of brand-name antiretroviral drugs, the policy of stimulating local pharmaceutical production, whether public or private (CASSIER; CORRÊA, 2009). This model came about as a result of Brazil's international cooperation. A Horizontal Technical Cooperation Group (HTCH) on HIV/AIDS was created by 21 countries from Latin America and the Caribbean. But it was the creation of the drugs factory in Mozambique that was the catalyst for exporting the Brazilian model. As Africa's first fully public drug company, this project flourished primarily after 2008, when it started to be managed by Fiocruz – more specifically, by its technology institute in pharmaceutical products, FARMANGUINHOS. Mozambique is one of the countries in the world most ravaged by AIDS, with 1.7 million contaminated people from a population of 21.4 million (OLIVEIRA, 2012).

In November 2012, the company presented the first antiretroviral drugs to the Mozambique government (MATOS, 2012).

Since it invested nearly 40 million reais in this project between 2008 and 2014, in addition to the costs of transferring technology for 21 drugs, Brazil was considered more like an activist than a donor, since it received no economic benefit from this cooperation (FOLLER, 2013) – which distinguishes it not only from the developed world, but also from other emerging countries, such as China.

However, the Brazilian model is not immune to criticism. The combination of the activism of patients, the interests of the pharmaceutical industry and the reform policies of the Brazilian State led to a progressive shift in the concept of public health, today viewed less as a mechanism for prevention and medical treatment, and more like a policy of access to drugs and health services; i.e. an increasingly more privatized and pharmaceutical concept of public health that, particularly in the case of the AIDS policy, reproduces prejudices related to color and poverty (BIEHL, 2009, p. 16).

Nevertheless, thanks to its response to the HIV/AIDS epidemic, Brazil has become an “agenda setter” in the health sector (BLISS et al., 2012).

### *3.2 Health in the BRICS*

Brazil also frames its action within the group of countries known as the BRICS, which has brought together emerging countries in annual summits of heads of States and Government since 2009. At the Sanya summit, in April 2011, the heads of States and Government decided to strengthen the dialogue in the field of public health, in particular in the fight against HIV/AIDS. Not long afterwards, in July of the same year, the bloc’s health ministers met for the first time, in Beijing, and adopted a declaration that listed all the similar challenges faced by the bloc’s countries, especially those involving access to health services and medicines.

The Beijing Declaration defines the following priorities of action: the strengthening of the health systems, in order to overcome the obstacles of access to vaccines and medicines in the fight against HIV/AIDS, tuberculosis, viral hepatitis and malaria; and the transfer of technologies in support of public health (BRICS, 2011).

The question of medicines carries special importance within the BRICS, since China and India are currently the largest suppliers of active ingredients for the Brazilian industry. Accordingly, Brazil intends to “increase effective horizontal cooperation and harmoniously develop capacities between the pharmaceutical sectors of the BRICS countries” and may “also assume a prominent role in the implementation of the Global Strategy on Public Health, Innovation and Intellectual Property, approved by the World Health Assembly in 2008” (PADILHA, 2011a).

The second meeting of the BRICS health ministers occurred in New Delhi, in January 2013, resulting in a communiqué that emphasized, among other things, the need to protect the circulation of generic drugs between developing countries (AGÊNCIA DE NOTÍCIAS DA AIDS, 2013).

Recent studies have drawn attention to the need to intensify research on the real possibilities of the BRICS to have an impact on world health (HARMER et al., 2013).



### 3.3 *The reform of the WHO*

The past few years have been marked by a growing engagement by Brazil in the WHO. In 2013, at the most recent meeting of the World Health Assembly (WHA), the highest decision-making body of the WHO that convenes annually in Geneva, Brazil became the tenth largest contributor to the institution's budget: its allocation increased from 1.6% to 2.9% of total State contributions, and will represent nearly 26 million U.S. dollars over the next two years (CHADE, 2013). Moreover, Brazil was elected to the Executive Board of the WHO for the 2013-2016 period.

This engagement has been accompanied by a vigorous criticism of the role of the WHO in global health governance. The Brazilian position on the reform of the organization illustrates this well, since the country has reprehended the Director-General's Office of the WHO for the haste with which it is conducting the reform process and for giving in to pressure from the major WHO donors that have the most to gain from speeding up the reform, given their well-defined positions (ISAGS/ UNASUL, 2013b, p.4).

The Member States of UNASUR have taken steps to coordinate their positions within the WHO over the past two years. UNASUR-Health has met in parallel to the WHA, in order to adopt common positions and speak with a single voice, including in the executive board of the organization (INSTITUTO SUL-AMERICANO DE GOVERNO EM SAÚDE, 2013a).

The critical position of Brazil in relation to the WHO also extends to the debate on the post-2015 Development Agenda, within the framework of the thematic consultation on health. The WHO, together with other actors, defends universal health coverage, while Brazil has proposed a coverage that is not only universal, but also equal and integral. According to Paulo Buss, the Federal Constitution and the concept of health that it guarantees are the only possible parameters of international action by Brazil (ESCOLA NACIONAL DE SAÚDE PÚBLICA, 2013).

## 4 **Conclusions: overcoming cross-cutting contradictions**

One of the risks of the current use of the expression "solidarity", by States, that threatens to reduce it to an empty slogan is its disconnection from a concrete application framework (BLAIS, 2007, p. 330). By evoking social rights, which encompass the right to health, Alain Supiot recommends moving from a "negative solidarity", that currently prevails in relations between States, to a "positive solidarity", that would establish common goals on decent work and justice in the international rules of trade and also create "the means to assess these rules in the light of their real effects on the economic security of men" (SUPIOT, 2010, p. 173).

This article has demonstrated that Brazil clearly does have a foreign policy in the field of health. It is solidary when it defends, for example, that international trade should be subject to human rights on matters of intellectual property, that social determinants have priority on the global agenda and that a reform of the WHO will make it more independent from the major private donors.

However, the other facets of Brazil's international action also need to be

considered, such as the predatory exploration of human labor and natural resources in certain countries by Brazilian companies, many of which benefit from public financing, whose business ventures may have harmful effects on the people's health in these countries.

Furthermore, unlike the national administration of public health, Brazil's international action in the field of health is still not equipped with mechanisms of transparency and social participation in its decision-making process, and the same applies to the control of its results.

Mireille Delmas-Marty explains that, given the contradictory effects of globalization, it is not enough simply to reaffirm humanist principles to change practices and promote the necessary rebalance between commercial values and non-commercial values, between private goods and the common good. It is necessary to directly address its very contradictions (DELMAS-MARTY, 2013, p. 96). As such, Brazilian health diplomacy may only be considered effectively solidary when it produces tangible health improvements in the population of the States with which Brazil cooperates. The concept of structural cooperation in health is a valuable Brazilian addition to the international lexicon of development aid. However, the resources allocated to this new type of cooperation are still modest.

The statistics on cooperation, besides not being widely available, need to be analyzed carefully. Indeed, there is an urgent need to encourage qualitative empirical research on the effects of cooperation all over the world. The results of the international cooperation actions need to be studied "more scientifically": the "protoscience" that is currently used to assess cooperation does not guarantee that the already scarce resources are employed in the best possible manner (KOURILSKY, 2011, p. 17).

The future of Brazilian health diplomacy, which cannot be dissociated from the effects of the country's overall foreign policy, depends on the internal arbitration of numerous contradictions. On the one hand, between Brazil's international action and the principles of the SUS; and on the other, between the principles and the reality of the SUS inside Brazil. According to José Gomes Temporão (2013), an arduous political battle is underway to preserve the public and universal health system in Brazil, which is currently under threat of "Americanization" through the dissemination of the idea that private health care is better than public health care, and that the acquisition of health insurance is an important part of Brazilian social mobility (DOMINGUEZ, 2013, p. 19). Moreover, private interests have infiltrated the SUS, whose coherence is being threatened by the increasing number of dubious public-private partnerships (OCKÉ-REIS, 2012).

It can be concluded that the tensions in Brazilian foreign policy, particularly those in the field of public health, are cross-cutting, encompassing the internal and external spheres, and that they multiply as opaquely as they do rapidly. The consolidation of a solidarity diplomacy in health depends both on the prevalence of human rights over other interests of our foreign policy, and on the political will of governments to complete the movement that began with the health reform, developing a free and high-quality health system, as a duty of the State and a right of all, and that underpins Brazil's international action.

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## RESUMO

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O artigo esboça uma visão de conjunto, não exaustiva, das ações internacionais do Brasil no campo da saúde pública, a fim de aferir a existência de uma política externa brasileira de saúde propriamente dita. A primeira parte do texto procura distinguir a cooperação brasileira da praticada pelo mundo desenvolvido, graças a um breve panorama da cooperação em saúde Sul-Sul, com especial destaque à Comunidade dos Países da Língua Portuguesa – CPLP, e à União das Nações Sul-americanas – UNASUL. A segunda parte do texto é dedicada à atuação brasileira em fóruns multilaterais, nos quais o Brasil propõe uma “nova governança” da saúde global. Conclui-se que existe uma política externa brasileira no campo da saúde pública, e que as tensões nela encontradas são de natureza transversal, perpassando as esferas interna e externa. Seu futuro depende da arbitragem de inúmeras contradições, tendo como baliza os princípios do Sistema Único de Saúde – SUS.

## PALAVRAS-CHAVE

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Saúde pública – Política externa – Saúde global – Brasil

## RESUMEN

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El presente artículo esboza un panorama general, no exhaustivo, sobre las acciones internacionales de Brasil en el ámbito de la salud pública, con el fin de evaluar la existencia de una política exterior brasilera de salud, propiamente dicha. La primera parte del texto busca diferenciar a la cooperación brasilera de aquella practicada por el mundo desarrollado, a través de un resumido panorama de la cooperación en salud Sur-Sur, enfocándose especialmente en la Comunidad de los Países de Lengua Portuguesa – CPLP, y en la Unión de Naciones Sudamericanas – UNASUR. La segunda parte del texto, se centra en la actuación brasilera en foros multilaterales, en los que Brasil propone una “nueva gobernanza” para la salud global. Se concluye que existe una política exterior brasilera en el ámbito de la salud pública, y que las tensiones que se observan en la misma son de naturaleza transversal, atravesando las esferas interna y externa. Su futuro depende del balance entre numerosas contradicciones, teniendo como guía a los principios del Sistema Único de Salud – SUS.

## PALABRAS CLAVE

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Salud pública – Política exterior – Salud global – Brasil



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#### ABSTRACT

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Based on the foreign policy work done by international organization based in Brazil Conectas Human Rights, this article examines the multilateral and bilateral roles of emerging countries in relation to their postures on international human rights protection. The inconsistencies and challenges revealed provide a starting point for reflecting on Conectas' approach and for suggesting a series of strategies that may be useful to other civil society organizations seeking to address foreign policy issues.

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#### KEYWORDS

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Foreign policy – Human rights – Emerging countries – Civil society – Conectas Human Rights



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# FOREIGN POLICY AND HUMAN RIGHTS IN EMERGING COUNTRIES: INSIGHTS BASED ON THE WORK OF AN ORGANIZATION FROM THE GLOBAL SOUTH\*

Camila Lissa Asano

## 1 Introduction

So-called emerging powers such as South Africa, Brazil, India, Indonesia, Mexico, Nigeria and Turkey have gained international prominence on account of their growing economies, and they play an increasingly active role in defining the direction of international politics. Their alliances, partnerships and fora continue to gain significance and visibility<sup>1</sup> and the decisions made by these countries have an impact that reaches far beyond their own borders.

While many emerging countries have focused on reforming global governance and put pressure on multilateral agencies and mechanisms to reflect their new international role, their commitment to improving the international human rights system is less clear. Their performance and conduct in the field of human rights is often inconsistent with their foreign policy activities. For example they frequently abstain in multilateral fora from supporting resolutions condemning flagrant human rights abuses. The governments of some of these countries also have allowed public funds to finance commercial and other developments in foreign countries that contributed to flagrant human rights violations of local people.

It is vitally important, therefore, for civil society in each of these emerging powers to demand transparency and accountability from their governments, as well as consistency between their governments' human rights commitments and the decisions and positions they adopt on the international stage. One way to do this is to analyze the voting record of a particular country in the traditional international fora, as well as its foreign policy activities at bilateral, regional and multilateral levels, with a view to publicizing information revealing possible or imminent

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inconsistencies. By working alongside national institutions and other civil society groups, NGOs can contribute to strengthening democracy at the national level. This kind of approach is timely, and can benefit from the fact that the emerging powers have only recently begun to assume a higher profile in multilateral and other fora. This means that civil society in emerging countries at present may be in a better position to bring about effective changes in governments' foreign policy, than civil society in long-established powers with more "institutionalized" foreign policies.

This paper intends to share the work strategies of Conectas Human Rights<sup>2</sup> on the subjects of foreign policy and human rights with other civil society organizations keen to influence the practices of their own governments and possibly even to invite scholars in their respective countries to research the issues for themselves. Some of the discussions and strategies presented in this paper echo those of a recent Conectas publication entitled *Foreign Policy and Human Rights: Strategies for Civil Society Action – A view through the experience of Conectas in Brazil* (CONECTAS DIREITOS HUMANOS, 2013) which includes, in addition to strategies and suggestions, an account of the organization's experience over the years of working on foreign policy advocacy.

## 2 Foreign policy and human rights

### 2.1 *Conectas' activities in the foreign policy area*

Conectas began working in the foreign policy area in 2005, at a time when this subject was of limited interest to other Brazilian organizations. Brazil's foreign policy agenda was primarily defined by executive branch officials, in particular by the Ministry of Foreign Affairs (known as Itamaraty<sup>3</sup>) and was subject to very little scrutiny from Brazilian civil society. Information was not readily forthcoming on many key issues: e.g. How was the government's foreign policy agenda formulated? What were the decision-making processes of Itamaraty and other government entities driving Brazil's position on subjects of international importance, such as voting in the UN Human Rights Council and other multilateral fora? How were ambassadors appointed? This dearth of information was also reflected in the Brazilian media, where the subject received scant attention.

Against this background, Conectas created its Foreign Policy and Human Rights Program based on the premise that in a democracy government has the obligation to be accountable to citizens for all its activities and to establish and foster channels for social participation. Given that foreign policy is public policy, civil society has a right to insist on transparency in the formulation and implementation of policies in this field. Furthermore the 1988 Brazilian Federal Constitution states in article 4, Paragraph II, that the country's international relations must be governed by "the prevalence of human rights" (BRASIL, 1988). It follows that calling for respect for human rights in all of Brazil's foreign policy decisions is more than simply a matter of principle, but also one of compliance with the constitutional commitment assumed in 1988.<sup>4</sup>

The Table below presents Conectas' principal action strategies related to its work on foreign policy.

**Table 1\***

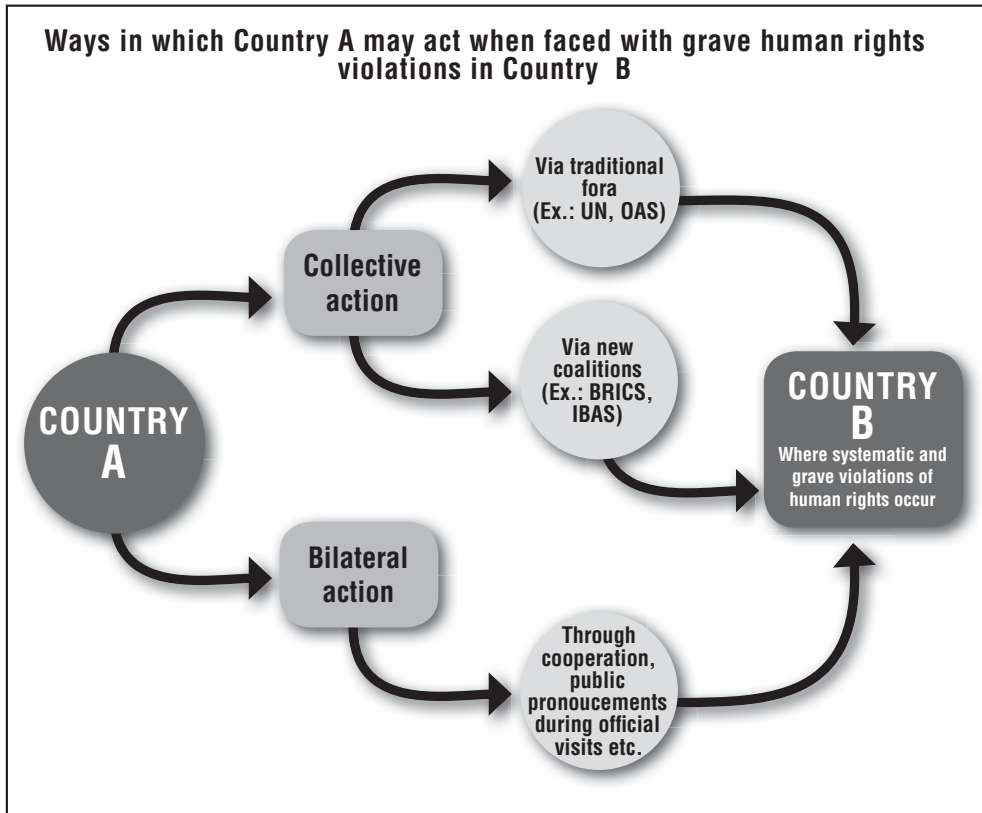
Action Line 1 INFORMATION AND RESEARCH	Action Line 2 NETWORKS AND PARTNERSHIPS	Action Line 3 CHECKS AND BALANCES	Action Line 4 MEDIA AND PUBLIC SCRUTINY	Action Line 5 FORA AND INTERNATIONAL MECHANISMS
<p><b>To demand transparency:</b> To pressure government to publish information on foreign policy commitments and priorities, State travel, attendance at multilateral meetings etc., and to take steps to disseminate this material widely in an active way, not simply in response to access-to- information requests.</p> <p><b>To systematize votes and positions:</b> To compile, systematize and organize information about the country’s international conduct, positions taken, and its voting record in international human rights agencies and other multilateral fora.</p> <p><b>To disseminate information:</b> To publish and disseminate information obtained or produced about the country’s foreign policy related to human rights.</p>	<p><b>To foster networks and opportunities:</b> Seek to form strategic partnerships with other civil society organizations and to broaden networks to include a diverse range of actors (academics, journalists, businessmen, trade union members, religious leaders, students, immigrant communities, etc.) on issues concerned with foreign policy. Acting as a network or in partnership, to promote the creation of formal and informal mechanisms (or to strengthen them if they already exist) with a view to enhancing interaction between civil society and those responsible for foreign policy making.</p> <p><b>To undertake inter-regional advocacy work:</b> To work alongside partner organizations from other regions in order to monitor the conduct and positions of countries at the UN and in other multilateral organizations. To organize South-South inter-regional campaigns on human rights situations in countries in crisis aimed at bringing influence to bear on the foreign policy positions of emerging democratic powers.</p>	<p><b>Legislative:</b> To encourage the Legislative Branch to oversee human rights related foreign policy by using established democratic procedures, such as calling for public hearings in Congress and facilitating dialogue between legislators and the Executive.</p> <p><b>Judiciary:</b> To employ legal mechanisms to question foreign policy actions and decisions, making full use of Constitutional provisions and the country’s laws, and mobilizing the courts where appropriate.</p> <p><b>Executive:</b> To activate the internal structure of checks and balances within the Executive Branch.</p>	<p><b>To inform the mainstream media:</b> To work with the national and international media with a view to increasing the visibility of the country’s international positions on issues related to human rights and to provide information on its foreign policy. To make available relevant information, witness statements and op-ed articles in order to strengthen ties with the national and international media.</p> <p><b>To use the media for advocacy:</b> To take advantage of the media in order to pressure government, to raise public awareness and to contribute to public debate on agendas involving human rights issues.</p>	<p><b>To participate in human rights related events:</b> To participate in sessions of the regional and international human rights systems (e.g. the UNCHR), to track the country’s conduct in the institutional processes germane to the regional and international human rights systems and to take thematic defensive actions appropriate to each country.</p> <p><b>Partnerships:</b> To work with organizations based in the key host cities. To seek to establish a permanent presence in cities where regional or international human rights bodies are headquartered (e.g. Geneva) in order to strengthen contacts in general and ensure a congenial environment for undertaking potential advocacy activities.</p> <p><b>To participate in other multilateral fora:</b> To participate in multilateral fora which address a variety of non-human rights-related issues, monitoring events and procedures and gaining understanding of how to anticipate potential impacts of decisions.</p>

Source: CONECTAS DIREITOS HUMANOS, 2013.

## 2.2 States’ conduct in protecting international human rights

For the purposes of this article, we depart from the principle that States can contribute to the international protection of human rights through bilateral or collective fora. By collective fora, we mean those in which States act on the basis of not only their own national interests and imperatives, but especially in concert with other States. They include traditional multilateral organizations with a high degree of institutionalization, which count on an extensive normative framework regarding human rights, but also other political coalitions not necessarily created exclusively for the protection of such rights – such as the new BRICS and IBAS -, which have been classified as “minilateral” arrangements by some (FONSECA, 2012).

\* This publication by Conectas Human Rights presents examples of Conectas actions, the main challenges faced by NGOs and suggestions for action.



Among the collective fora, an example of a multilateral body is the United Nations Human Rights Council (UNHRC), a subsidiary body of the General Assembly and the world's leading international human rights body. Its purpose is to seek to contribute to the advancement of international standards that strengthen the promotion and protection of human rights around the globe by inter alia adopting resolutions on thematic issues. The UNHRC also monitors respect for human rights through mechanisms such as: its resolutions on countries where serious or persistent violations of human rights take place; a system of "special procedures" (independent reporting and working groups); and the Universal Periodic Review (UPR), a mechanism under which all UN Member States are subjected every four years to a critical appraisal of their human rights conduct in a formal session where they also receive recommendations from other States participating in the Review. Other multilateral institutions considered part of the official system of human rights protection include those within the mandate of regional organizations such as the Organization of American States (OAS) with its Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights. When the multilateral and regional agencies demand more commitment to respect human rights by the emerging nations, the expectation is that these countries will help to bolster international human rights protection mechanisms by maintaining a responsible posture in international and regional fora. This involves their contributing to enhance the

rules, strengthening the monitoring capacity of the human rights institutions and complying with their recommendations and rulings.

Increasingly, however, the discussions and decisions that impact on fundamental rights go beyond the remit of the bodies created exclusively for addressing the issue and that are understood to form part of the traditional international human rights system. A multitude of bodies also exists whose primary mandate does not concern human rights, but which nevertheless deal with issues that have a direct impact on the international protection of these rights. Among these are groupings such as IBSA (India, Brazil and South Africa) and BRICS (Brazil, Russia, India, China and South Africa). Despite fluctuating between optimism and skepticism about the ability of these groups to challenge the international *status quo*, there is no denying that they have gained prominence in global debates, including those on human rights. The proliferation of bodies in which human rights are inserted transversely poses a tough challenge to civil society organizations monitoring the conduct of their governments.

Bilateral activities also have an international impact. Decisions on closer political relations with other governments, development aid investments and trade promotion obviously have a major influence on human rights protection in partner countries. Opportunities thus exist in the ambit of bilateral relations between States to promote and protect human rights on a broader, even worldwide scale.

In addition to the traditional diplomatic links nurtured by senior officials from both countries (in a bilateral relationship) and the activities of their embassies around the globe, other aspects of bilateral relations such as the provision of humanitarian assistance and international cooperation call for close inspection since they can have a substantial impact on human and other rights of local populations. Other mechanisms with the same consequences include the controversial system of bilateral sanctions and the practice, increasingly adopted by emerging countries, of providing public financing for commercial promotion of national companies in foreign States.

Conectas, through its Foreign Policy and Human Rights Program, tracks the performance of Brazil and other emerging countries both in terms of their bilateral activities and in regard to their stances in collective fora such as the UN and new coalitions to ascertain whether the positions adopted by these countries are consistent with their principles and commitments on human rights. Some examples are presented below.

### *2.3 Emerging powers' conduct requiring the attention of civil society*

The following are samples of foreign policy conducts by some emerging countries which call for closer study since they manifest marked inconsistencies with the rules of international human rights protection. While this behaviour cannot be generalized to all the emerging States, we seek to point out certain weaknesses in the foreign policies of some of the countries monitored by Conectas. The examples aim to illustrate ways in which a Global South human rights organization can do valuable work in the foreign policy field.

### 2.3.1 *Emerging countries' conduct in collective fora*

#### i United Nations: Voting history and criticism of selectivity

At the multilateral level, one of the emerging countries' main complaints concerns the alleged *selectivity* of the UN Human Rights Council. This body has been criticized for its lack of consistent and transparent criteria when deciding which countries should be the target of resolutions and which topics should be prioritized. This was clear from the intervention in 2012 of the South African Deputy Foreign Minister, Ebrahim Ismail Ebrahim, who argued that:

*...the Council should remain a credible arbiter and deal with all global human rights concerns in a balanced manner. There should be no hierarchy. Economic, social and cultural rights should be on an equal footing and be treated with the same emphasis as civil and political rights.*

(SOUTH AFRICA, 2013).

Similarly, the Council has been criticized for neglecting or absolving countries with urgent or chronic human rights crises while simultaneously and repeatedly issuing resolutions on a few states with dubious human rights records such as North Korea. This issue is very much in Brazil's interest. In 2012, Brazil's Human Rights Minister Maria do Rosario Nunes affirmed that the UNHRC "must assume position on serious human rights violations wherever they occur, respecting the principles of non-selectivity and non-politicization" (BRASIL 2012a) In the following year the then Brazilian Foreign Minister, Antonio Patriota, argued that the Council should act to improve "the lives of human beings, through a balanced and non-selective approach to human rights, free from futile objections and paralyzing polarization" (BRASIL, 2013).

However, criticism of the selectivity of the UNHRC is not always accompanied by consistent behaviour by the emerging States. A striking example was the case of Bahrain which, despite the serious violations committed there and the condemnation by the UN High Commissioner for Human Rights, Navi Pillay,<sup>5</sup> received little attention from the Council.

The human rights situation in Bahrain deteriorated from February 2011, when peaceful protests for democratic reforms commenced. Despite the serious human rights situation, the UNHRC kept silent for over a year. Seeking to reverse this situation, 26 human rights organizations in June 2012 demanded all delegations in Geneva to desist from turning a blind eye to the events in Bahrein (JOINT..., 2012). During the 20th UNHRC session, 27 States<sup>6</sup> finally issued a Joint Statement showing concern about the situation in Bahrain. Among the emerging countries that had criticized the Council for its selectivity, such as South Africa, Brazil, India, Indonesia, Nigeria and Turkey, only Mexico signed this statement. The violations continued apace in Bahrein, leading in February 2013 to a further joint appeal for the abuses to be investigated by the Council (JOINT..., 2013a). At the 22nd UNHRC session 44 countries<sup>7</sup> appended their names to a second



Joint Statement. Once again Brazil, South Africa, Nigeria, India, Indonesia and Turkey failed to sign. And once again Mexico was an exception.<sup>8</sup> The subject was revisited at the 24th session, in September 2013, after robust civil society action demanding the adoption of a resolution on Bahrain and pressuring countries that had not adhered to previous statements to join in this fresh initiative. While the result was yet another statement (the idea of a specific resolution was dropped) one positive point emerged: Brazil, which previously had merely chosen to make its own statement on the Bahrain situation, finally joined Mexico as one other emerging nation to sign the new statement (JOINT..., 2013b). Conectas played a role in all the collective initiatives reported here.

As a way of pointing to the contradictions between talk and action, Conectas has since 2006 published the yearbook *Human Rights: Brazil at the UN*. This publication contains information about Brazil's votes at the UN and recommendations made and received by Brazil on human rights. In addition to providing data for researchers and/or other organizations involved with human rights, the Yearbook is an ideal vehicle for making clear to the Brazilian government that its conduct in multilateral forums is closely followed by civil society.

Before 2009 monitoring of UN votes was done either virtually or by Conectas representatives attending sessions in Geneva on an ad hoc basis. In 2010, the organization joined forces with two other Latin American organizations - the Center for Legal and Social Studies (CELS) based in Argentina and *Corporación Humanas* from Chile - to appoint a permanent representative in Geneva. As well as tracking voting at the UN, this partnership of three organizations made it possible to undertake joint actions on different fronts in Geneva.

As regards voting patterns, Conectas observed fluctuations from year to year in the support given by emerging countries such as Brazil, Mexico,<sup>9</sup> Nigeria, South Africa, India and Indonesia to UN resolutions targeted at violations in specific countries. While the human rights component of a particular country's foreign policy is not necessarily reflected only in the way it votes on resolutions in the UNCHR and the UN General Assembly, it nevertheless provides important pointers to its general direction on the subject. The UNCHR and the UNGA provide, after all, a benchmark for setting minimum limits to the international acceptance of human rights violations. Monitoring votes thus allows civil society to detect inconsistencies and to concentrate advocacy efforts on causes or countries that receive less attention in multilateral fora.

The following are examples of the above-mentioned fluctuations and Conectas' strategies for influencing Brazil's votes at the UN:

### North Korea

Human rights violations in the Democratic People's Republic of Korea (North Korea) have been the subject of international concern for many years. Since 2003 the former UN Human Rights Commission<sup>10</sup> and the current HRC adopted a number of resolutions expressing misgivings about the human rights situation in that country.

Table 2

VOTES IN THE UN HUMAN RIGHTS COMMISSION RESOLUTIONS ON HUMAN RIGHTS IN NORTH KOREA (2009 - 2012)				
Country	10th session (2009) Resolution A/HRC/10/16	13th session (2010) Resolution A/ HRC/13/14	16th session (2011) Resolution A/ HRC/16/8	19th session (2012) Resolution A/HRC/19/13
Brazil	Abstention	In favor	In favor	(Not a member)
India	Abstention	Abstention	(Not a member)	Joined the consensus
South Africa	Abstention	Abstention	(Not a member)	(Not a member)
Mexico	In favor	In favor	In favor	Joined the consensus
Nigeria	Abstention	Abstention	Abstention	Joined the consensus
Indonesia	Abstention	Against	(Not a member)	Joined the consensus

Source: High Commissioner for Human Rights. Data compiled by the author.

While Brazil had previously voted in favor of several *procedures* on North Korea, it abstained in the UNGA in 2008 and again the following year, both at UNGA and the HRC. As the above chart shows, India and South Africa abstained, Indonesia and Nigeria voted against and, once again, Mexico voted in favor.

Arguing that Brazil's abstention violated the country's constitutional principle of respect for human rights in the conduct of foreign policy (Federal Constitution, article 4, II), Conectas approached the Federal Public Prosecutors Office in Brasilia to ask it to demand an explanation of Brazil's vote from the Ministry of Foreign Affairs. Itamaraty responded that it had abstained in the belief that the way forward was to create a political and diplomatic environment capable of allowing North Korea to voluntarily commit to human rights and cooperate with the UN. In the event, North Korea refused to accept all the recommendations made by the 2009 UPR mechanism, including those put forward by Brazil. As a result Brazil changed its position in 2010, joining Mexico to vote in favor of the resolution. From 2012 onwards, resolutions on North Korea were adopted by consensus and a Commission of Inquiry on Human Rights in the Democratic People's Republic of North Korea was later adopted (in March 2013), also by consensus of all members of the UNCHR. In short, it is clear that the request for information made by another government body (in this case the FPPO) was useful for eliciting the required information (i.e. an explanation of Brazil's position), and at the same time forced Itamaraty to confront the failure of its adopted strategy, and to remedy this by assuming a more robust attitude for human rights.

## Iran

In the voting on the human rights situation in Iran at UNGA, India, Brazil, South Africa, Nigeria, Indonesia were notable for their questionable voting conduct. An analysis of the votes from 2009 onwards shows that among the so-called

emerging countries group, only Mexico voted in favor of the resolutions on Iran. Brazil had in fact abstained since 2001 (except in 2003) on all the resolutions condemning human rights violations in Iran. This was also the case of South Africa, Nigeria and Indonesia (the latter two had voted against in previous years). India also wavered between abstention and voting against the resolution with final prevalence of the latter.

**Table 3**

<b>VOTES IN THE UN GENERAL ASSEMBLY RESOLUTION ON HUMAN RIGHTS IN IRAN (2010 - 2012)</b>				
<b>Country</b>	<b>64th session (2009) Resolution A/ RES/64/176</b>	<b>65th session (2010) Resolution A/ RES/65/226</b>	<b>66th session (2011) Resolution A/RES/66/175</b>	<b>67th session (2012) Resolution A/RES/67/182</b>
Brazil	Abstention	Abstention	Abstention	Abstention
India	Against	Abstention	Against	Against
South Africa	Abstention	Abstention	Abstention	Abstention
Mexico	In favor	In favor	In favor	In favor
Nigeria	Against	Abstention	Abstention	Abstention
Indonesia	Against	Against	Abstention	Abstention

Source: High Commissioner for Human Rights. Data compiled by the author.

To raise the Brazilian government's awareness on the issue, Conectas organized a series of meetings between Iranian activists and Brazilian government and civil society representatives aimed at persuading Brazil to take a stronger position. The outcome was that within a month (on 24 March 2011) Brazil voted in favor of the UNHRC adopting a resolution "establishing the mandate of a Special Rapporteur on the situation of human rights in the Islamic Republic of Iran". Since then Conectas has kept a close watch on Brazil's position on Iran, and continues to keep the issue alive in Brazil, publishing opinion articles and disseminating other information on the subject.

## **ii International coalitions: BRICS and IBSA**

The IBSA (India, Brazil and South Africa) and BRIC (Brazil, Russia, India, China and South Africa) groupings of so-called emerging or rising powers have gained prominence internationally. A common thread bringing these countries together is the prospect of their forming an alternative to the distribution of power centered on Europe and the United States by promoting an agenda to reform global governance and strengthen the South-South axis. Human rights play a particular role in these two groupings and call for deeper analysis by academic practitioners and others. As mentioned in the Introduction above, although the groupings were not established with a specific mandate to promote and protect human rights (unlike UNHRC), the decisions taken by IBSA and BRICS can nevertheless have a powerful impact

on these rights. These groupings also offer opportunities for joint advocacy on topics of interest to civil society in the individual member countries.

According to Itamaraty,

*IBSA is a coordinating mechanism covering three emerging countries, three multiethnic and multicultural democracies, which are determined to contribute to building a new international architecture, to speak with one voice on global issues and to enhance their mutual relations in different areas.*

(BRASIL, [20--a]).

The subject of human rights, considered to be of core importance to the grouping, has occupied a specific place in the Official Summit Declarations and has been mentioned in the final declarations of all five Presidential Summits to date.<sup>11</sup> Furthermore, IBSA has shown itself in the past to be able and willing to coordinate policy in areas impacting on human rights, e.g. the group's reaction to the Middle East crises (the IBSA Mission to Syria in August 2011, the IBSA Declaration on the Gaza Conflict, November 2012, etc.), and the joint positions at the UNHRC (proposal supporting the draft resolution on the right to health and access to medicines at the 12th Session in 2009).

An example of action by Conectas was when a second IBSA mission to Syria was first announced (it did not materialize). Questioning the results of the first mission Conectas was concerned about

*...the announcement of a possible second mission in Syria, since the first showed weak and ineffective outcomes in terms of the victims of human rights violations. The group is concerned that the Syrian government used IBSA to legitimize its actions by averring that Syria is in dialogue and cooperating with countries of the South, without showing proof of genuine commitment to immediately ending the repression.*

(CONNECTAS 2011, s / w).

In the case of the BRICS, the grouping's identification with human rights as a key subject is much less clear.<sup>12</sup> According to Itamaraty "the BRICS is an informal grouping which provides space for its five members to (a) dialogue, identify convergences and consult on various topics and (b) expand contacts and cooperation in specific sectors" (BRASIL, [20--b]).

Although the first four BRICS declarations touched on issues such as the Millennium Development Goals, the human rights issue was addressed only tangentially. The first mention of human rights was in the Final Declaration of the 5th Summit (Durban, 2013), which cited the 20th anniversary of the Vienna Conference and floated the possibility of sectoral cooperation in the human rights area.<sup>13</sup> The text also mentioned the need to ensure wideranging humanitarian relief access in the Syrian conflict, thereby significantly expanding the scope of the official statements of the group. The BRICS had hitherto confined themselves to backing the idea of a non-military solution to the conflict and the need to respect Syria's sovereignty and territorial integrity - all reflecting the standard language

previously used to refer to other conflict situations (Afghanistan, Libya, Central African Republic, Iran, etc.).<sup>14</sup>

On the specific issue of the BRICS approach to the Syrian crisis, Conectas developed an incidence action plan aimed at securing the inclusion in the Declaration of the 5th Summit of a firm statement to underscore the need for unrestricted and secure humanitarian access to all parts of Syria. Prior to the summit, Conectas met Itamaraty officials in Brasilia with a view to familiarizing itself with Brazil's position on the issue. Conectas also sought to inform the public about the impact that decisions taken jointly by BRICS countries could have on human rights in Brazil and elsewhere. Conectas also joined forces with other humanitarian and human rights organizations in various countries over the case of Syria. These initiatives resulted in the 5th Summit Final Declaration including a specific mention of Syria.<sup>15</sup>

### **2.3.2 Emerging countries' approach to human rights in terms of bilateral relations**

#### **i Official high-level visits: timid reactions to serious violations**

Brazil's foreign policy has been marked by a reluctance to prioritize human rights in the context of bilateral relations. This has been the case especially during visits by senior Brazilian government representatives to other countries. One possible explanation for this timidity when confronted with serious violations in countries with which Brazil has diplomatic relations (such as Zimbabwe), is that Brazil does not feel it has moral authority to criticize other nations while human rights abuses continue to be committed in its own territory.

The "glass ceiling" argument has already been put forward by President Dilma Rousseff to justify Brazil's non-criticism of the notorious violations in two countries which she visited in February 2012 in her capacity as Head of State – Venezuela (PRESIDENTE..., 2011) and Cuba.<sup>16</sup> When asked about her failure to raise the issue of political prisoners in Cuban gaols, President Rousseff brushed off the question by commenting that if human rights were on the agenda it would be necessary also to address the situation at Guantánamo Bay. Following on the President's comment, Conectas requested (two months later) the President to raise human rights, including violations at Guantánamo, with her US counterpart during her official visit to the United States. However according to official information, the subject received no particular emphasis during the visit.<sup>17</sup>

Conectas is firmly of the opinion that high-level official visits are valuable opportunities that should be used to raise questions related to human rights, given that they are exclusive channels where many other difficult topics such as disagreements over foreign exchange or protectionism are invariably discussed.

Questioned on the case of Cuba, the Brazilian government has stuck to the official line that it awards priority to dealing with human rights issues in multilateral fora.<sup>18</sup> Paradoxically, and despite these protestations, very little activity has been observed on the part of the Brazilian government to raise concerns in these multilateral fora about specific cases of human rights violations around the world.<sup>19</sup>

## ii Use of public resources: humanitarian cooperation and investments abroad

International cooperation comprises development cooperation initiatives (financial contributions for infrastructure construction, technology transfer through technical and scientific cooperation, etc.) and humanitarian aid (food distribution, provision of doctors, nurses, etc.). Both types of cooperation have an impact on the rights of local populations.

One of the Conectas' research findings in this area is that international cooperation provided by emerging countries is still low in terms of the resources invested. A further issue of concern is that in the case of humanitarian aid it would appear that no clear criteria exist to define which recipients are in greatest need. This problem is abundantly clear in, for example, the case of Syria.

With the continuing deterioration of the Syrian crisis and few prospects for improvement, the UN launched in June 2013 the largest humanitarian call for funds in the organization's history. An appeal for a total of US\$ 4.4 billion for humanitarian assistance programs in and around the country, to serve more than 6.8 million people in urgent need of humanitarian aid, 4.25 million internally displaced and over 1.6 million refugees was launched.

Considering the growing need for humanitarian aid resources for Syria, the economic crisis affecting many traditional donor countries in the North and the process of altering the axis of power from "the Old to the New World", as certain governments are proud to proclaim, expectations revolved around the emerging countries being willing to make larger financial contributions to the appeal for assistance. However, if we analyze the UN figures, it is now clear that none of these factors led to a significant change in the flow of donations, which continue to be provided mainly by northern hemisphere countries.

According to data from the United Nations High Commissioner for Refugees (UNHCR) (UNITED NATIONS, 2013c), of the approximately US\$800 million raised for the Regional Response Plan for Syria (RRP) in 2013, 62.9% was donated by the United States, France, Japan, Germany, UK and the EU. Donations from the United States alone accounted for 37.2% of all the funds. Russia, in contrast, donated 1.2% of the total, while China accounted for 0.1%. No RRP donations have yet been verified as forthcoming from emerging countries such as South Africa, India, Mexico, Indonesia, Nigeria and Turkey.

Another issue that has concerned Conectas from the bilateral relations standpoint is the use of public resources made available by national development banks to finance the operations of home-based firms abroad. The activities of such firms and the potential for them to be involved in human rights violations are not subject to appropriate social controls.

This situation can also be observed at supranational levels. The announcement, for example, of the creation of the BRICS Bank during the grouping's 5th Summit in 2013 (in South Africa), flagged up a warning in this regard since no mention was made of transparency criteria and respect for human rights in the Bank's founding statutes. This amounts to a crucial oversight, particularly since the Bank will be financing major infrastructure projects with significant potential for human rights violations (especially in Africa).

Elsewhere it has been stated that one of the models for the new BRICS Bank would be the BNDES (Brazil's National Bank for Economic and Social Development), which provided, according to the Bank's annual report, around US\$190 billion in project financing in Brazil and abroad in 2013.

It is worth highlighting that the BNDES has been severely criticized for its lack of transparency and rigour with regard to human rights issues when supplying credit to Brazilian companies operating outside of Brazil. This worrying situation led seven Brazilian civil society organizations, including Conectas, to deliver a joint submission to the UN when it was Brazil's turn to be subjected, for the second time, to the Human Rights Council Universal Mechanism Review in Geneva.<sup>20</sup>

### 3 Some conclusions

This article is not based upon the premise that emerging countries are not sufficiently committed or qualified to make a positive contribution to the protection of human rights internationally. There are nevertheless aspects of their foreign policies that can and should be modified to reveal more clearly the role of human rights issues in their international actions. With the emerging countries achieving a new level of responsibility and visibility on the world stage, it becomes increasingly unacceptable for them to ignore or disregard human rights in their foreign policy agendas.

Various explanations have been put forward for the developing countries' reluctance to fully embrace the cause of human rights. These involve ideological questions frequently rooted in the idea that emerging countries are loath to reproduce what they regard as the "imperialist" imposition of human rights. On other hand, practical considerations are also thought to hold them back, such as being host to serious human rights violations in their own countries that would leave them open to embarrassing charges of inconsistency between their pronouncements to the world at large and stark reality - the famous "glass ceiling". In certain developing countries geopolitical considerations also tend to influence attitudes to human rights. This is the case, for example, of India which has to contend with sensitive problems with neighbors in its immediate region (e.g. Pakistan) and which inhibit its government (and governments in similar situations) from taking a more robust line on human rights questions in other parts of the world. These and other causes have been suggested that require cautious and careful analysis. This topic would undoubtedly provide fertile ground for the *think tanks* devoted to the study of foreign policy which are rapidly evolving in the emerging countries.

On a final note, one particular cause on which human rights organizations can indeed have a degree of influence is to seek to increase the low cost of a foreign policy that fails to promote human rights.

This is one area directly susceptible to intervention by organized civil society: the higher the cost of avoiding transparency and accountability in a country's international stand on human rights, the greater the political cost will be of a foreign policy that treats human rights as something that is negotiable - a mere bargaining chip in the endless rounds of negotiations between countries. Increasing the political cost of internationally adopted positions that do not necessarily promote and protect human rights is something entirely within the reach of social movements, trade unions and non-governmental organizations.

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## NOTES

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1. This analysis is shared by: Trubek (2012), Cadernos Adenauer (2012); Alexandroff; Cooper (2010); Piccone; Alinikoff (2012).
2. Although the observations in the article are inspired by the work done by the author with Conectas Human Rights, the positions presented here do not necessarily reflect the institutional views of the organization.
3. The Foreign Ministry's name refers to the first location of the Ministry, in 19th century Rio de Janeiro, in the house that had once belonged to the Conde de Itamaraty.
4. The Federal Constitution of 1988 states in article 4, Paragraph II that Brazil's international relations must be governed by 'the prevalence of human rights.'
5. According to Pillay, hundreds of human rights defenders and dozens of health professionals were arrested in street demos in the country, with some of them brought before the Military Court. Protesters were sentenced to death and life imprisonment. In June 2011, an Independent Commission of Inquiry was set up which found evidence of serious violations committed by the government. Even after the publication of the report and recommendations of this Committee the human rights abuses continued (UNITED NATIONS, 2011).
6. The 27 countries that signed the first joint statement on Bahrain at the 20th Session of the Human Rights Council, were Austria, Belgium, Bulgaria, Chile, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Iceland, Italy, Ireland, Liechtenstein, Luxembourg, Mexico, Montenegro, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Switzerland.
7. The 44 countries that joined signed the second joint statement on Bahrain, at the 22nd Session of the Human Rights Council, were Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Korea, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, United States and Uruguay.
8. The human rights situation in Bahrain is still a matter of concern: the government has resorted to legal mechanisms to restrict demonstrations and the right of association, using specific laws to control the activities of civil society organizations. The government has reacted violently against those who oppose these measures and reports of torture and arbitrary detention are still common, even against human rights activists. Additional information about the current and past situation in Bahrain is available from the United Nations (2013a and b), Human Rights Watch (2013a and b) and Amnesty International (2012, 2013) and also on the site of the Cairo Institute for Human Rights Studies in the publication entitled "77 International and regional organizations urge the Human Rights Council to stop attempts to undermine UPR" (2013).
9. Compared with other so-called emerging countries, Mexico stands out with its more consistent voting record reflecting its commitment to human rights. According to Bruno Boti, "changes in Mexico's human rights foreign policy were not a result of pressure exerted by a transnational network of activists, as described by the boomerang and spiral models. The changes were initiated endogenously in government, which sought to anchor the new democratic situation in Mexico abroad through international human rights commitments. In addition the Mexican government sought to ensure and convince international audiences of the credibility of this new attitude adopted by the Mexican State with respect to democratic reforms and human rights" (BERNARDI, 2009, p. 5).
10. The Human Rights Commission of the United Nations was replaced by the Human Rights Council in 2006. To learn more about the creation of the HRC, see Lucia Nader's article in Issue no. 7 of Sur Journal.
11. At the first Brasilia Summit in 2006, the official text stated that: "India, Brazil and South Africa, elected to the newly-formed Human Rights Council of the United Nations [...] share a common vision for reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, including the implementation and operationalization of the Right to Development and the special protection of the rights of vulnerable groups" (paragraph 16). The text also mentions that countries look kindly upon the adoption of the Convention on the Rights of Persons with Disabilities (paragraph 17). At the following Summit held in 2007 in Pretoria, the question of the right to development is mentioned again, and countries equally affirm their commitment to the Council and the Universal Periodic Review (UPR) mechanism of that body (paragraph 14). In 2008, in Delhi, the group again refers to the UN Human Rights Council and states that the work of the group "must develop without politicization, double standards and selectivity, and promote international cooperation on this subject" (paragraph 22). The leaders also emphasize the importance of a sectional dialogue around the subject aimed at mutual benefit to be secured from the protection and promotion of human rights (paragraph 23). At the 4th Summit in Brasilia in 2010, the member governments reaffirmed the high priority given to human rights and the

importance of cooperation in this area (paragraph 9). Specific mention is made of the issue of racism, racial discrimination and xenophobia as an area deserving attention (paragraph 10). They also acknowledge the adoption of a resolution by the HRC proposed collectively by the group members in the context of access to medical drugs (UNITED NATIONS, 2009). Finally, at the most recent Summit in Pretoria (2011), the group repeats the "imperative need for the international community to recognize and reaffirm the centrality of the Human Rights Council" (paragraph 39). The same paragraph also reaffirms that "leaders recognize that development, peace and security and human rights are interlinked and mutually reinforcing." Furthermore they reaffirm their commitment to the Durban Declaration and its Plan of Action for the achievement of the World Conference against Racism, Xenophobia and Related Intolerance (WCAR) + 10, held that year. In paragraph 41, the need is highlighted to enhance cooperation in international human rights bodies and to share good practices in this area.

12. At the Delhi Summit (2012), the group claimed to be a "platform for dialogue and cooperation [...] for the promotion of peace, security and development in a multipolar, interdependent and increasingly complex and globalized world" (Delhi Declaration, 2012, paragraph 3).

13. "We welcome the 20th Anniversary of the World Conference on Human Rights and the Vienna Declaration and Plan of Action and agree to examine possibilities for cooperation in the area of human rights (paragraph 23)."

14. "Due to the deteriorating humanitarian situation in Syria, we urge all parties to allow and facilitate the immediate, safe, full and unrestricted humanitarian organizations to all who need access to care. We urge all parties to ensure the safety of humanitarian workers" (paragraph 26).

15. Learn more about the action in Conectas <<http://www.conectas.org/pt/acoef/politica-externa/noticia/cupula-dos-brics-termina-com-avanco-sobre-a-siria-e-incertezas-sobre-novo-banco>>. Last accessed on: Nov. 2013.

16. The allegation that the existence of human rights problems in Brazil disqualifies it from making

any criticism of major assaults on, and abuses of, freedoms in the world. An example of this argument is shown during President Rousseff's visit to Cuba (LIMA 2012).

17. Conectas made use of the channel opened up by the Foreign Ministry to engage with society via Twitter regarding the President's official visit to the US in 2012. See Brasil (2012b).

18. Examples of Dilma Rousseff's statements in this vein are: "I believe that human rights cannot be the object of political struggle, and I will not use political struggle to that end because I do not consider that there is only one country or group of countries that violates human rights. Therefore I would like to discuss this issue always multilaterally, because I know that this issue is exploited for political purposes" (UOL, 2012). At Harvard during the visit to the United States. Finally, "Who throws the first stone has a glass ceiling. We have ours in Brazil. That's why I agree to talk about human rights within a multilateral perspective" (FELLETT, 2012). During a press conference in Cuba.

19. The monitoring done by Conectas of Brazil's role in the UN Human Rights Council, the main multilateral body on human right questions, reveals that Brazil continues to award priority to the Universal Periodic Review (UPR) mechanism for addressing issues in other countries. While this is certainly a tool that should be strengthened, it must be remembered that each of the UN Member States submit themselves to the UPR once every four and a half years. Human rights crises need to be dealt with promptly and the HRC has the clear mandate to do so. Brazil should concentrate on strengthening the international community's ability to react robustly against violations wherever they occur so that its oft-stated preference for dealing with violations in multilateral spaces and its harsh criticism of HRC selectivity are less contradictory. For more information about the UPR see Conectas Direitos Humanos (2012).

20. Conectas Human Rights on Business and Human Rights submission for the second appearance by Brazil in the Universal Review of Human Rights, including the question of the National Development Bank of Brazil. See Agere et al. (2011).

## RESUMO

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A partir da experiência da organização brasileira Conectas Direitos Humanos em seu trabalho com política externa, este artigo analisa o papel dos países emergentes nas dimensões multilateral e bilateral da proteção internacional dos direitos humanos. As incoerências e desafios encontrados nestes âmbitos são utilizados como ponto de partida para refletir sobre a prática da Conectas e sistematizar estratégias de atuação que possam ser úteis para outras organizações da sociedade civil desejosas de atuar com temas de política externa.

## PALAVRAS-CHAVE

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Política externa – Direitos humanos – Países emergentes – Sociedade civil – Conectas Direitos Humanos

## RESUMEN

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Sobre la base de la experiencia de la organización internacional brasileña Conectas Derechos Humanos en su trabajo con política exterior, este artículo analiza el papel de los países emergentes en los ámbitos multilateral y bilateral de protección internacional de los derechos humanos. Las incoherencias y desafíos encontrados en estos ámbitos se toman como punto de partida para reflexionar sobre la práctica de Conectas y sistematizar estrategias de acción que puedan resultar útiles para otras organizaciones de la sociedad civil que deseen actuar en temas de política exterior.

## PALABRAS CLAVE

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Política exterior – Derechos humanos – Países emergentes – Sociedad civil – Conectas Derechos Humanos



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## INTERVIEW WITH MAJA DARUWALA (CHRI) AND SUSAN WILDING (CIVICUS) EMERGING DEMOCRACIES' FOREIGN POLICY: WHAT PLACE FOR HUMAN RIGHTS? A LOOK AT INDIA AND SOUTH AFRICA

Camila Lissa Asano and Laura Trajber Waisbich  
(Conectas Human Rights).

The role of Global South nations in the international sphere has, until recently, been mostly restricted to the one of targets of other countries' foreign policies and of multilateral bodies' human rights recommendations. In the past few years, however, these countries—notably the so-called “emerging democracies”—have been assuming more proactive stances in international affairs as a whole. Their foreign policy – including policy-making dynamics, narratives and policy priorities – as well as their international engagements affecting human rights, therefore, call for a more systematic review.

To discuss the matter, Conectas has reached out to two major human rights organizations from the Global South, both actively working with foreign policy issues in their countries, to explore some of the dynamics of foreign policy in two different countries: India and South Africa.

To comment on India, we have invited **Maja Daruwala**, director of the Delhi-based Commonwealth Human Rights Initiative (CHRI), a 26-year-old organization devoted to ensure the *practical* realization of human rights in the countries of the Commonwealth. Based in Delhi, CHRI has offices in London and Accra. CHRI programs focus on human rights monitoring and advocacy, access to information, and access to justice.

To speak about South Africa, we have **Susan Wilding**, project manager for the Civic Space Initiative at CIVICUS: World Alliance for Citizen Participation. Based in Johannesburg, CIVICUS works to strengthen citizen action and civil society throughout the world, especially in areas where participatory democracy and citizens' freedom of association are threatened. CIVICUS has a vision of a global community of active, engaged citizens committed to the creation of a more just and equitable world. This

is premised on the belief that the health of societies exists in direct proportion to the degree of balance between the State, the private sector and civil society.

*Camila Lissa Asano and Laura Trajber Waisbich (Conectas) – In your country, are human rights seen as a foreign policy issue? What is the current governmental discourse on this relationship?*

**Maja Daruwala (CHRI, India)** – India sees itself as having been part of the history that formulated human rights norms in the UN. The government is very conscious that human rights are a factor that affects the country's image. But it also feels that Western governments use it to flay other countries while having skeletons in their own cupboards. As with all countries, human rights are not the fundamental factor for designing foreign policy but rather a negotiating chip and a reputational factor. In relation to other countries, India positions itself on a case-by-case basis, subjecting its positions to realpolitik.

I have not seen a strong or consistent policy against which one can measure whether or not human rights are the guiding principles in foreign policy formulation. The Indian government measures its human rights record as gauged by adherence to or compliance with international obligations and with our own constitutional norms. The government's discourse is that, in terms of human rights, India it is constantly going toward compliance with international obligations and its own constitution.

**Susan Wilding (CIVICUS, South Africa)** – South African foreign policy has, since the first democratic government in 1994, held human rights at its core. Following the atrocities of the Apartheid Era, the South African Constitution was written into law. The Constitution was adopted to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights' and 'to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family nations' (The Constitution, 1996). As such, the protection of human rights as enshrined in the constitution was translated into all components of South Africa's foreign policy.

South Africa's foreign policy moved from a human rights focus under Nelson Mandela to a Pan-African focus under President Mbeki. Mbeki's vision of an 'African Renaissance' affected every decision made by South Africa under his presidency. His slogan "African Solutions for African Problems" described how South Africa's foreign policy was focused on the continent and on African issues in international fora.

Currently, under the Presidency of Jacob Zuma, human rights remain an integral part of South Africa's foreign policy, although there have been some subtle shifts towards a foreign policy focused on economic gain. However, The White Paper on South Africa's Foreign Policy, drafted in 2011, attempts to outline South Africa's current foreign policy and illustrates its commitment to human rights with the following; 'In pursuing our national interests, our decisions are informed by a desire for a just, humane and equitable world order of greater security, peace, dialogue and economic justice', which remains the rhetoric with South Africa's Principals and diplomats.

*C.L. Asano and L.T. Waisbich – In your view, what are the main strengths about your country's current foreign policy and what positions related to human rights should be reviewed? Why?*



**M. Daruwala**—India's strength lies in its soft power, which is evident, for instance, in peacekeeping and peace-building efforts in Africa and its assistance in democracy-building in Afghanistan. India's expertise in creating institutions and providing technical advice on legal frameworks is recognised and sought by countries moving towards democracy, especially ones based in the Global South or those that have had a colonial past and may not be completely trusting of outside interference.

The other facet of India's foreign policy that I see as its strength is its ability to maintain flexibility in creating partnerships: it has not locked itself in any one coalition or grouping. For instance, while it maintains strategic economic and military ties with the US, it has not let its stand on the question on Palestine be dictated by America, nor has it agreed to toe America's line on Iran. Similarly, while it seeks to strengthen ties with partners in the Indian subcontinent, it has kept up its ties since the days of the struggle for independence with its African counterparts. India has also increasingly sought to move beyond its traditional allies and seek associations with countries as far as Brazil, through platforms like IBSA and BRICS, as well as bilateral commissions, due to mutual interest and scope for dialogue and exchange.

Because India is seen as an ally by many, it should use this position to seek commitment to human rights and not cite these partnerships to block movement on human rights issues. Owing to India's own struggle against abuses of those in power and its eventual freedom and embracing of democracy, India should be robust in implementing human rights within and outside of its borders. But, too often it cedes this potential leadership role. Its consistent opposition to 'outside interference' and 'respect for sovereignty' allows it to resist international oversight of itself and other countries and also to remain silent on human rights violations in other countries, — essentially turning its tall foreign policy ideals. This has to change. I think there is a great advantage to India as an international player if it champions human rights.

**S. Wilding**—When South Africa emerged onto the foreign stage in 1994, the international community looked to this new bright nation as a leader in championing the values of democracy, human rights, reconciliation and, most of all, of building equality with the eradication of poverty. South Africa has since played a meaningful role on these issues locally, regionally and abroad.

The White Paper on Foreign Policy (2011) describes the strengths of South Africa's foreign policy thus: 'South Africa's greatest asset lies in the power of its example. In an uncertain world, characterised by a competition of values, South Africa's diplomacy of Ubuntu, focusing on our common humanity, provides an inclusive and constructive world view to shape the evolving global order.' In other words, South Africa's strength lies in its past, in its power to overcome great adversity and its role in taking these values to the world.

While our progressive constitution, which informs foreign policy, does not leave much room for criticism, the reality stands that there are still human rights positions that need to be reviewed. These positions need review not because of the value system South Africa holds, nor because of its foreign policy objectives, but because South Africa often makes bad decisions based on factors outside of its national interest.

South Africa has shown a tendency to vote against resolutions in both the UN Security Council and the Human Rights Council in a way that goes against the very core of its national values. Aside from the recent example of South Africa's

vote against sanctions on Zimbabwe, South Africa also voted against a resolution on Burma that called for democratic reforms and condemned human rights abuses in the country. Once again, this vote was with Russia and China and against the West. South Africa's Ambassador explained that South Africa was worried that the resolution would interfere with the work of the UN Secretary-Generals envoy to Burma and that it overstepped the mandate of the Council. South Africa's reputation as a golden light for human rights and democracy was tainted, and would continue to be tarnished through the many examples similar to this in both the UN Security Council and the Human Rights Council.

South Africa often hides behind the dictum of non-intervention in the sovereignty of nations, stating that a nation's issue should not be in the purview of what they view as a skewed international order. This belief, although it has some merit in certain instances, is also the biggest hindrance to spouting justice and democracy in the world.

From a nation that has suffered an unthinkable past, freed in part because of the support of other nations, it is disheartening to watch South Africa deny others the support that was so readily given to them in their time of need.

*C.L. Asano and L.W. Waisbich—In your opinion, can the existence of major domestic human rights challenges be seen as an obstacle for your country to assume a more vocal stance towards human rights abroad?*

**M. Daruwala**—Yes, this is one significant factor. While at a domestic level measures to address human rights issues exist, India would not want to be under international glare and pressured for compliance. India considers this a sovereignty issue. This same concept directs the way India sees human rights situations abroad – as domestic matters in which it may not involve itself in beyond a point.

The other obstacle for countries like India to take a proactive stand internationally is the shifting stance of those who traditionally consider themselves to be the champions, upholders of human rights and their own selectivity. This gives non-complying countries a finger-pointing opportunity that does not help take forward universal human rights compliance.

There is also resentment over the fact that gains in human rights compliance are not being acknowledged, nor are structural difficulties, cultural contexts and degrees of development that obstacle human rights compliance. However, these are too often used as an excuse for tolerating ongoing bad practices and for doing too little to proactively and rigorously protect and promote human rights compliance within its borders.

**S. Wilding**—While South Africa faces human rights challenges at home, these do not hinder it from taking a vocal stance abroad. This is because South Africa has one of the most progressive Constitutions in the world. This, along with a history of struggle and discrimination, gives the country a 'soap box' on which to stand and criticise human rights abuses abroad.

While South Africa feels that it has the right to be vocal on human rights abroad, it often fails to speak up when it should. It is swayed by political groupings, power politics and [predictions of] economic gain into staying mum on issues about which it should be the most vocal.

An example where South Africa failed to be vocal is the recent case where it voted along with China, Russia, Libya and Vietnam against sanctions on the

Zimbabwe government in addition to an arms embargo in the UN Security Council. South Africa's ambassador to the UN explained the vote as an obligation to follow African consensus in the African Union (AU) and the Southern African Development Community (SADC). It was an opportunity lost for a new democratic nation to speak up with power and conviction against a suffering autocratic neighbor.

*C.L. Asano and L.W. Waisbich – Are there formal or informal channels for civil society participation in foreign policy-making in your country?*

**M. Daruwala**—Foreign policy in India has always been the preserve of a small, elite group, and the public has been kept out of such debates. However, of late, the scene seems to be experiencing some change, not just in the form of civil society demanding that their voice be heard on specific foreign policy issues, but there also seems to be more openness on the part of policy-makers to discuss foreign affairs. A prominent government television channel recently organised debates and talk shows with top level participation from the government, studying the trajectory of foreign policy in India. This sort of thing is very new.

Of course, there are the traditional mechanisms that come with being a parliamentary democracy. The most prominent example of this is the Parliamentary Standing Committee on External Affairs. It acts as an expert group on India's foreign engagements and, while preparing its report to the government, it seeks expert advice and submissions from civil society, specialists and others outside of the government. This mechanism offers a channel for civil society to make its views known. To what extent these views influence the final policy is moot, but the institution is alive and functioning. Civil society should push for its views to be considered by making use of the opportunities that such institutions offer.

A very recent development is the establishment of the Forum for Indian Development Cooperation by a Ministry of External Affairs-funded think-tank – *Research and Information System for Developing Countries (RIS)*. In its own words, the Forum seeks to study the various facets of development partnership in achieving India's foreign policy objectives. And to this end, it holds monthly seminars and open discussions, inviting civil society organisations and academics. This is a step in the right direction.

That said, there is need for a lot more to be done in order to democratize foreign policy formulation and agenda-setting on matters of external affairs. India's policy projections outside its boundaries are far away from representing the true aspirations of its people.

**S. Wilding**—'The business of national interest cannot be the purview of the state alone, but it can encourage an enabling environment of dialogue and discourse among all stakeholders to interrogate policies and strategies, and their application in the best interests of the people' (White Paper, 2011).

President Zuma has, on two recent occasions, while speaking to the Department of International Relations and Cooperation (DIRCO), highlighted the importance of civil society dialogue and pushed for stronger engagement. For many years, there was distrust between civil society and government, neither being sure of the others motives, but this discourse appears to be changing.

One example of civil society engagement with DIRCO has been the drafting

of the White Paper on Foreign Policy. Civil society was invited to engage in the formulation of the paper during discussions that lasted over a few days. Another example is the Universal Periodic Review, during which consultations with civil society were held to reflect on the state of South Africa's human rights situation. Finally, a third example would be the consultations held on the LGBTI resolution at the UN HRC in 2011.

Formally, civil society can use the South African Parliament to lay complaints, make enquiries and influence Foreign Policy by going to their party representatives in Parliament. Informally, civil society is free to, and indeed do request meetings with DIRCO officials on specific foreign policy Issues. This informal dialogue is then translated into formal submissions, which carry the main points of the meeting and are relayed to DIRCO heads.

*C.L. Asano and L.W. Waisbich – How do you see the civil society landscape when it comes to working with human rights and foreign policy? What are the major issues you and your partners are focusing on currently?*

**M. Daruwala** – Domestically, the overall landscape is never steadily upward and onwards. It is shifting. Civil society has the space to dissent and aver with government stances. There are areas in which there is a great deal of consultation and in which civil society initiatives are welcome and become government agendas. In other areas, there is a reluctance to engage or include.

Aside from providing expert input through academics and think- tanks – a majority of them security-centred – there has been little input from civil society on foreign policy matters. There remains a discomfort with such interventions on the side of government. Civil society organisations that hope to input into foreign policy agendas have to develop greater expertise before they can gain a respected place at the table.

**S. Wilding**—Civil society in South Africa is in a state of dormancy. During the Apartheid era, South Africa had a strong civil movement that was well supported, well-resourced and held a common cause. Today, civil society is fragmented, under resourced and lacking broad support.

From a common cause, civil society split into issue specific causes as democracy settled in. The causes range across the broad spectrum of human rights issues and have resulted in smaller organisations that do not necessarily share a common cause with their previous partners. Today, without a common cause, there is a vacuum where a strong civil society once stood, allowing it to be filled with unhindered government prerogative.

Some of the biggest issues that are being tackled by South African civil society are economic, social and cultural rights (right to housing, water, education etc.) and civil and political rights (women's rights, LGBTI rights, the rights of the child).

With the national elections coming up in 2014, civil society is focusing on the non-delivery of services to the people. In the months previous to the elections, most of civil society will have a common cause—holding government accountable for the promises made and the promises broken.

*C.L. Asano and L.W. Waisbich – How the fact that the country sees itself, or is seen by others, as an emerging power has affected the way you work with foreign policy?*

**M. Daruwala-** For a long time civil society has been engaging with international agencies in relation to standard-setting and monitoring country compliance, producing shadow reports and taking issues to the international community through influencing the National Human Rights Commissions, etc. To this extent, the processes of civil society organizations and government have been parallel, but also engaged with each other when status, papers etc. have to be produced. There is input.

In the recent perception of being an ‘emerging power’, there is more government consciousness of the embarrassment that might be caused by being seen negatively as well as a defensiveness about it. At the same time, there are more openings for civil society to engage with and provide input to government. The perception that India is an emerging power has also encouraged civil society outside the country to seek alliances and collaboration with country-based civil society with more deliberation than before. But this is a very nascent area and everyone is still feeling their way around it.

**S. Wilding-** South Africa has long seen itself as an ‘emerging power’ in Africa and, as such, has presumed a role of leadership in the continent, often playing the role of mediator in conflicts on the continent or raising African issues in international fora.

South Africa has also taken up a leading role in various multilateral arenas, including SADC (Southern African Development Community), the African Union (AU), the Non-Aligned Movement (NAM), G77+China, the Commonwealth, and the United Nations. South Africa exhibited leadership in promoting the causes of developing nations and Africa in particular. As a non-permanent member of United Nations Security Council (UNSC) from 2007-2008 and for the period 2001-2012, South Africa promoted peace and security with emphasis on Africa and improving cooperation between the UNSC and regional organisations such as the AU Peace and Security Council.

Although South Africa aligns itself strongly with the African continent, it also promotes South-South cooperation as a main tenet of its foreign policy. As an ‘emerging power’, South Africa has played a strong yet humble role in groupings such as IBSA and BRICS. These new groupings serve to further South-South cooperation and have, without a doubt, influenced South Africa’s foreign policy as it chooses to build consensus with these nations while picking up issues it may not have previously been active on.

During her Budget Speech in March 2010, the Minister of International Relations and Cooperation, Ms. Maite Nkoana-Mashabane, emphasized that South Africa’s foreign policy should be “assessed against the weight of rising expectations”. These are the expectations of South Africa as an emerging power, capable of playing a successful role in stabilising the power poles evident in the current world order while fighting for a more just and equitable world on behalf of nations of the South.



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## ABSTRACT

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The question of how best simultaneously to achieve and reconcile the twin desirable goals of good governance and economic prosperity has long been a focus of philosophical inquiry. In the modern (post-war) era, a new and important ingredient has been added to the mixture that binds economic and socio-political well-being - international law, and particularly international human rights law. This paper focuses on the different roles that so-called universal rights and freedoms are said to play in forging, sustaining and destroying the relationship between economic and social well-being, and analyses what are and will be the consequences for the political economies of the West and China. Though certain conclusions are drawn as to the significance of the agency of human rights, the paper suggests that it may yet be – as, reputedly, Zhou Enlai believed was the case regarding lessons learnt from the French Revolution – too soon to say.

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## KEYWORDS

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# FINDING FREEDOM IN CHINA: HUMAN RIGHTS IN THE POLITICAL ECONOMY

David Kinley\*

## 1 Introduction

In February 2012, a rather remarkable article appeared in the *New York Times* written by Eric Li, a self-described Shanghai “venture capitalist”. Under the provocative title of “Why China’s Political Model is Superior”, Li makes some bold claims. First, that “the modern West sees democracy and human rights as the pinnacle of human development. It is a belief based on absolute faith” (LI, 2012). And then, after articulating what he claims to be the Chinese Government’s alternative view that human rights and democracy are negotiable instruments or privileges granted only according to a country’s needs (especially economic) at any one time, Li adds: “The West seems incapable of becoming less democratic even when its survival may depend on such a shift [towards the Chinese Model]. In this sense, America today is similar to the old Soviet Union, which also viewed its system as the ultimate end” (LI, 2012).

And indeed today – more than five years after the onset of the current global financial crisis (GFC) – many Western economies are struggling, with some in serious trouble. The economic down turn following the credit crisis in 2007/8 has had enormous social and political implications, including a diminution in the enjoyment of basic human rights standards for many. Highly regressive austerity measures hurt the poor (and even the not so poor) more than the well-off, precisely because they affect the social welfare programs and public service programmes that the economically disadvantaged depend on. Mass unemployment, especially among the young, has long term detrimental social, political and economic consequences. Further, both the perception of, and experience of, wealth disparity resulting from publicly funded bailouts of private banks, tax breaks and tax avoidance schemes, creates, for many, a generalised sense of economic injustice.

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As a result, the prevailing economic philosophy is being questioned and challenged. Is the free market promise of ‘trickle down’ benefits for all enough? Is it, more fundamentally, sustainable? The very itch that Li is scratching has yielded serious debates not only over whether bad economic management is endangering democratic government, but also, whether “democratic governance may in some modern situations be inimical to competent economic stewardship”.<sup>1</sup>

## 2 History and the post-war rise of international law

These are not new questions. The simultaneous achievement *and* reconciliation of the twin desirables of good governance and economic prosperity has long been a focus of philosophical inquiry – in Ancient Greece, and before that during the Zhou Dynasty in Ancient China.

The European Enlightenment of the 17<sup>th</sup> and 18<sup>th</sup> Centuries preceded, precipitated and then partnered the 19<sup>th</sup> Century Industrial Revolution, with mixed results, but probably overall an advancement on the improving human circumstances in terms of social outcomes (mobility) and political practices (expanded democracy), as well as increasing aggregate economic wealth.

In the modern (post-war) era, the relationship between economic and socio-political well-being has had an increasingly important ingredient added to the mix, namely, international law. Many forms of international law have played their part:

- International trade law has accompanied and promoted globalisation which has had impacts within and between States far beyond mere trade relations;
- The cross-over between public and private international law regimes in the field of transnational commerce has directly influenced domestic laws governing investment, corporate conduct and dispute resolution;
- Multilateral and regional development and finance institutions have had profound and sweeping effects on how many poor countries govern their States; and,
- Increasingly, international environmental law impacts on the policies of domestic governments.

## 3 Human rights and the economy

Of all the sub-disciplines of public international law, however, it is international human rights law that is of greatest interest to the relationship between economic and political goods. This paper focuses on the different roles that rights and freedoms are said to play in forging, sustaining or destroying that relationship, and analyses what consequences thereby flow for the political economies of the West and China.

Although it sits in the ‘Bronze Medal’ position (behind peace and security, and international comity), the protection of human rights was included in the list of essential aims of the United Nations in its 1945 Charter. The protection



of human rights has an expressly stated object, namely, “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character” (UNITED NATIONS, 1945, art. 1, para. 3). This bold proclamation marked the beginning of the modern era of intense and varied analysis and argument over why, how and with what consequence, the governance of the economy on the one hand, and the rights of people on the other, can be reconciled so as to promote the ends of both.

In the years immediately after the War, and upon the advent of the modern ‘Age of Human Rights’ (HENKIN, 1990), with the Universal Declaration on Human Rights (UDHR) in 1948 and the steady stream of international human rights instruments that followed, the linkage between social and economic goods was dominated by notions of Big Government.

#### 4 Big Government - West and East

Thus began, in the stark but enabling environment of post-war Europe (and the West generally), the ambitious project of building the universal welfare state; a project which was seen as essential to cementing post-war peace and economic security, precisely because it underwrote human rights (and economic and social ones in particular) that had previously existed only as potential opportunities.

At the same time as this was happening in the Capitalist West, so ‘Big Government’ of a very different sort was being rolled out in the Communist East. The Leninist precepts shared by the Union of Soviet Socialist Republics (USSR) and China were being transformed into totalitarian concepts of the state by Stalin and Mao. Here too the political philosophy of the state claimed to be concerned with the welfare and security of the people, albeit in a manner encompassing state control of *all* aspects of societal existence, not just economic management.

Politically and economically, the West and East were divided, and steadily more so over the coming decades. That schism continued into the realm of human rights, as exemplified in the bifurcation of the rights in the UDHR into two separate Covenants by 1966. The West – reflecting its predominant concern with ‘freedom’ – sought to promote primarily civil and political rights, which, it argued, when secured by way of good/democratic governance would yield economic and social benefits (whether or not recognised as rights per se). China and more especially Russia, on the other hand, were more concerned with ‘equality’, stressing the need to focus above all on securing economic, social and cultural rights. In other words, while the West considered the political freedoms of individuals as the preferred path towards greater social wealth and security, the Hammer and Sickle States saw state-imposed or planned economic equity as the path towards individual fulfilment and security.

But times change, and even the best laid plans peter out or die. In fact, whilst at various times, each camp (the democratic/capitalist camp and the communist/planned camp) has claimed to be inimical and unrelated to the other, the direction and trajectory of each has very much been influenced by the development of the other. And so it continues today.

## 5 Changed times and new philosophies - *The West*

In the West, spurred by Hayekian views of how liberty is gained and maintained by protecting it from the totalitarian tendencies of States such as the USSR, which was imposing itself on Eastern Europe (VON HAYEK, 1944), advocates of much freer economic and financial systems raised their voices in the 60s and 70s. Milton Friedman in *Capitalism and Freedom* (1962) argued, that not only did such free markets operate more efficiently in economic terms, they were also the well-spring for the promotion of society-wide political freedoms (FRIEDMAN, 2002). In other words, while he didn't express it as such, Friedman and his acolytes saw the free market as the guarantor of the individual freedoms promised in international human rights laws.

Slowly but surely, upon the battlefield of economic philosophy, the free marketiers prevailed and by the 1970s, Keynesian financial and fiscal controls were replaced by a new vision of a liberalised international trading system that would, it was claimed, benefit us all by combating the scourge of poverty of people and nations, and bolstering the prospects for greater individual liberty (HELLEINER, 1994).

However, in setting this vision into motion, the architects of the project adopted a technocratic view of economics that was based upon theoretical models and sets of principles that were abstracted from any social context and which made no attempt to understand, let alone predict, the way changes in the financial and economic system would interact with different societies and their social structures. Human rights concerns, like all 'social' factors, were externalised from the calculations that determined economic direction.

Unfortunately, the aspect of the economy that is most prone to such unrealistic modelling was and is also one of the most critical, as well as being the least understood. The transformation of the financial sector over the past 20 years into the dominant economic force on the planet today has been truly remarkable.<sup>2</sup> But financiers – like many other professions – stick largely to the narrowly defined confines of their trade and do not spend much time worrying about how financial flows may be creating or exacerbating social tensions. When they do so, they do so from the perspective of country or credit risk – how it may affect the value of their investments or returns – not from the perspective of social cohesion and stability, still less notions of civil and political freedoms. A financial system driven by quantitative mathematical formulae capable of gargantuan leverage (the global derivatives market alone is worth many times the global Gross Domestic Product - GDP<sup>3</sup>), has played a direct role in the acute polarisation of humanity according to wealth (LIN & TOASKOVIC-DEVEY, 2011; DOWD & HUTCHINSON, 2010). The last decade of globalisation has seen an enormous growth in income inequality both within and between nations, for while the financial system creates enormous gains for insiders, it provides no guarantees or insurance for the masses of outsiders who are generally the worst affected by its periodic instability.<sup>4</sup>

In fact, such levels of abstraction provide fertile ground for application

of the law of unintended consequences, as the social realities of such matters as unpredictable patterns of behavioural risk-taking rudely intrude upon fine-tuned economic models. Free market bubbles expand and burst, with detrimental – sometimes disastrous – results for States and their peoples. And sometimes, in the aftermath – as is the case with the present burst bubble – the prevailing economic philosophy is fundamentally questioned in the ways indicated at the beginning of this essay.

## 6 Changed times and new philosophies - *The East*

The 1970s and 80s were times of changes and challenges for the USSR, and China too. The USSR was struggling to maintain political and economic traction as it, together with its satellite States in Eastern Europe, fell further and further behind the West in terms of wealth creation, leading eventually to the stop-gaps of Perestroika and Glasnost and the final collapse of the Soviet Empire in 1989. China, which was recovering from the monumental impacts of famine and an abandoned cultural revolution, moved steadily towards a political crisis that reached its peak in Tian'anmen Square in June 1989, following which the steps towards economic liberalisation taken during the 1970s and 1980s were consolidated and accelerated under Deng Xiaoping's direction in the early 1990s.

## 7 China

The extraordinary changes that China has undergone since that time, though perhaps most dramatic in economic terms, are also profound in terms of politics, social relations and indeed human rights. Critical to those transformations has been the degree of interconnection between all of these spheres. The world over, the hopes and aspirations of people and individuals regarding their economic and political freedoms and opportunities, are tied closely to how economic and political systems are performing. Therefore, in times of growth and plenty, hopes and expectations of gaining or advancing such freedoms are high, while they tumble when economies slacken and systems of governance are challenged. And so it is with China.

### 7.1 *Social, political & economic considerations*

Thus, for example, the instance, size and reporting of public protests is evidently rising at the same time as the economy is slowing from its average annual growth rate of 8-14% over the last 12 years. Such community disquiet is concerning for China's government and citizenry alike. A recent editorial in Caixin, China's leading business journal, warned that "if we continue to hanker after economic 'miracles', we must be prepared to pay a high price in the future". What is particularly interesting about this caveat is the set of indicators that the magazine chooses to illustrate the 'high price' to be paid, namely:

*growth will fall; discrimination will become pervasive, and rent seeking and corruption rampant; our society and environment will be pushed to their limits; and development cannot be sustained. The mass protests, riots and environmental disasters we have seen are just some of the consequences of this growth model.*

(BRANIGAN, 2012).

Apparently, the very same concerns have played on the minds of delegates to the latest 18<sup>th</sup> Communist Party Congress.<sup>5</sup>

The possibility or prospect of the political consequences of economic or financial forces inside China is also a matter of intense and enduring interest to the rest of the world for both economic and geo-political reasons. How financially squeezed is the so-called ‘squeezed middle’ in China and what are their political hopes and expectations? What will be the social impacts of the reorientation of the Chinese economy from being export driven to having a focus on domestic consumption, as well as the transformation of its industrial model from one based on manufacturing to one based on services? And how long will these transitions take? How susceptible is the local economy to significant political change or unrest, and how, in turn, would that affect the global economy?

## *7.2 Good governance and economic growth<sup>6</sup>*

There are many factors at play here of course – and far too many to be adequately covered in an article of this size – but one that seems to be critical from the perspective of outsiders looking in, relates to the connections between good governance (open, fair and safe, as well as efficient) and sustained economic growth and wealth dispersal. This is difficult terrain to chart, but some – like Kaufmann, Kraay and Mastruzzi at the World Bank Institute – have been trying to do so for nearly a decade now by using six so-called ‘governance indicators’ for more than 150 countries (WORLD BANK, 2012a). Taking measurements for each country’s progress relative to all others over the 10 years since 2002, the results are remarkably stable for China, with only minor changes during the period on all indicators. In only one of those indicators does China reach into the top 50th percentile (‘government effectiveness’); and in respect of ‘voice and accountability’ it ranks in the lowest 10th percentile. For all others (‘political stability’, ‘regulatory quality’, ‘rule of law’, and ‘control of corruption’) China hovers around the middle of the 25th-50th percentile (WORLD BANK, 2012b). On the basis of these data, the country’s Gross National Income (GNI) growth over the same period (from approximately US\$ 1,000 in 2002 to nearly US\$ 5,000 in 2011), would appear to have had little impact on the governance as so measured (WORLD BANK, 2013a; 2013b).

That said, a lurking spectre of widening levels of income inequality has for a decade now threatened to destabilize the nexus between governance and wealth distribution. For the 11<sup>th</sup> year in a row, China’s National Bureau of Statistics (NBS) has collected data and calculated the nation’s so-called Gini Co-efficient, but then declined to publish it claiming incomplete data sets. Unsurprisingly, many see this as a tacit admission that inequality is considerable, and, significantly, that it

is getting worse, not better. This suspicion would appear to be confirmed by the International Institute for Urban Development in Beijing which, by using what data is available, estimates that the index has crept upwards (i.e. more inequality) from 0.425 in 2005 to 0.438 in 2010 (XUYAN & YU, 2012; CHINA REALTIME REPORT, 2012). As it turns out, in fact, these estimates were somewhat understated. For in January 2013, the NBS reversed its hitherto secretive stance by publishing all its inequality data for the past twelve years, which showed that the Gini coefficient for China in 2012 was 0.474, having come down from a high of 0.491 in 2008 (ECONOMIST, 2013, p. 28).

### *7.3 A Human rights perspective*

Certainly, perceptions from inside and outside the country are that the sheer speed and size of China's economic progress has brought both social (including human rights) and economic gains as well as losses. Some benefits have spread widely and others trickled down deeply.<sup>7</sup> In less than a decade, for example, China has expanded rudimentary health care insurance to cover 95% of the population; abolished state school fees in rural areas; provided farmers with access to a (admittedly minimalist) state pension scheme; and a massive low-cost housing program is currently being undertaken in all major cities (ECONOMIST, 2012, p. 19). Most impressive of all, some 250 million people have been lifted out of abject poverty (measured as an income less than \$1.25 per day) since 2000. Problems remain, however, with some 150 million people (12% of the total population) still languishing below that line, while, at the same time and underscoring the inequality point made earlier, China now boasts more than 100 billionaires (in US dollars), up from zero in 2002 (FORBES, 2012).

### *7.4 Political freedoms*

The Chinese government's expenditure on internal security suggests that the potential for egregious inequalities to tend communities towards fervent expressions for greater economic *and* political freedoms is taken very seriously. The Chinese government spends more on internal (or 'public') security than it does on national security (US\$ 111 billion and US\$ 106 billion, respectively, in 2012 (REUTERS, 2012)). The number and boldness of street protests is increasing, as are criticisms of state cronyism and incompetence posted on social media. The latter, in particular, is not only an increasingly important avenue for public expression (Weibo now has some 300 million accounts with 30 million daily active users), but such micro-blogging – which the *Economist* recently labelled 'the next best thing to a free press' (ECONOMIST, 2012) – also provides the leadership with a barometer to gauge the strength of community feelings over a wide range of social, economic and political matters. The keenness with which the Chinese leadership attends to these signals is evident in its consent in August 2012 to release through official media sites a previously restricted (but leaked) report prepared for the senior leadership that warned of crises looming on a number of

fronts, which, if not properly handled, could set off “a chain reaction that results in social turmoil or violent revolution”.<sup>8</sup>

## 8 A human rights frame of reference

The interconnectedness of the fate of human rights and the management of the political economy - whether in China or in the West – is such that no one grand theory adequately explains their ties *and* at the same time provides a path to their satisfactory reconciliation. Neither the extreme of free market economics, with little or no state intervention, nor the opposite of state totalitarianism yield social and political freedoms that are widespread and sustainable. To vacillate between the two by countering the one with the other is destructive and dangerous. Thus while so many scorned the inanities and inequities of Hitler’s Germany and Stalin’s Russia when arguing for the promotion of individual political and economic freedoms, Karl Popper was rightly careful to warn against using this to justify removing all state safeguards altogether, lest one permit private economic authoritarianism to take the place of state-based versions.<sup>9</sup>

In the space between these two extremes China has come to occupy a place of peculiarity, wonder and some notoriety. Friedman, in the Preface to a Fortieth Anniversary edition to the republication (in 2002) of *Capitalism and Freedom*, acknowledged that China’s (or more specifically Hong Kong’s) powerful, liberalised economy had nevertheless not led to more political freedom, as his thesis would otherwise suggest.<sup>10</sup> Though, reflecting upon the arguments made earlier in this essay, one might prudently add that perhaps it is still too soon to say.

Another philosopher-economist, Amartya Sen, provides an alternative perspective on the relationship in his book *Development as Freedom* (1999). Sen’s objective is to assist the poor and marginalised in terms of their social and economic circumstance, and the means he advocates by which to do so is to reconfigure orthodox (i.e. purely economic) perceptions of ‘development’ such that both their goals and methods combine social and political freedoms with economic capacity.<sup>11</sup> For Sen, it is critical to look at the causal processes that lead to any economic circumstance (SEN, 1999, p. 150), for whether it is wealth or poverty, or somewhere in between, the nature and extent of political freedoms will be at their heart. Far from being in opposition, political freedoms on the one hand, and economic prosperity and development on the other, work, necessarily, in tandem. A position of economic security or even abundance, but *without* attendant civil and political freedom is, for Sen, not development at all, but a sort of misshapen or aberrant version of it.

As such, one might conclude that a robust response to Mr. Li (our Shanghai venture capitalist) is to say that whatever the problems caused by the West blindly worshipping at the altar of democracy and human rights, the situation cannot be repaired by placing the economy on a pedestal and worshipping it instead.

In reality, neither the West, nor China truly worships only at the one altar. Many readers of the *New York Times* article would have laughed at the assertion that the US and the West generally have “absolute faith” in human rights, when it

seems so clear that the power of the economy holds sway in the minds of Western governments. China, equally, does not of course only see the world through economic eyes. It is a growing participant and contributor to the development of international law generally and to international human rights law in particular, having ratified all of the major UN human rights instruments bar one – the International Covenant on Civil and Political Rights (ICCPR) (HUMAN RIGHTS COMMITTEE, 1994).

And it is perhaps with respect to the rights covered by the ICCPR that China faces one of its greatest challenges in terms of international law and domestic governance. For, while the fact that China has signed but not ratified the Covenant, shows earnest intent *not* to dishonour the instrument, it remains to be decided whether for China to eventually ratify (as it surely will), would be to assist in the country's smooth transition to a system democratic government combined with a thriving free-market economy.

On this reading, human rights can be seen as integral components of the processes and ends of development. Their expression, promotion and protection and enforcement in legal and non-legal forms are vital. In practical terms, this requires meaningful domestic application through legal rules and policies that result in acceptance and/or adherence. It might be said, therefore, that international human rights law plays a role in promoting compliance, but only when it reflects what exists 'on the ground' in States. 'Freedom' for many people in many States, however, does not reflect development in practice in the manner envisaged by Sen. Presently that includes countries such as China where political freedoms are restricted, albeit alongside greater economic prosperity and distribution. But also in States such as Greece, Ireland, Spain and the US, economic and social rights are denied to the poorest and most marginalised, even if, in theory, political freedoms are available to them.

All this points to an uncomfortable truth. There are, as Sen argues in his later work, "limits" to the utility of human rights law (SEN, 2006). The legal baggage of human rights can sideline or distort the other necessary elements of development – political philosophy, social and cultural mores, as well as economic capacity – especially if relied on too much.

## 9 A concluding lesson

For me, this point is no better illustrated than by the example of the ongoing, but misguided promotion of the notion of a 'Right to Development', as quintessentially represented by the UN Declaration on the Right to Development in 1986. The right to development as depicted in the Declaration is not only legally compromised (being unclear, circular and contradictory), but far more importantly, it is strategically naïve and politically counterproductive. Almost no one outside a committed band of advocates likes what is being offered. Rich States abjure any legal duty to provide development assistance; developing States might like to see such a duty imposed on rich States, but balk at it being imposed on them; and the individuals and communities that stand to gain from development may like the

idea of an individual (or group) being able to claim a right to such, but distrust the sincerity and commitment of any State or international body claiming to accept responsibility to honour such a claim.

It is on this salutary - even chastening - point that I would like to conclude. For if we are to better understand the nature of the relationship of human rights with the political economy, and how then we might more successfully 'find freedom', we must, as lawyers, know where to draw their legal boundaries. We must accept that there are limitations to the utility of human rights laws. And to know when to step outside the boundaries of our discipline to learn, engage with and argue with others. And while the implications of this circumstance may differ for international and human rights lawyers in China's political economy, as compared to those in the political economies of the West, they all share the overarching goal securing the political and economic benefits of freedom. That is, they seek to understand, explain and promote systems of governance that are fair, efficient and inclusive, and economies that are open, effective and prosperous. In the decades before China's recent rise, a number of its neighbours - Japan, South Korea and Taiwan - enjoyed similarly spectacular trajectories of economic growth. Yet, while each adopted, like China, carefully calibrated economic policies that balanced protectionism and trade liberalization, they did so under the direction of very different forms of government (STUDWELL, 2013). Significantly, however, politically, each of these is now a flourishing democracy with broad recognition of, and respect for, international human rights standards. Certainly, such an outcome was not and is not inexorable, but it surely a prospect understood by many both inside and outside China.

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## NOTES

1. A neat phrase that I am borrowing from an essay of one of my 2012 postgraduate students, Christianne Salonga.
2. This section draws directly from a conference paper I wrote with Mary Dowell-Jones (KINLEY; DOWELL-JONES, 2012).
3. Statistics from the Bank for International Settlements indicate that there are now nearly US\$650 trillion worth of 'over the counter' derivatives (those negotiated privately between financial institutions, which include only roughly half the outstanding total) in existence. This alone is more than ten times the value of world GDP (BIS QUARTERLY REVIEW, 2012).
4. As we have seen with the recent financial crisis, at the extreme the financial sector cannot insure its own losses, despite the theory of derivatives as risk management tools, and the taxpayer has to subsidise the system as well as cover their own losses from financial instability.
5. See remarks by Premier Wen Jiabao immediately before the NPC (INTERNATIONAL BUSINESS TIMES, 2012).
6. This section is drawn from Kinley; Dowell-Jones, 2012.
7. See, for example, the human rights advances in respect of economic and social rights in particular, as outlined in China's most recent 'White Paper' on human rights in 2009 (CHINA, 2010), and as projected in its *National Human Rights Action Plan (2012-15)* (CHINA, 2012).
8. "Internal Reference on Reforms - Report for Senior Leaders", (re)released in August 2012 (ECONOMIST, 2012).
9. This was the consequence of what Popper called "the paradox of freedom" (POPPER, 1945, Notes to the Chapters, Chap. 7, Note 4).
10. While reviewing how well his arguments have withstood the test of time since their first airing 40 years earlier, Friedman reflects: "[i]f there is one major change I would make, it would be to replace the dichotomy of economic freedom and political freedom with the trichotomy of economic freedom, civil freedom and political freedom. After I finished the book, Hong Kong, before it was returned to China, persuaded me that while economic freedom is a necessary condition for civil and political freedom, political freedom, desirable though it may be, is not a necessary condition for economic and civil freedom" (FRIEDMAN, 2002, p. ix).
11. "Not only is free agency itself a 'constitutive' part of development, it also contributes to the strengthening of free agencies of other kinds" (SEN, 1999, p. 4).

## RESUMO

A questão de qual a melhor maneira de alcançar e conciliar as duas metas desejáveis e complementares de boa governança e prosperidade econômica são há muito tempo objeto do pensamento filosófico. Na era moderna (pós-guerra), um ingrediente novo e importante foi adicionado à relação entre bem-estar econômico e sociopolítico – a saber, o direito internacional, e em especial o direito internacional de direitos humanos. Este artigo trata especificamente dos diferentes papéis que os chamados direitos e liberdades fundamentais devem supostamente desempenhar no sentido de forjar, manter e desfazer a relação entre bem-estar econômico e social e analisa quais são hoje e quais serão no futuro os efeitos destes direitos e liberdades para as economias políticas do Ocidente e da China. Embora este artigo apresente algumas conclusões sobre a importância da agência dos direitos humanos, sugere-se aqui que talvez ainda seja – como supostamente Zhou Enlai acreditava ser o caso das lições aprendidas da Revolução Francesa – muito cedo para dizer.

## PALAVRAS-CHAVE

China – Direito internacional – Direitos humanos – Desenvolvimento – Crescimento Econômico – Boa governança – Liberdades políticas

## RESUMEN

El interrogante de cuál es la mejor manera de alcanzar y conciliar simultáneamente las dos metas deseables de la buena gobernabilidad y la prosperidad económica es objeto de indagación filosófica desde hace mucho tiempo. En la era moderna (de posguerra), se ha sumado un ingrediente nuevo e importante a la mezcla que combina el bienestar económico y el socio-político: el derecho internacional y, en particular, el derecho internacional de derechos humanos. Este trabajo se centra en los distintos roles que se dice que desempeñan los así llamados derechos y libertades universales en forjar, sustentar o destruir la relación entre el bienestar económico y el social, y analiza cuáles son y serán las consecuencias para las economías políticas de Occidente y de China. Si bien se extraen ciertas conclusiones respecto de la importancia de la agencia de los derechos humanos, el trabajo sugiere que –tal como se dice creía Zhou Enlai respecto de las lecciones aprendidas de la Revolución Francesa– aún podría ser demasiado pronto para saberlo.

## PALABRAS CLAVE

China – Derecho internacional – Derechos humanos – Desarrollo – Crecimiento económico – Buena gobernabilidad – Liberdades políticas



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## ABSTRACT

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This article looks at the constitutional challenge filed before Colombia's Constitutional Court that sought to include conscientious objection within the grounds for exemption from compulsory military service, as an example of strategic litigation by legal clinics and social movements. It analyzes the discourses of different actors to shed new light on the translation of a social claim into a legal one, and examines in particular the way in which these discourses relate to each other, and are interpreted and restricted. It aims to show that, in addition to the legal benefits, it is relevant to keep in mind other, less evident aspects and implications for social movements (such as reliance on experts as intermediaries who can translate lay/non-expert claims into legal language), when considering the best strategy to promote and protect their claims.

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## KEYWORDS

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Constitutional Court of Colombia – Conscientious objection – Social movements – Strategic litigation – Legal clinics



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# THE PROMOTION AND PROTECTION OF HUMAN RIGHTS THROUGH LEGAL CLINICS AND THEIR RELATIONSHIPS WITH SOCIAL MOVEMENTS: ACHIEVEMENTS AND CHALLENGES IN THE CASE OF CONSCIENTIOUS OBJECTION TO COMPULSORY MILITARY SERVICE IN COLOMBIA

Laura Betancur Restrepo

## 1 Introduction

In Colombia, ever since the Constitutional Court (hereafter referred to as “the Court”) was created by the 1991 Constitution, it is common to hear that the protection of fundamental human rights and advances in legislation on this issue have come about primarily through “landmark”<sup>1</sup> rulings by this body. One of the consequences of this tendency to take the most controversial cases before the Court is evident in the rise of legal clinics. These legal clinics cover a range of things, including strategic litigation aimed at achieving concrete changes in the law, and they have become important focal points for the legal promotion and protection of fundamental rights. At the same time, different social movements have increasingly sought to ally themselves with legal clinics in order to present litigation that has the best chance of being heard by the Court.

One way of analyzing the relationship between legal clinics and social movements is to look at the legal results that have been obtained, in order to determine whether the Court rules in favor of or against them, and/or if it modifies the existing law in favor of the right in question, or not. In other words, analyzing the relationship between the argument in the document that is presented (the complaint) and the argument in the result (the ruling), with the understanding that the goals of the social movements can be found in the complaint that they file before the Court. A less common way of analyzing this relationship involves

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*Notes to this text start on page 171.*

looking at the arguments made by the social movements and the strategic legal discourse produced with the support of the legal clinic. In this study, I will focus on this relationship, and the “translation” of discourse that happens therein, using the example of the case filed before the Constitutional Court seeking to include conscientious objection as grounds for exemption in the law that governs Obligatory Military Service (hereafter referred to as OMS).

## 2 Objective and methodology

This article seeks to highlight the use of different discourses in the process of making constitutional claims. It does so in order to analyze constitutional rulings from a perspective that looks beyond the outcome of the judgment; sometimes, the Court’s decisions are analyzed only in terms of how the argument is constructed and the legal interpretation that it applies. Thus, this article also takes into account the arguments used in the complaint, in interventions by citizens and social movements, in the judges’ deliberations, and in the ruling (C-728-09) (COLOMBIA, 2009b). Keeping in mind that landmark decisions are often preceded by various prior failed cases,<sup>2</sup> it is important to look at the types of discourse used by the plaintiffs, to see the degree to which those influence the achievement of effective progress through rulings that “re-conceptualize” fundamental rights (LÓPEZ, 2006, p. 165).

However, this article also seeks to trace the interests and motivations of the complaint’s beneficiaries, and the degree to which they are reflected in the legal discourse. That is to say, to determine to what extent the movements’ goals are clearly reflected in the claims made in the case, and to what degree the Court’s ruling satisfies them. This is particularly relevant considering the proliferation of cases that seek to constitutionally promote and protect fundamental rights and that result from alliances between social movements and legal clinics. The article will then analyze the different intervening discourses in one concrete case, in order to shed light on the reach and limitations of the legal translation of a social claim, looking in particular at the way in which the discourses relate to one another, are interpreted, and limited, when joint strategies are used in this kind of alliance. This closely follows sociological and discursive characteristics identified by Bourdieu (2000 [1987]) and Conklin (1998).<sup>3</sup>

I will begin by offering a short background of the law clinic – social movement alliance that presented a constitutional claim in this concrete case. I will then examine the text of the lawsuit as it was presented, trying to identify the goals contained therein, to then compare it with the aims of the actors that participated in its development. In doing so, I will base my description primarily on interviews with the actors that participated in the process<sup>4</sup> and informative documentation from each of the organizations. Furthermore, I will analyze the Court’s response, contained in decision C-728-09, emphasizing the type of discourse used, and whether it adopts or rejects the discourse of the complaint and citizens’ interventions,<sup>5</sup> in order to try to identify which of the arguments from the complaint and the interventions was considered by the judges, and

how they were received. Here I will be using the record of the deliberations in the courtroom where the case file was discussed, and an interview with the Auxiliary Judge of the Court.<sup>6</sup> Finally, I will offer some theoretical commentary on the benefits and limitations of this kind of proceeding, where an “expert intermediary” seeks to “translate” and move the struggles of social movements into the legal arena.

### 3 Context

Between 2007 and 2008, CIVIS,<sup>7</sup> as part of its work in Colombia, decided to support the Collective action of Conscientious Objectors (ACOOOC).<sup>8</sup> This support included training, financial assistance, advocacy work, follow-up and connecting with other organizations or institutions, in order to strengthen the work undertaken by the conscientious objectors. In 2008, as part of that support, CIVIS put ACOOC and members of the Mennonite Church of Colombia<sup>9</sup> in touch with the Public Interest Law Group (G-DIP), a legal clinic at the Universidad de Los Andes (Bogotá, Colombia),<sup>10</sup> to come up with joint strategies to help advance legal recognition for conscientious objection, especially to prevent those objectors from having to fulfill OMS.

G-DIP proposed filing a constitutional claim regarding article 27 of Law 48 from 1993 before the Constitutional Court, because it did not include conscientious objectors within the group of people who could be exempted from offering OMS.<sup>11</sup> The lawsuit was drafted by members of G-DIP and the Constitutional Observatory (hereafter referred to as “the Observatory”) at the Universidad de Los Andes, in an alliance (discussed and approved) with ACOOC and CIVIS, and financed by the European Union. The case was filed in March 2009 in the name of Gina Cabarcas (member of G-DIP), Daniel Bonilla (then the Director of G-DIP) and Antonio Barreto (Director of the Observatory) and was accompanied by numerous citizen interventions.

On October 14, 2009, the Constitutional Court issued decision C-728-09, which affirmed the constitutionality of the norm in question, but determined that conscientious objection is in effect a fundamental right that derives from right of conscience, and thus that it does not require a regulation to be protected, and can be claimed directly through a writ of protection. The Court urged Congress to issue legislation on this topic.

After that, the alliance comprised of G-DIP, CIVIS and ACOOC continued to work together to prepare a bill for Congress on the right to conscientious objection, and lobbied for progress in different efforts to regulate the issue.

### 4 The discourses and goals within the adopted legal strategy

A first question that arises is what was the plaintiffs’ underlying goal in presenting a case like the one on conscientious objection, so that we can then determine the extent to which the social movements’ goals coincide with those of the legal clinics, and the degree to which those goals can be achieved through a

constitutional challenge. Further on, there is the question of where to find these goals: in the text of the lawsuit? In the arguments of the lawyers who drafted it? In the aims of the social movements? In the way in which the Court understood and responded through its ruling? In what the judges hoped to communicate through their decision?

It's not about trying to understand the text (of the complaint or the decision) as something objective, independent of the intention of its authors (the plaintiffs or the judges), because, accepting the idea of Foucault (1992 [1970]), the discourse is not a simple (transparent, neutral, external) vehicle of an idea (which is external, significant, subjective). Discourse exists when it is uttered; it is a singular, subjective act with its own power and force, and it is never objective or true. But this should not stand in the way of trying to distinguish between the texts (those that are written collaboratively and trying to be neutral and truthful, as legal complaints and rulings are) from the discourses, and trying to understand the latter by analyzing not only the goals as they appear in the texts themselves, but also the goals that seem to emerge from the interests of the texts' authors.

By distinguishing between different goals in this way, I am not trying to separate the discourse from its author, but on the contrary to understand a text's content (which is apparently neutral, logical, and descriptive) by starting with the motivations and goals that carry all the weight of power and intentionality, and which come out in complementary texts and discourses. What appears to be the basic goal of a demand in a text does not always coincide with the participants' interests and motivations. This way of analyzing the different discourses will allow us, for example, to see more clearly the degree to which the goals of a social movement are incorporated into a text like that of a constitutional challenge (to what extent they are altered by being incorporated there), and to what degree a text like a court ruling is receptive to a given discourse and can or does really respond to the goals reflected therein.

## 5 The discourses of the plaintiffs

### 5.1 *The goals according to the lawsuit*

The complaint that gave rise to decision C-728-09 (hereafter referred to as “the complaint”) is technically complex. Its legal strategy was developed over more than a year, in the context of the activities of G-DIP and the Observatory, and it reflects the participation of students and professors from the Universidad de los Andes. This judicious and cautious work is evident when one reads the text of the complaint. Its structure, argumentation, wording and technicalities indicate that it was essentially done by lawyers. The complaint's argument is divided into four points. Two of them are technical legal arguments to show procedurally that the Court has jurisdiction to rule on the merits of the case<sup>12</sup> and two are technical legal arguments with the basic content of the complaint: that objectors were omitted from the legal bases for exemption from OMS



and that this violates several fundamental rights that are protected by the Constitution.<sup>13</sup>

The argument explicitly states the need for legislators to include conscientious objection within the grounds for legal exemption; that is, the formal objective is a declaration of the conditional enforceability or alternatively the unenforceability of article 27. It is this claim that gives the Court jurisdiction to rule, and on which the arguments of the complaint are constructed. However, the arguments are based on the assumption that conscientious objection is part of the core of the fundamental right of conscience (a line of argument that had not been embraced by the Court before) and recognition of this is in itself a goal of the complaint. So we can say that recognition of the right of conscientious objection is part of the goal of the lawsuit filed by the G-DIP (if not the key goal) because it is only in the degree to which conscientious objection is understood and recognized as a fundamental right that its legislative omission from the OMS exemptions can be considered a violation of the aforementioned rights, and that the request for conditional enforceability or unenforceability can be accommodated.

The complaint was supported by many citizen interventions that together were joined by more than 400 supporters. Several of them reinforce or deepen the technical legal arguments in the complaint, and others bring in other discourses that fall outside the legal arena (personal motivations, religious convictions, or historical proof of their traditions).

## 5.2 *The goals of G-DIP and the Observatory*

For G-DIP, this was a strategic lawsuit built around protecting and guaranteeing conscientious objection; it connected with the Observatory due to their expertise in constitutional law, in order to come up with a legal strategy that had a chance of success. Between the two, they developed the legal argumentation mentioned above.

Now, the strategy built to make it possible to go to the court with a concrete complaint comprises the *legal* objective. It is one way (among a range of possibilities) to achieve a goal: recognition of the right to conscientious objection to avoid the forced recruitment of young objectors to OMS. This was corroborated in interviews with Antonio Barreto (2012) and Daniel Bonilla (2012), who saw the Court's ruling as progress, even though the Court did not embrace the formal goals of the complaint.<sup>14</sup>

Thus, we can differentiate between the formal, legal/technical goal and the essential, bottom line goal that motivated the use of a particular argument to convey that objective, which can change the way of evaluating whether or not the complaint was successful. If it is seen as a path towards recognition of conscientious objection as a fundamental right, then the strategy (the complex construction of a strategy that got the Court to rule on the issue) achieved its objective; but if one looks at the Court's refusal to modify the standard in response to the complaint, then it did not achieve it.

### 5.3 *The goals of ACOOC and CIVIS*

Julián Ovalle (2012), a member of the ACOOC and the link between G-DIP, ACOOC and CIVIS, says “they knew” that the strategy that G-DIP proposed was “limited” to making *legal* advances in the recognition of conscientious objection. So he says that he understood the legal strategy that was adopted, although he admits that he had trouble reading and understanding the technical arguments in the complaint. However, while he celebrated the fact that the Court recognized conscientious objection as a fundamental right, he says it “seemed strange” to him to incorporate conscientious objection within a norm that governs OMS and consider it as a reason for exemption from that service.

He finds it strange because conscientious objection has broader implications that include opposition to the “militarization of society and the State” (OVALLE, 2012) that is reflected in the existence of OMS and the inability to object to it for reasons of conscience. He says that he knew that wasn’t the goal of the complaint, and that the complaint “had to” be like it was because anti-military sentiments “did not fit” there. He says they trusted what G-DIP was doing on the legal elements, since they were experts, and that the result seemed to him to be “a great academic document” (OVALLE, 2012). Thus, although the perspective on conscientious objection struck them as incomplete (because it did not affect the overall militaristic situation), and even problematic (framed as exemption from a norm that governs OMS), they figured that the experts knew best how to proceed. However, for them, this was one step within a larger struggle. For him, having this recognition of the fundamental right to conscientious objection “gives muscle” (OVALLE, 2012) to their fight. A supplementary “muscle”, insufficient by itself.

In accepting and endorsing G-DIP’s strategy, he says that they supported its formal objectives and that they knew that it essentially (and narrowly) sought to fight for recognition of a right, but that this did not encompass all of the ACOOC’s goals. The distinction between what they sought with the lawsuit (what they hoped to get from the Court) and their additional motivations was clear for them, and they let their objectives be translated into a legal fight that left other, broader goals to one side. In this sense the translation of one discourse into another was perceived to be of strategic interest for both G-DIP and ACOOC, because it allowed for progress, albeit partial, to be made in their broader personal struggles.<sup>15</sup>

However, even though Ovalle says that they understood and endorsed the legal strategy, with all its limitations and the risk of an unfavorable decision, there are times when that was not so clear. This can be seen, for example, in how they understood the decision and the potential to continue with the legal alliance to work on the legislation that would regulate the right to conscientious objection. They find it unacceptable that an objector would have to “prove” his or her beliefs, even though the Court expressly requires that the objector status be “proven”. For the G-DIP, without implying that nothing more can be done through other channels, it meant that if they want to go to Congress regarding

what was requested in the ruling, the dialogue should proceed within the limits imposed by the legal discourse, and an effort to advance things before Congress should be made within the limitations established by the ruling. For the ACOOC, nothing the Court says and nothing that the right expresses can restrict or modify their struggle. The complaint was one step among many others to advance their social aims and motivations. The idea, then, is that if there is a law or a right that they agree with, they support it, and if they don't, they don't. However, they find themselves somehow having to continue the struggle within the legal arena (before with the Court, and now with Congress) and with the consequences that emerge from there. While they don't have to modify their convictions, this will surely affect and change their priorities.

So, when does the experts' involvement stop being "enriching" or "useful" and become "necessary" or "indispensable"? Is the choice of leaving to the experts the translation of a broader goal that doesn't fit within the legal discourse really a free one? How can one determine the point at which that translation distorts the primary objective of the social struggle? In sum, is this appropriation of social and political problems by the legal discourse desirable?

## 6 The discourse of the Constitutional Court

### 6.1 *The goals according to the text of decision C-728-09*

In many rulings, the summary of the goals of the complaint takes up a few paragraphs or a few pages, but in this case several arguments are taken up again and extensively cited. This leads us to think that there was receptivity to the technical legal discourse of the complaint. The Court shows varying degrees of interest in citizens' interventions. Among the interventions that are taken up to a large or medium degree are those that contain legal arguments. Of those that include non-legal arguments (such as social and political beliefs), only the ACOOC's and three life stories of ACOOC members drafted by anthropology students are referred to. The others are only mentioned briefly or not at all.

The text indicates that the legal problem reflected in the complaint is whether or not the legislature committed legislative omission that violated the rights to equality, freedom of conscience and freedom of religion by not including conscientious objectors. In other words, the goal that was picked up by the decision is the technical-legal one that was formally demanded in the text of the complaint. Later, it notes that there was an absolute, not relative, legislative omission, and that the judge cannot add content to the standard. But it also affirms that the right to conscientious objection does come directly from the Constitution (which can give an exemption to the OMS) and that, as a fundamental right, it can be protected through a writ of protection. It urges Congress to pass regulation on this issue, but it imposes certain criteria for someone to be considered a conscientious objector: the person should demonstrate, through external means, that his or her convictions are deep, fixed, and sincere.

Four judges dissented, reasoning that the goals of the complaint should

have been accommodated. However, the existence of a fundamental right to conscientious objection, and the potential to invoke it to exempt oneself from OMS (the goal that was determined to be the “bottom line”) was unanimously accepted.

## *6.2 Goals according to the judges’ deliberations*

The record of the deliberations regarding the proposed decision show how the judges perceived the interests or objectives sought through the complaint, and the arguments that they considered when they made their decision. These controversies, interests and disagreements can’t be seen in the text of the decision, which is presented as “neutral” but is the result of a decision and a discussion that permeates the result and allows us more easily to see the charges that are later presented as logical, objective truths.

In the words of Bourdieu, a court ruling “condenses all of the ambiguity of the legal field; it is a political compromise between irreconcilable demands that, nevertheless, is presented as a logical synthesis of opposing theses” (BOURDIEU, 2000 [1987], p. 185). Despite the fact that the record of the deliberations is itself a summarized, biased document –an intermediary between the discussions, the private intentions of the judges and the wording used in public – its analysis is nevertheless interesting, because it gives another perspective into the judges’ motivations.

It fell to Judge María Victoria Calle to present the draft decision. That decision took up the aims of the lawsuit almost in their entirety, and declared conditional constitutionality based on partial legislative omission regarding conscientious objectors. In the record, there are several discussions on the technical content of the complaint, particularly regarding the broad and vague scope that could be deduced from the declaration of conditional enforceability and whether or not the objectors could be grouped together with indigenous persons and people with disabilities (which turned out to be the argument used to reject the aims of the complaint). But alongside these technical aspects, the deliberations also covered other issues, indicating that the judges’ perceptions of the objectives of the case did not come solely from the text of the complaint nor from a legal/technical analysis.

They discussed the role of the citizen interventions, the importance they should be accorded, and the freedoms or limitations of content that was considered “political”. They debated whether these covered an additional claim to the case, with content offensive to the Armed Forces. These two aspects are interesting because there were many interventions, all of which were different: some came from legal centers or organizations, and others from social movements that fought for conscientious objection and that explained their reasons for calling themselves objectors, thus adding additional discourse to the case. Some used technical legal elements (protection of international law, or links between conscientious objection and the rights to freedom of conscience and religion) and others took on a personal tone, narrating their motivations for not being part of an armed group.

Now, the judges refer to “citizens’ interventions” as if these citizens were a cohesive group. Some felt that these interventions shouldn’t be given much weight in a Constitutional Court decision, arguing that “the Court shouldn’t fall for these organizations’ game” (Judge Pretelt) (COLOMBIA, 2009d, p. 10) and that “the constitutional judge can only hear legal arguments, not political ones” (Judge Vargas) (COLOMBIA, 2009d, p. 11). The need “not to fall for the game” refers to the fact that some judges saw this as part of a “strategic lawsuit” that they should mistrust. According to Judge Sierra, this type of litigation

*uses the public actions permitted by the Constitution to get recognition of rights, but also to achieve political objectives – in this case, establishing that there is no obligation to provide military service [...] and ultimately, to get rid of the military.*

(COLOMBIA, 2009d, p. 11).

In other words, Judge Sierra interprets the goals of the lawsuit as going much farther than what the text of the complaint states, by which we can assume that by “litigation” they refer both to the complaint and to the accompanying interventions, and that by “interventions” they refer to those in which certain objectors explain their concept of war and their perception that armies increase violence, leaving aside all of the other interventions. For the judge, the contents of the interventions include broad goals that are not limited to technical legal arguments, and therefore he calls attention to the need to avoid being fooled: the Court should focus solely on the legal discourse, not other kinds.

Similarly, Judge Pretelt also calls his colleagues’ attention to the need to avoid being deceived:

*50% of the interventions (56 out of 115)<sup>16</sup> are from organizations that the plaintiffs themselves belong to – that are pouring out all their anger against the army – which reduces the weight that can be given to a supposed mass citizen engagement. He affirmed that the Court should not fall into the game that these organizations are playing.<sup>17</sup>*

(COLOMBIA, 2009d, p. 10).

Judge Pretelt does not specify which interventions he refers to, nor does he say who he considers to be the plaintiffs. According to the compliant, the plaintiffs are Cabarcas, Barreto and Bonilla. A quick search would show that all of them work at the Universidad de Los Andes, but none of them are members of the organizations that submitted citizen interventions. Part of G-DIP’s strategy was indeed to carry out a campaign to get interventions, but they are not members of any of the ones that made submissions. So it seems to refer directly to the objectors themselves, who authored citizen interventions and allied themselves with some of the international organizations that joined or submitted other interventions.

But in addition to deciding the extent to which they should consider the citizen interventions, they also discussed whether those interventions were insulting or denigrating the armed forces. It was said that the interventions

actually sought to abolish the army (Judge Sierra) (COLOMBIA, 2009d, p. 11), that they equated the armed forces to guerillas (Judge Pretelt) (COLOMBIA, 2009d, p. 10) and that while “citizens are free to state their case, this doesn’t mean they won’t turn to political positions” (Judge Sierra) (COLOMBIA, 2009d, p. 13). In the end, Judge Ponente tried to defend her statement, clarifying that it highlighted the commendable role and function that the armed forces play in Colombia (COLOMBIA, 2009d, p. 14).<sup>18</sup>

The grouping of the plaintiffs with the authors of the citizen interventions, the reading of what they suppose to be their “true objectives”, together with the adjectives used to describe “strategic litigation” and the “game” they want the Court to “fall for”, shows the mistrust and cautious views of several of the judges that studied these files. One could ask whether the decision that was adopted, which accepts that the partial legislative omission vaguely left open a door that turned out to be dangerous and uncontrollable, could be related to a more concrete mistrust or fear of falling for the game of organizations that denigrate the armed forces and seek to abolish the military through strategies like getting recognition for conscientious objection. However, the “neutral” technical construction (BOURDIEU, 2000 [1987], p. 183) used in the text of the decision does not hint at any of these fears or claims related to the interveners’ “political” arguments (or even “complicity” between the plaintiffs).

In the end, there was consensus that the right to conscientious objection is fundamental, and therefore immediately applicable, and defensible through a writ of protection. The proposal by Judge Calle was rejected (5 votes against, 4 in favor) and the alternative drafted by Judge Mendoza to declare constitutional the article in question and add in the operative section a request for Congress to “in light of the considerations of this decision, regulate the issue of conscientious objection to military service” (COLOMBIA, 2009d, p. 16) was approved (5 votes in favor, 4 against).

## **7 Reach and limitations of the legal translation of a social demand**

The case of the complaint regarding conscientious objection is an example of the type of alliances that are formed between social movements who consider participation in the legal arena necessary or at least worthwhile, and “experts” that have mastered technical legal language. Many of these “experts” have their own clear political and social agendas, and they deftly use legal technical language to achieve sociopolitical changes or advancements. Among other efforts, legal clinics like G-DIP promote high impact litigation with the clear objective of supporting causes defended by groups that are frequently marginalized or discriminated against in the legal field. They act as intermediaries between the social movements that fight for a concrete issue that directly affects them, and the legal body (in this case the court), in order to obtain progress—like the recognition of a fundamental right—in the legal sphere.

The relationship between the “expert”, “professional”, or “connoisseur” of

certain technical language and the one who lacks this expertise and is considered the “client”, “ally”, or “beneficiary” (but in any case the “layman” or “non-expert”) is always complicated. Recognizing that clinics like G-DIP act cautiously, and that the reality and the work that they do there is more complicated than what this article is able to convey, we can still ask ourselves—thinking more broadly than just the G-DIP case—to what point the legal struggle can really transmit and translate the interests of social movements (in this case the ACOOC) and help them to advance in their own fight for conscientious objection.

This, in the words of Bourdieu (2000 [1987]), means examining the relationship between the “laymen” and the “professionals”. He argues that this relationship brings with it various problems, given the unequal power contained therein, because there is competition for the monopoly of access to legal resources, which depends on the separation between laymen and professionals (BOURDIEU, 2000 [1987], p. 160-161). This is especially obvious in the legal arena, where the decision is the result of a symbolic fight between professionals who are equipped with unequal technical and social skills (BOURDIEU, 2000 [1987], p. 180). The gap between the vision and the technical language, and between the discourses of the expert and the layman, leads to the construction of a different reality that implies the “dispossession” of the client/layman through translation into technical language. This happens at the very moment that the legal space is created, when those who are not prepared to participate in the game—particularly in terms of language, because they lack the necessary technical knowledge—are left out.

When the experts (lawyers, judges, legal advisors, etc.) do a technical formulation of the legal problem they consider most relevant, along with the appropriate goals for a complaint from a legal point of view, and the standards that are applicable to the case, they are separating their expert technical vision of the world from the layman’s vision held by the client/beneficiary/non-expert ally. And this separation constitutes “a power relationship that covers two different systems of assumptions [...], two visions of the world” (BOURDIEU, 2000 [1987], p. 181-182). This division “imposes a system of requirements, at the core of which is the adoption of a comprehensive position, especially one that is clear in terms of language” (BOURDIEU, 2000 [1987], p. 181-182).

The dispossession and unequal power relations arise not only when a “non-technical”, “common” goal is translated into a “technical”, “legal” one, but from the very moment when that translation is perceived to be necessary. It creates a space where only qualified technical competence, held by experts, is indispensable, while belittling and excluding those who do not possess the technical expertise and who lack the appropriate language to engage (BOURDIEU, 2000 [1987], p. 181). Throughout this construction of the social reality, the “experts” employ a logic around the problem and the solution that is completely airtight and inaccessible to the laymen, which “creates the need for their own services, by turning the problems expressed in ordinary language into legal problems, translating them into the language of law” (BOURDIEU, 2000 [1987], p. 189-190).<sup>19</sup>

Conklin (1998) argues that the legal discourse happens between “knowers” and “non-knowers”, and describes legal discourse as a second-level discourse that

transforms the affected non-expert's original experience (an injury, suffering) into a series of external statements that represent those feelings indirectly, using legal terminology. When the transformation to legal discourse occurs, a story becomes a series of abstract, standardized "facts". It is a work of "intellectualization" that claims to "represent" the experience of the other, but in reality transforms the "meaning" of the experience into an external object, expressed in technical terms that are familiar and intuitive for the intended audience, but are removed from the affected individual. This transformation and distancing occur regardless of whether there is sympathy with the affected person:

*I may empathize with the witness [...]. I may offer Kleenex [...]. But, loaded with my special terminology, my client's utterance becomes a sentence which I resituate into a cohesive chain of signs which makes sense to me as a professional knower. [...] I choose that configuration which seems most authoritative. [...] The witness thus becomes "a case".*

(CONKLIN, 1998, p. 60).

But in addition to this transformation, once the non-knower turns to legal discourse and its technical legal jargon, going forward he can only represent his suffering/interests/struggles through the language developed by the knower (CONKLIN, 1998, p. 53). He thus becomes dependent on the knower as an intermediary to transform his own experiences into that discourse. Through legal discourse, a person's experience is converted into a language of signs that make up what he calls a "secondary genre discourse"<sup>20</sup> in which the person directly involved can no longer communicate in their own language: "the person harmed becomes a non-knower, an outsider to the legal discourse [...]. The legal opinion or judgment or argument of the professional knower, then, functions as the site for the displacement of embodied meanings" (CONKLIN, 1998, p. 57).

In this sense, in the concrete case of the conscientious objection complaint, the experts (G-DIP and the Observatory) came up with a legal strategy to "translate" a common goal (recognizing the fundamental right to conscientious objection) into the legal discourse. Despite the fact that it seemed to be clear from the beginning that this part of the legal strategy would be limited to that point—the recognition of the right—the consequences and the restrictions imposed on the non-experts once they got involved aren't quite as clear. The "trust" that Julián Ovalle (2012) cites, regarding the work that the G-DIP team did on the complaint, is accompanied by disinterest regarding the particular strategy and technical argument that were adopted. It didn't matter if they chose to talk about a legislative omission or not, or if they challenged article X or article Y. It was all part of one card that was being played within a much larger struggle – one way of entering the legal debate together with an "expert"; what matters to them is "what the result can be used for", "what they can do with that" (OVALLE, 2012).<sup>21</sup> Nevertheless, the need to play that game in that way, and to work with an expert that translates (and in the course of the translation, limits the goals) has some concrete implications for the future.



The concrete benefits are not disputed. Clear, precise progress was made, which, according to Ovalle, “gives legal muscle” to their struggle: the Court modified its case law, accepted the existence of this fundamental right and the potential to invoke it with regard to OMS, and recognized direct constitutional protection. Now they have a recognized “right” that serves as a tool in their fight. They probably would not have achieved that without the alliance. The “translation” into legal language clearly facilitated greater receptivity by the Court, helped to achieve social and political change through a constitutional, technical legal decision, and maintained significant parts of their struggle. But in a way their fight was condensed and represented in a few legal arguments and objectives within that “secondary discourse”, where continuing to participate necessitates an expert/translator.

As Bourdieu (2000 [1987], p. 189-190) says, the “translation” strategy comes with a certain degree of “dispossession” of the “beneficiary”, who becomes trapped in a discourse that he can’t employ, which limits him. Using legal discourse to carry out the fight for the recognition of conscientious objection led, for example, to the Court not only recognizing the existence of a fundamental right, but also imposing conditions for objectors to be recognized, and urging Congress to issue regulations. These decisions now require the objectors to continue the struggle within the legal arena.<sup>22</sup>

It is worth asking ourselves, then, whether the detachment with which Julián Ovalle perceives the ACOOC’s struggle in the face of the restrictions that arise from the ruling and the regulatory process taken up before Congress, is really an expression of independence from the power of the legal discourse and the need for an intermediary, or whether it is in fact a manifestation of a discourse that excluded him, where he was relegated to simply being the recipient of things that were decided in courts and discourses where he has no access, but that will inevitably affect him and his struggle. While there are indeed many benefits to the legal advances made in the protection and promotion of fundamental rights, it is also important to remember these less obvious aspects and consequences for social movements, before choosing the best strategy to promote and protect their claims.

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## NOTES

1. According to López (2006, p. 141), "A line of case law is a well-defined question or legal problem, under which there is space for possible answers [...]. [I]t is a convenient strategy for plotting the solutions that the case law has recognized for the problem, and recognizing an emerging pattern of decisions if one exists". Within a line of case law there can be various kinds of "landmark" decisions, that is to say, "decisions that have a fundamental structural weight within [the jurisprudence]" (LÓPEZ, 2006, p. 162).

2. As occurred, among other areas, with complaints regarding the decriminalization of abortion and the recognition of the rights of same sex partners.

3. It is important to clarify that the interaction and the work between legal clinics and social movements is quite rich and complex, and not limited to the characteristics described here. The purpose of this article is not to simplify them, but to present some elements that could be problematic.

4. Interviewees included Daniel Bonilla (2012), then director of G-DIP and co-author of the complaint, Manuel Iturralde (2012), director of G-DIP, Antonio Barreto, director of the Constitutional Observatory and co-author of the complaint, Lukas Montoya (2012), a researcher at G-DIP in charge of working on conscientious objection, Julián Ovalle (2012), a founding member of AC00C, a link between G-DIP-AC00C-CIVIS since the case started, and author of one of the personal histories submitted as a citizen intervention, and Tito Cortés (2012), member of CIVIS and point of contact for

G-DIP-AC00C-CIVIS.

5. Case file D-7685 in the Constitutional Court files was reviewed, along with the entire text of the complaint and the interventions (COLOMBIA, 2009a).

6. A copy of the deliberation record for Courtroom No 53 and 54 from October 7 and 14, 2009, in which case file D-7685 was discussed, was obtained (COLOMBIA, 2009c, 2009d). An interview was conducted with Aquiles Arrieta (2012), Auxiliary Judge in the office of Judge María Victoria Calle, the judge in charge of the first presentation of the aforementioned file and co-author of the Dissenting Opinion.

7. "CIVIS is a Swedish international cooperation organization [...] Its overall objective [...] is to contribute to a sustainable Culture of Peace by supporting and strengthening young people's actions of nonviolence, and their initiatives to promote and defend human rights". Available at: <<http://civis.se>>. Last accessed on: Nov. 2013.

8. AC00C is a collective headquartered in Bogota that seeks "respect for freedom of conscience and the right to refuse to participate either directly or indirectly in war". Available at: <<http://objetoresbogota.org/que-es-acoc/acoc/>>. Last accessed on: Nov. 2013.

9. "The Christian Mennonite Church of Colombia is a historic church of peace that has been promoting non-violence, conflict transformation and peace building" (COLOMBIA, 2009a, Expediente D-7685, Intervención de la Iglesia Cristiana Menonita de Colombia, p. 285).

10. G-DIP "has three main objectives: first, to build bridges between academia and society;

second, to support advancements in legal education [...]; and third, to contribute, through the use of the law, to the resolution of structural problems in society, particularly those affecting the most vulnerable groups in our community". Its lines of action include "high impact litigation".

"High impact litigation is a form of strategic litigation that aims to address structural social problems. It primarily involves presenting public cases regarding unconstitutionality, writs of protection, and class actions". Taken from the web site: <<http://gdip.uniandes.edu.co/index.php?modo=clinica>>. Last accessed on: Nov. 2013. In this article, we focus only on the litigation before the Constitutional Court.

11. Article 27 exempts the following from OMS, without charging a military compensation fee: "a. Those with permanent physical and sensory limitations [and] b. Indigenous peoples who live in their territory and preserve their cultural, social and economic integrity" (COLOMBIA, 1993).

12. There is no *res judicata* and there is no legal precedent (or that apply at least two of the criteria to justify a change in precedent).

13. The requirements for legislative omission are fulfilled, and that legislative omission leads to the violation of the fundamental rights to equality (Article 13), freedom of conscience (Article 18) and freedom of religion (Article 19).

14. For Barreto (2012) the extreme technicality of the complaint was a deliberate strategy, which backfired because the Court rejected the complaint using an equally technical response. But in the end, they got an unexpected but important advancement of the bottom line goal, which was recognition of the fundamental right to conscientious objection.

15. As also occurred with complaints regarding the rights of same sex partners: progress was made with the support of "lawyers, law professors, and in general a group of professionals that served as allies and participants in the strategy. [...] They act as intermediaries and translate social demands into the language of constitutional rights" (ALBARRACÍN, 2011, p. 23).

16. It is strange that in the deliberations, Judge Sierra talks about 115 citizen interventions and Judge Calle talks about close to 400. In the case file, there are 11 separate written documents (in addition to the opinions of the Ministry of Defense

and the Attorney General's Office), several of which were joined by others, for a total of 440 organizations and individuals. The decision takes up and summarizes 10 written submissions and notes the number of supporters joining each one.

17. Judge Pinilla says, "the Constitutional Court can't be an instrument for that kind of abusive strategic litigation" (COLOMBIA, 2009d, p. 12). Judge Vargas (COLOMBIA, 2009d, p. 11) also called for a reduction in the interventions while Judges Calle and Henao defended their importance. Judge Calle stated: "it is not common for there to be almost 400 [interventions] in a case. These are serious and careful statements that allowed a deeper dive into the issue" (COLOMBIA, 2009d, p. 14).

18. Judge Henao expressed his "disagreement with the disqualification of the intervening organizations [...]. Personally, he did not observe insults or offense directed at the armed forces, but rather concepts that were strictly academic" (COLOMBIA, 2009d, p. 12).

19. "The constitution of the legal field is inseparable from the establishment of professionals' monopoly [...]. Legal competence is a specific power that controls access to the legal field, as it can determine which conflicts deserve consideration and the specific way they should be portrayed in order to constitute proper legal debates. Only this skill set can provide the necessary resources" (BOURDIEU, 2000 [1987], p. 191-192).

20. "A genre [...] is a particular way of perceiving the world. It is a collective phenomenon which organizes utterance and texts. [...] The legal discourse is a secondary genre in that it parasitically lives off primary genres [...]. A secondary genre re-resents another's experience. It resituates an utterance into chains of signs which other members in the secondary genre will recognize" (CONKLIN, 1998, p. 55).

21. In this sense, they see the Court's decision as positive but insufficient, and note that it left a dangerous task in the hands of Congress.

22. Ovalle (2012), while not considering it appropriate to modify his goals to "make a good law", states that it is "completely necessary" to continue to participate in the legal discourse, and particularly the legislative one.

## RESUMO

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Este artigo aborda o caso da ação de constitucionalidade apresentada à Corte Constitucional da Colômbia que almejava incluir a objeção de consciência entre as causas de isenção do serviço militar obrigatório como exemplo de litígio estratégico entre clínicas jurídicas e movimentos sociais. São analisados discursos dos vários participantes, a fim de lançar novas luzes sobre a tradução jurídica de uma reivindicação social, buscando, em especial, a forma pela qual os discursos se relacionam, são interpretados e limitados. Busca-se demonstrar que, além dos benefícios em matéria jurídica, é relevante considerar outros aspectos e consequências menos evidentes para os movimentos sociais (como a dependência de intermediação do especialista/conhecedor que traduz as reivindicações do leigo/não conhecedor para uma linguagem técnico-jurídica), quando se considera a melhor estratégia para promover e proteger suas reivindicações.

## PALAVRAS-CHAVE

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Corte Constitucional da Colômbia – Objeção de consciência – Movimentos sociais – Litígio estratégico – Clínicas jurídicas

## RESUMEN

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En este artículo se toma el caso de la demanda de constitucionalidad presentada ante la Corte Constitucional de Colombia que buscaba incluir a la objeción de conciencia dentro de las causales de exención al servicio militar obligatorio, como ejemplo de litigio estratégico entre clínicas jurídicas y movimientos sociales. Se analizan distintos discursos intervinientes con el fin de dar nuevas luces sobre la traducción jurídica de una reivindicación social, mirando en particular la forma en que los discursos se relacionan, se interpretan y se limitan. Se busca poner de manifiesto que, además de los beneficios en materia jurídica, es relevante tener en cuenta otros aspectos y consecuencias menos evidentes para los movimientos sociales (como la dependencia de intermediación del experto/conocedor que traduce las reivindicaciones del profano/no-conocedor a un lenguaje técnico jurídico), en el momento de considerar la mejor estrategia para promover y proteger sus reivindicaciones.

## PALABRAS CLAVE

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Corte Constitucional de Colombia – Objeción de conciencia – Movimientos sociales – Litigio estratégico – Clínicas jurídicas



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## ABSTRACT

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In April 2007, Brazilian media reported the existence of a “Family Planning Clinic” that allegedly performed abortions in the city of Campo Grande (in the state of Mato Grosso do Sul). Three days later, the police raided the establishment and seized nearly 10,000 medical files, violating the privacy of women who had dared to exercise the freedom to make decisions and control their own lives. The article tells this story, known as the “case of the 10,000 women”, so as to reflect on the restrictions on women's reproductive rights and to comment on the coercion resulting from the law that bans the voluntary termination of pregnancy in Brazil.

Original in Portuguese. Translated by Barney Whiteoak.

## KEYWORDS

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Human rights – Abortion – Reproductive rights – Women – Brazil



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# MODERN-DAY INQUISITION: A REPORT ON CRIMINAL PERSECUTION, EXPOSURE OF INTIMACY AND VIOLATION OF RIGHTS IN BRAZIL \*

Alexandra Lopes da Costa

## 1 Introduction

Article 128 of the Brazilian Criminal Code, which dates from 1940, permits abortion only in cases of rape and when a woman's life is at risk. Following a recent decision by the Supreme Court, it is now also permitted for women carrying anencephalic fetuses.<sup>1</sup> However, contemporary ethical debates systematically emphasize that the decision over whether to have an abortion involves what is most intimate in a woman's psyche, involving physical, subjective, psychological and even existential dimensions, among other aspects, because only the female body can gestate and give birth (CORRÊA; PETCHESKY, 1996; ARDAILLON, 1997; SARMENTO, 2005; TORRES, 2010). For this reason, several authors question the use of coercion and the recourse to criminal law for matters such as sterilization, abortion and pregnancy.

This article aims to show that the criminalization of abortion, based on the defense of the right to life of the fetus, violates the constitutional principle of freedom, interpreted here as the exercise of reproductive decisions by women.

To illustrate this violation, the article tells the story known as the "case of the 10,000 women": on April 10, 2007, in the city of Campo Grande (in the state of Mato Grosso do Sul), after closing a family planning clinic, the police violated the privacy of nearly 10,000 women by confiscating, opening and publicizing their medical records.

When 9,896 women had their privacy violated, whether because they decided to terminate an unwanted pregnancy or simply because they had made an appointment at the clinic in question, the episode created an atmosphere of public accusation,

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sparking a debate on the conditions in which women have access to abortion in Brazil, as well as the ideology and the values that underlie the debate on the issue.

This article is based on documentary research, empirical observations of the jury trial and bibliographic review. The next section presents the recent developments involving women's rights in the international arena. The article then provides an overview of the political, social and economic climate in Mato Grosso do Sul, thereby putting the "case of the 10,000 women" into context. Afterwards, it describes the debates in the jury trial relating to the case and, finally, offers some comments on the arguments that were used. These comments are based on critical analyses of the restrictions imposed by criminal law on reproductive rights, in particular in the case of abortion, considering the violation of privacy and equality, as well as the disrespect of women as ethical subjects who should be capable of making decisions about their own lives.

## **2 Women's rights, reproductive rights and the criminalization of abortion**

Although the Universal Declaration of Human Rights of 1948 establishes equality between the sexes by guaranteeing that all people are entitled to the same rights and freedoms, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status" (NAÇÕES UNIDAS, 1948, art. 2), the text is also grounded on the generic perspective of man (white, heterosexual, Western male) as a synonym for human (PIOVESAN, 2002).

The process of internationalization of human rights, which began with the Universal Declaration, was improved with respect to women, children, indigenous peoples and black populations, as specificities, diversities and differences were integrated into the human rights discourse as factors of inequality and discrimination. Therefore, human rights are mutable, and they can and should be altered when societies and cultures change (PIOVESAN, 2002; 2008; 2010). In 1979, another fundamental step was the approval of the Convention on the Elimination of All Forms of Discrimination against Women, which broke with the paradigm of the male figure as the symbol of humanity that characterized the rhetoric of the Universal Declaration of 1948. Another notable event occurred in 1993, at the World Conference on Human Rights in Vienna. Article 18 of the Vienna Declaration asserts that the human rights of women and girls are inalienable, a principle that would later be incorporated into other United Nations conventions and conferences (IKAWA; PIOVESAN, 2009; BARSTED, 2002).

In other words, in contemporary times, human rights should not be viewed as separate from the debates on gender inequalities, which reflect the symbolic value culturally attributed to males and females that "form the basis of discrimination and underpin power relations" (BARSTED, 2001, p. 3). In search of equity, the principle of equality must consider gender relations in different societies (BARSTED, 2001).

In the intersection between human rights and gender, reproductive rights are particularly significant, since they involve a person's right to decide freely, without



constraint or coercion, whether or not to have children, as well as the number and the interval of time between pregnancies, all the while having at their disposal updated information and efficient methods of contraception, in addition to security, social services and quality healthcare.

However, Corrêa and Petchesky (1996) point out that men and women do not have the same prerogatives in the field of reproduction, since it is women who get pregnant and are largely responsible for raising and educating their children – in most cases, without any support from the fathers.

*If we take the problem of contraception as an illustration, the principle of equality would require that, to the extent that contraceptives come with risks and benefits, such risks and benefits be distributed fairly between men and women, as well as between women. This would mean a population policy that emphasized the male responsibility in the sphere of controlling fertility and scientific research into efficient male contraceptives (Pies/Sd). However, such a policy could also conflict with the basic right of women to control their own fertility and the need that many women feel to preserve this control, sometimes in secret and without 'equal division' of the risks.*

(CORRÊA; PETCHESKY, 1996).

According to the two authors cited above, sexual and reproductive rights should consider both the power relations in the private sphere and the resources available to women for decision making in this sphere. As such, the ability to exercise reproductive rights depends on social, cultural and economic conditions and also on gender, class, race, ethnicity and generation, and must include public policies that guarantee access to information and services. The authors indicate, therefore, that sexual and reproductive rights are not related exclusively to “personal freedoms” or “individual choices”, but also include other dimensions, such as the right to physical integrity, self-esteem, access to education and income, and respect for the ability of women to make ethical decisions about their own lives. Corrêa and Petchesky (1996) consider, therefore, that sexual and reproductive rights are also social rights.

However, the burden of unwanted pregnancy necessarily falls on women, in spite of the participation of men in biological reproduction. Thousands of women die each year around the world from causes related to abortion. In Brazil, the World Health Organization (WHO) estimates that 1.4 million women each year resort to unsafe abortions, and that one in a thousand lose their lives (COMISSÃO ECONÔMICA PARA A AMÉRICA LATINA E O CARIBE, 2010). Additionally, there occur severe impacts on the health, life trajectory and the dignity of women, since they are always subject to criminalization. In a report presented in 2011, the United Nations Special Rapporteur on the Right to Health asserted that measures that criminalize abortion constitute “an unjustifiable form of State-sanctioned coercion and a violation of the right to health” (NAÇÕES UNIDAS, 2011, p. 7).

According to the survey *Abortion and Religion in Brazilian Courts* (2008), the Brazilian justice system heard 781 abortion cases between 2001 and 2006. Although relatively few of them involved unsafe abortions compared to terminations due to anencephaly, sexual violence and risk to the woman’s life they all featured

a strong criminalization or attempt at criminalization of clandestine abortions (GONÇALVES; LAPA, 2010). This situation has not changed significantly in recent years, and charges are still brought against women for having abortions. Among them were at least some of the nearly 10,000 women from Campo Grande who were stigmatized for an episode that could, allegorically, be compared to an inquisitorial “witch-hunt”. This process culminated in the trial by jury of four employees of the Family Planning Clinic, on April 8, 2010.

### 3 Human rights in Mato Grosso do Sul and the “case of the 10,000 women”

The state of Mato Grosso do Sul is located in the Center-West region of Brazil and the mainstay of its economy is agribusiness. Campo Grande, the state capital, has an estimated population of 832,352 people (INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, 2013). Associated with livestock raising, farming and, over the past decade, ethanol production by sugarcane distilleries, the region is marked by contrasts and stark inequalities. It is home to the second largest indigenous population in the country, in addition to various rural settlements and *quilombo*<sup>2</sup> communities, where many live in poverty. Income is highly concentrated and the traditional and conservative sectors exert a significant influence on lawmakers, the Executive and the Judiciary. Both the political culture and society are strongly patriarchal and androcentric.

The presence of dogmatic religious groups in the political arena has always existed, but has intensified since the 2000s, when the state government introduced a new system of presenting parliamentary budget amendments for spending on local projects. According to the system, the 24 state legislators may allocate funds to serve specific demands of their constituencies. These funds may be allocated to projects associated with religious charity such as the construction or reform of church halls; the activities of support groups for alcoholics; assistance for homeless families, pregnant women and migrants; the provision of vocational courses; the work of the Catholic Church’s pastoral outreach programs (such as the Child Pastoral, Land Pastoral, Indian Pastoral and Woman Pastoral programs) and evangelical social institutions. The availability of this public money has created a fertile ground for buying the votes of the beneficiaries of this funding.<sup>3</sup>

The close relationship between the public authorities and religious groups is reflected in the influence that dogmatic and anti-feminist positions have on the state’s laws and policies. An example of this was the vote in the state legislature, in 2005, of a bill banning the distribution and sale of the “morning after pill” emergency contraception. The initiative sparked an intense public debate, mobilized by the women’s movement, which resulted in the shelving of the bill.

In the same year, the municipal legislature of Campo Grande refused to issue the Association of Transvestites of Mato Grosso do Sul with a “public utility certificate” for tax purposes. This decision, repeated in 2007, was preceded by a public hearing in the First Baptist Church that was attended by legislators, pastors and faithful who professed skewed opinions and religious, moralistic and

homophobic beliefs, creating a negative and uncomfortable atmosphere for the homosexual and transsexual population of the city. In 2009, municipal aldermen approved a bill banning advertisements, magazine covers and billboards showing semi-nude models and forbidding storefronts from displaying lingerie mannequins and sex products. Known as the Anti-Pornography Law, the bill was vetoed by the mayor. In the following year, a bill approved by the same aldermen banned the use of so-called “sex bracelets”<sup>4</sup> in both public and private schools in the city. A similar bill extended the ban to the rest of the state.

In 2011, lawmakers staged an uprising against the installation of condom dispensers in municipal buildings and in public and private schools, despite the recommendations of the Ministry of Education’s “Health and Prevention in Schools” program.

This was the background against which the case of the women criminalized for abortion came to light. The episode was triggered on April 10, 2007, when a report featuring hidden camera footage was aired on the region’s largest television station, exposing the Family Planning Clinic for performing abortions.<sup>5</sup> The Civil Police from the state capital launched an investigation the very next day and on April 12 representatives from the Mixed Parliamentary Front in Defense of Life and Against Abortion, of the National Congress, met with the Attorney General of Mato Grosso do Sul to pressure for charges to be brought against the owner of the clinic, the anesthesiologist Neide Mota Machado (IPAS, 2008; CAMPOS, 2008). On April 13, police officers executing a search and seizure warrant closed the establishment, without the presence of its owner, and confiscated materials such as surgical instruments, medicines and syringes. They also confiscated the medical records of all the 9,896 women who had visited the clinic since it first opened, approximately 20 years before (CAMPOS, 2008; IPAS, 2008).

Three months later, the State Public Prosecutor’s Office charged Neide Mota and another eight clinic employees with the crime of abortion, which was allegedly performed on 25 women (IPAS, 2008).<sup>6</sup> The 9,896 medical records were included as evidence for the indictments. To avoid the statute of limitations, the Public Prosecutor’s Office filed charges against all the women (CAMPOS, 2008; IPAS, 2008), a number that was equivalent to all the women in prison in Campo Grande. The cases were categorized based on the medical records that included ultrasounds, positive pregnancy tests and forms signed by women authorizing medical procedures, regardless of the type of treatment, excluding the cases for which the statute of limitations had expired (IPAS, 2008 e GALLI; CAMPOS, 2008; 2011). These criteria resulted in charges against 1,500 women for the crime of abortion (CAMPOS, 2011).

Moreover, the first women who were subpoenaed to appear before the police without knowing the reason for the summons, and were interrogated without being informed of their rights, such as the right to remain silent and to be accompanied by a lawyer or public defender, in a blatant violation of the right to a full defense and in breach of judicial guarantees (GALLI; CAMPOS, 2010). Some of the women were offered the chance of having the charges dropped, provided they agreed to collaborate with the investigations under a series of conditions.<sup>7</sup> Only five men were charged during this stage (IPAS, 2008) and it is estimated that less than 10 were subpoenaed.

For three months, the cases (containing names, charges, addresses, etc.) were available for consultation on the website of the Mato Grosso do Sul State Court (TJ/MS). The page attracted a great deal of public curiosity over the identity of the women who had undergone abortions and represented a violation of the constitutional right of intimacy and privacy (IPAS, 2008). Based on Law No. 9,099/95 – which provides for the application of alternative penalties – many of the women were able to choose between paying a fine, doing community service or donating food to charities. Poor women chose to do community service and were sentenced to work in schools and daycares, so they would see the children and regret their actions, according to a statement made by the judge to the press (IPAS, 2008).

Although 1,500 were charged, it is no exaggeration to affirm that all the nearly 10,000 women had their rights violated, since neither their medical confidentiality nor their privacy were respected. Their medical records were seized and opened by the police, prosecutors and other authorities without the presence of an expert, which constitutes a violation of the right to medical confidentiality, guaranteed by Brazilian legislation (IPAS, 2008 e GALLI; CAMPOS, 2008; 2011).

It may also be said that, even before this violation of privacy and confidentiality due to the criminal law and the unacceptable investigation procedures, the reproductive rights of these women were also disrespected. A report produced by Ipas Brasil and Grupo Curumim reveals that family planning and maternal health policies are inadequate in Mato Grosso do Sul (COSTA et. al., 2010). The study identifies flaws in the Family Planning Program in the capital “referring to the quality of medical treatment, the maintenance of stocks of medicines and, consequently, the continuity of the provision of contraceptives” (COSTA et. al., 2010, p. 31). Furthermore, the state did not have a legal abortion service for cases of rape and when a woman’s life is at risk until 2008.

In the process of investigating and filing charges in the “case of the 10,000 women”, the judges on the Mato Grosso do Sul State Court (TJ/MS) unanimously decided to submit the owner of the Family Planning Clinic – Neide Mota Machado – and four of her female employees to a trial by jury. Months before the trial, however, on the evening of November 29, 2009, Mota was found dead in her car, on a deserted road near her country home. In the car were found two syringes, a vial of lidocaine hydrochloride and a note with words alluding to death: “there would be no panic, no trauma, nor pain”. Just days before, Mota had officially registered her desire to be cremated, leading the police to suspect suicide (MANIR, 2009).

The mysterious death caused a good deal of alarm. According to one article published in a local newspaper, the doctor left behind her many unanswered questions, since she allegedly had a CD with information on the medical procedures including the names of girls younger than 15 and of nearly 10,000 men involved in the cases of abortion, including authorities and distinguished people in society (BOCA DO POVO, 2009). After the investigation, the authorities concluded that the doctor had indeed committed suicide, but for many her death was not fully explained. As pointed out by Margareth Arilha, executive secretary of the Commission on Reproductive Citizenship (an organization that defends

reproductive rights), Mota would have faced a trial by jury a few months later: “[...] perhaps she would have used the trial to speak out, once again. To speak out about the national hypocrisy when it comes to reproductive rights, while for some anything is permitted, for others, it gags, lies and kills” (ARILHA, 2009).

Nearly three months after the closure of the Family Planning Clinic, four of its female employees were tried for the crimes of abortion and criminal conspiracy.

#### 4 Trial by Jury: a modern-day inquisition?

The trial of the four former employees of the Family Planning Clinic, which began on April 8, 2010, lasted two days. Despite all the repercussions of the case, only 30 or so people attended the trial: family and friends of the defendants, some students, legal practitioners and just five feminists from the city. There was no public demonstration outside the courthouse, although journalists from various television stations, newspapers and news sites covered the event.

In its opening statements, the prosecution pointed to the first two television reports as having triggered the criminal investigation. In the first report, a male journalist and female producer visited the clinic posing as a couple that was looking for an abortion. Using a hidden camera, they were informed of the prices of the procedure. In the second report, which did not involve a hidden camera, Neide Mota admitted to the journalist Honório Jacometto that she performed abortions, upon the request of her customers. The defendants were accused of involvement in 26 abortions performed by the Family Planning Clinic on 25 women,<sup>8</sup> listed as witnesses for the prosecution. During the interrogation stage, the nurses described their work at the clinic. Two of them affirmed that the clinic only performed procedures to remove miscarried fetuses, remove cysts, perform curettage and insert intrauterine devices (IUDs), and that it was frequented by people of all classes, including patients referred by other doctors.

The psychologist said that her function was to triage patients. When the women came to the clinic to terminate their pregnancies, she said she explained about methods of contraception, described the procedures and presented alternatives to abortion. She emphasized that her role was not to convince anyone either way, and that the decision to terminate a pregnancy was left to the women.

The prosecution began its case by showing the video of the television report in which Neide Mota confirmed that the clinic performed abortions. In the interview, she stressed the health risks associated with abortions conducted without adequate medical assistance, said that prohibition does not stop abortions from happening and, therefore, that abortion should be legalized. One of the main concerns of the prosecutor, Douglas Oldegardo Cavalheiro dos Santos, was “the induced diversion of the case towards this controversy” (SANTOS, 2010, informação verbal), since, he said, it was not about supporting or opposing abortion: the decision of the jury must be based on the law, despite the fact that NGOs had threatened to denounce the case internationally. He emphasized that the activities at the clinic clearly constituted a violation of the right to life, since nowhere in the world, not even where abortion is legal, is the procedure performed on the first appointment.

The arguments of the prosecution stressed the adverse effects of abortion on the psychological integrity of women and pointed out the financial interests, the commercial nature and the social segregation that characterized the activities of the clinic. The prosecutor then revealed that the clinic had expired medicines, veterinary drugs used to “abort pigs” and a “disgusting suction machine” (SANTOS, 2010, informação verbal), which he exhibited in the court. No feminist movement could possibly support what went on there, he declared.

Only two lawyers for the defense presented arguments during the trial. One of them, responsible for defending the psychologist, showed the recording of the first television report on the case, made by a hidden camera. In this report, his client appears advising the supposed couple that was allegedly looking for an abortion. The lawyer drew attention to the illegal nature of the recording by TV Morena, an affiliate of the *Rede Globo* network, and emphasized the hypocrisy of society in relation to abortion.

In addition to contesting the evidence presented to demonstrate that abortions were performed at the clinic, this lawyer directed the jurors to reflect on the motives that led such a large contingent of women to choose to terminate their pregnancies. After two days of trial, the jury decided to convict the clinic’s former employees, who received prison sentences in semi-open facilities. Rosângela de Almeida was sentenced to seven years; Simone Aparecida Cantaguessi, to six years and four months; Maria Nelma de Souza, to four years; and Libertina de Jesus Centurion, to one year and three months. Afterwards, the defense appealed the conviction and in October 2010 the women had their sentences reduced by the Mato Grosso do Sul State Court (TJ/MS): Almeida had her sentence cut to one year; Cantaguessi, to two years; Souza, to two years; and Centurion, to ten months.

## 5 Interpreting the judgment

As already mentioned, the political culture and society of Mato Grosso do Sul is characterized by conservatism, patriarchy, oligarchy and a growing influence of religious dogmatism in politics. There is a clear exchange of political favors between the State government and the religious institutions and leaders that openly violates the principles of a secular State. The local elites and the dominant power structures tend to perpetuate the patterns that prevent full equality between men and women, respect for differences and sexual and reproductive rights.

In this context, the analysis of Mujica (2011) can be applied, namely that the changes underway since the 1980s in the oligarchic States of Latin America, coupled with the neoliberal models of governance, have impelled conservative groups to shift their arguments, previously based on tradition-family-religion, to “defense of life” in its broadest sense. Defense of life is a highly valued principle in contemporary democracies, and considered indispensable for the exercise of human rights. Nevertheless, the exploitation of the defense of life by religious groups creates countless possibilities for ideological manipulation and intervention in political, legislative and legal debates in the field of reproductive rights.

The concept of life promoted by these groups is not the same as in the vocabulary

of human rights. Their arguments emphasize the sacredness of life as emanating from God, which would give the Church the full responsibility to “legislate” on this matter and, consequently, on all social conducts involving the reproduction and preservation of biological life. This implies a permanent effort by these groups to influence laws and policies, and to penetrate the human rights discourse and the state apparatus, to “introduce, furtively, a conservative discourse of exclusion of what they consider different and what they call ‘abnormal’” (MUJICA, 2011, p. 341).

The “case of the 10,000 women” is, no doubt, an illustration of how in Brazil – and particularly in Mato Grosso do Sul – conservative religious forces have resorted to various types of stratagems, including legal, to restrict the principles of freedom and colonize sexuality and reproduction based on dogmatic rules. The trial described in this text makes it clear how recourse to criminal law favors this “colonization”. On the subject of unsafe abortion, it is also necessary to consider the problems encountered in the public health service, since access to contraception, just like in other places around the country, is still low among poor women. Access to regular gynecological check-ups and means of contraception, as well as abortions under safe conditions, is contingent on income and social class.

In other words, social conditions lead a large number of women to decide to terminate pregnancy. This aspect was highlighted during the jury trial by the lawyer for the defense of the psychologist who worked at the Family Planning Clinic in Campo Grande:

*What I'd like to know is this: what led these women to have an abortion? Weren't they able to raise a child or did the father not want to take responsibility? Were they forced by their husband or boyfriend or fiancé? How many people do we know who had to give up their child because they weren't in a position to raise them? Am I telling a lie here? What about all the street kids in Campo Grande... This has nothing to do with being for or against abortion! You have to look deep inside every person. How can I see inside the heart of a person who is compassionate, who nobody knows? How can I? Campo Grande has around 800,000 people. These 10,000 women... That's nearly 5% of the population, over the course of these 20 or so years. They were in Dr. Mota's office, it's on the record, they were in her office.*

(SIUFI, 2010, informação verbal).

The lawyer's statements also highlight another crucial point: the respect for the privacy of women who choose to have an abortion. The dilemma over whether to carry an unwanted pregnancy to term or to terminate it considering the woman's specific circumstances is an intimate, private matter. It is worth pointing out that statement the right to privacy is protected by the Brazilian Constitution of 1988, which, in article 5, item X, affirms: “the privacy, private life, honor and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured” (BRASIL, 1988, art. 5º, inciso X). According to Sarmiento (2006), the principle of reproductive self-determination is essential for preserving the dignity of the human person, since it involves the intimacy of the individual in choosing what is best for their own life, without interference from third parties.

Every citizen, male and female alike, is an autonomous agent capable of making decisions based on his/her values, ideologies, personal beliefs, specific life circumstances and plans for the future. Nonetheless, since men and women are affected differently by the impact of reproduction on the body, forcing women to carry an unwanted pregnancy to term is an affront to their dignity and reduces their bodies to mere vessels of reproduction. This creates the need for legal guarantees to protect the individuality and the decisions of women. Restrictive criminal law, however, serves as a punishment on women. In the “case of the 10,000 women”, for example, only five men were charged. Drawing attention to this disparity does not mean calling for a new witch-hunt against men. We do not propose the selective use of criminal law, not do we simply defend punishment for men, but instead to demonstrate the gender inequality in the legal treatment on the matter of abortion. As Ventura (2006) points out, there is a huge disproportionality in the control of the State over the reproductive life of women. The issue is directly associated with the power asymmetry between the genders that prevails in society.

The contempt for women who refuse to continue an unwanted pregnancy and the irresponsible behavior of many men when faced with paternity are aspects that are socially tolerated (DOMIGUES, 2008). Even though laws exist on the responsibility of the father, “Men have the choice either to form a family, to provide for their family without building an emotional bond with them, or simply to abandon their partners without ever seeing the product of their sexual relationship” (DOMINGUES, 2008, p. 94).

To this can be added the difficulty faced by many women over men’s resistance to using condoms.

According to the Brazilian judge Torres (2010), the criminal justice system presents strong androcentric characteristics and its discourse on the protection of life conceals the political nature of controlling female sexuality, which perpetuates prejudices and inequalities. In other words: abortion is still illegal in criminal law (broadly speaking, drafted by men) for the purpose of policing the sex of women. Moreover, the legal restriction on the voluntary termination of pregnancy in Brazil is an affront to the right to equality established in article 5, item I of the Constitution, since it results in discrimination both between social classes – since the consequences of unsafe abortions affect women living in poverty more acutely – and between genders – since it places a greater burden on women than on men (SARMENTO, 2006; VENTURA, 2006). In short, the prohibition of abortion has contributed to the selective death of women, only women, and in particular the poorest women.

Zaffaroni (2011) denounces the arbitrary and highly selective nature of punitive power, a model of vertical imposition of power that is unconcerned with solving conflicts and characteristic of strongly hierarchical societies. He explains that the punitive model is radically exclusionary and inefficient, and in addition to not solving the conflict, it prevents or hampers any combination with other models, such as the reparatory, therapeutic or conciliatory models, which resolve situations in other ways. In accordance with the punitive model, injured parties have no power to participate, to decide on how to resolve the conflict, but must instead declare themselves as victims. Moreover, this model tends to reduce legal authority to a form of direct coercion, through extensive policing, that possesses a



latent and irrational element of vengeance. Its content can vary depending on the “enemy in the crosshairs”, but, for punitive power, nothing must stand in the way of the task of safeguarding the moral order.

The effects of coercive power derived from criminal law could be observed at various times during the trial of the employees of the Family Planning Clinic. This was the case, for example, when the judge denied the request by the defense for the security guards surrounding the women in the dock to be removed from the court:

*In relation to the security guards, the defendants, despite being women...Well, tradition requires the guards to remain. The treatment they shall receive shall be the same as all the others who have been here. I asked, only, for a female police officer to be among the guards. We can ask the police officers to stand a little farther away because [the defendants] are not dangerous. At any rate, however, we have to have the security so we are not caught off guard by any unexpected situations; so the police shall stay.*

(SANTOS, 2010, informação verbal).

Another point identified by Zaffaroni (2011) concerns the inefficiency of criminal law. Criminalization does not stop thousands of women from getting around the law and having unsafe abortions, either by using drugs or seeking out underground clinics. Prohibition under criminal law, therefore, causes pain, suffering, fear and even death for many women. Punitive legislation also reinforces stigmas, making the exercise of the right to decide about one’s life an abominable act.

We are not making an apology for abortion, nor defending pregnancy termination as a method of contraception. Neither does it boil down only to the need to guarantee women’s freedom to decide over their own bodies. From the perspective of sexual and reproductive rights, the decision over abortion involves both ethical parameters and mechanisms to allow individuals to exercise their emancipation, in the sexual arena, and their reproductive capacity with full autonomy and dignity (PIMENTEL apud TORRES, 2010). This assessment requires a non-absolutist treatment of the right to life of the embryo. It is important to point out that the legal structures of many contemporary democracies permit voluntary pregnancy termination without compromising the defense of the right to life, including intrauterine life. However deep the divisions caused by the diversity of opinions, the plurality of beliefs and the difference between ideologies (characteristics of democratic societies), there is always a humanitarian answer that confers intrinsic value to human life. This common thread needs to be emphasized, as Professor Dworkin affirms: “what we share is more fundamental than our quarrels over its best interpretation” (DWORKIN, 2009, p. 99).

Religious freedom and freedom of thought are principles defended by the Brazilian Constitution, although the Brazilian State is secular. This means that the country cannot legislate or create unrestrictive policies based on moral or religious beliefs (BRASIL, 1988, art. 19, inciso I). It should also be considered that the right to life is not an absolute value, as illustrated by legal systems that recognize justifiable homicide in cases of legitimate self-defense (LOREA, 2006; VENTURA, 2006). An embryo has

the potential for life, but it is not a person; therefore, its legal protection cannot be the same as that afforded a human person. There is a conflict between the rights of women and the protection of embryos that can be resolved through reasonableness, minimizing the sacrifice of those involved while pragmatically observing the principle of the dignity of the human person (VENTURA, 2006). On a legal and political level, an international consensus has been established to resolve the dilemma between the protection of embryonic life and the right to terminate a pregnancy (VENTURA, 2006). In this equation, the degree of protection for the embryo increases in accordance with the stage of development and the possibilities of survival outside the womb.

*However, what cannot be permitted is for the protection of the unborn child to disproportionately infringe on the fundamental rights of the woman, i.e. that legislation and decisions strike a balance between the rights of the pregnant woman and the interests of the State to protect the unborn child.*

(VENTURA, 2006, p. 186).

Many of these laws guarantee women the free choice to terminate a pregnancy not only in situations of physical health risk, sexual violence and fetuses with incurable abnormalities, but also when they experience emotional suffering upon becoming pregnant, as a result of financial, social or family problems. In this case, counseling is recommended for pregnant women, as well as the consideration of alternatives before choosing abortion. These experiences illustrate the need to strike a balance between the right to the life of the fetus and the rights of women. If a balance cannot be found, then it is necessary to admit the prevalence of just one right, based on the context and the delicate relationship established between the pregnant woman and the unborn child (SARMENTO, 2006; TORRES, 2010). This concept of reasonableness of rights appears to be what guided the professional ethics of the psychologist who worked at the clinic, according to her testimony at the jury trial: “What was at stake wasn’t my life, it was their lives [...] what they would choose for their lives” (SOUZA, 2010, informação verbal). Imposing on women the obligation to carry an unwanted pregnancy to term implies coercion, violates their physical, mental and psychological integrity and interferes with their desires and life plans. Reproduction should not be considered as destiny, martyrdom or a burden, nor be a source of pain or suffering. Criminal law, therefore, violates the exercise of freedom and self-determination.

During the trial of the “case of the 10,000 women”, the prosecution claimed that abortion is a tragedy for the psychological integrity of the woman, since the body produces “305 million new cells when pregnancy occurs... Chemical depression and suicidal tendencies can occur, in cases of abortions... It is necessary to question the woman to determine whether she is really capable of deciding to have a safe abortion” (SANTOS, 2010, informação verbal). However, a report prepared by the UN Special Rapporteur on the Right to Health stresses that criminal restrictions on abortion infringe human dignity – a fundamental principle for the realization of human rights – since they negatively affect the physical and emotional health of women, among other reasons due to their exposure to the risk of criminalization (NAÇÕES UNIDAS, 2011). According to the report, when criminal laws are used

to regulate and restrict conduct in the field of sexual and reproductive health, the State imposes its force, suppressing the will of the individual, which represents an interference and a serious violation of the right to sexual and reproductive health. In other words, the “creation or maintenance of criminal laws with respect to abortion may amount to violations of the obligations of States to respect, protect and fulfill the right to health” (NAÇÕES UNIDAS, 2011, p. 9). It is worth pointing out that the right to health is enshrined in article 6 of the Brazilian Constitution. The report of the UN Special Rapporteur also criticizes the use of legislation as a means of interfering with personal convictions and as a deterrent, by punishing people who engage in “prohibited” forms of conduct.

The use of the criminal justice system to control and regulate behavior and values, and to criminalize moral choices and conceptions is an assault on the democratic rule of law. Remember that thousands of women choose to have an abortion every year, both in Brazil and around the world. The discriminatory and coercive nature of criminal law was evident in the “case of the 10,000 women”, when once again the inquisitorial forces violated the privacy of the women, subjecting them to the punishment and criminalization of punitive power. The restriction of female freedom in the realm of sexuality and reproduction, particularly in relation to abortion, demonstrates that the decision in the field of reproductive self-determination and the exercise of freedom as a constitutional principle – inviolable principles of the autonomy to determine one’s own history and future – are still not a reality guaranteed to women in Mato Grosso do Sul or anywhere in Brazil. This exposes the need to systematically promote discussion on human rights, including sexual and reproductive rights, in order to broaden and deepen democracy in institutions and in society.

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## NOTES

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1. In 2004, the National Confederation of Health Workers (CNTS) filed an Allegation of Violation of a Fundamental Precept (ADPF 54) claiming that the ban on pregnancy termination in cases of anencephalic fetuses represented an affront to the dignity of the mother. On April 12, 2012, the Supreme Court approved pregnancy termination in cases of anencephaly.
2. Quilombos are settlements founded by escaped slaves before the abolishment of slavery in Brazil. Today, they are inhabited mostly by their descendants.
3. According to Figueiredo and Limongi (2002), parliamentary budget amendments cater to the special interests of voters, and politicians "expect these benefits to be converted into votes" (FIGUEIREDO; LIMONGI, 2002, p. 304). In Mato Grosso do Sul, this policy was implemented in 2000, following an agreement between the state government and the state legislature that allowed legislators to allocate funds from the state's Social Investment Fund – FIS (MATO GROSSO DO SUL, 2000). In 2012, each state legislator was entitled to allocate R\$ 800,000 in benefits.
4. Colored silicone wristbands worn by girls as part of a game in which a boy attempts to pull off one of the bands, whose colors represent acts ranging from hugging to sexual intercourse. In some regions of the country, girls wearing these bracelets have been raped. Afterwards, numerous municipalities banned the bracelets, reinforcing the idea that women who wear short skirts, low-cut tops and ultimately bracelets provoke the violence they suffer (CALLIGARIS, 2010).
5. The story broken by the journalists Ana Raquel Copetti and Wiliam Souza was aired during prime time on the local news program MS TV, produced by TV Morena, a station affiliated with Rede Globo, Brazil's largest television network.
6. Initially, eight employees from the Family Planning Clinic were charged, but the charges against four were dropped. The other four employees from the clinic, together with Dr. Mota, would face a trial by jury.
7. Over the course of the investigation, three different procedural options were offered: suspension of cases due to the application alternative penalties, suspension of cases due to the observance of certain requirements, and the application of the statute of limitations for abortions performed more than eight years earlier.
8. One of the witnesses for the prosecution had two abortions at the clinic.
9. The prosecutor is referring to the drug Cytotec. On some occasions during the trial, he uses the word "child" instead of "fetus".

## RESUMO

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Em abril de 2007, uma reportagem denunciou a existência de uma “Clínica de Planejamento Familiar”, que supostamente realizava abortos em Campo Grande (MS). Três dias depois, a polícia invadiu o estabelecimento, apreendeu cerca de 10 mil fichas médicas e violou seu conteúdo, trazendo à tona a intimidade de mulheres que ousaram usufruir da liberdade de tomar decisões e cuidar de suas vidas. O texto apresenta essa história, conhecida como o “caso das dez mil”, para fazer uma reflexão sobre as restrições aos direitos reprodutivos das mulheres, tecendo considerações acerca da coerção decorrente da lei que proíbe a interrupção voluntária da gravidez no país.

## PALAVRAS-CHAVE

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Direitos humanos – Aborto – Direitos reprodutivos – Mulheres – Brasil

## RESUMEN

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En abril de 2007, un reportaje denunció la existencia de una “clínica de planificación familiar” que supuestamente realizaba abortos en Campo Grande (capital del estado de Mato Grosso do Sul). Tres días después, la policía invadió el establecimiento, incautó cerca de 10.000 fichas médicas y divulgó su contenido, desvelando la intimidad de mujeres que osaron hacer uso de la libertad de tomar decisiones y cuidar de sus vidas. Este texto presenta esa historia, conocida como el “caso de las diez mil”, para hacer una reflexión sobre las restricciones a los derechos reproductivos de las mujeres, abordando algunas consideraciones acerca de la coerción derivada de la ley que prohíbe la interrupción voluntaria del embarazo en Brasil.

## PALABRAS CLAVE

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Derechos humanos – Aborto – Derechos reproductivos – Mujeres – Brasil



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ABSTRACT

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This paper is part of a line of research which has been developed over a number of years by the *Bureau for the Life and Health of Women in Colombia*, aimed at identifying and analyzing progress concerning the rights of women requesting voluntary termination of pregnancy, or abortion, particularly through the monitoring of judicial rulings. The text addresses four key issues. Firstly, it highlights the commitments under the Program of Action of the Cairo International Conference on Population and Development relating to access to abortion and reproductive health protection. Secondly, the paper briefly examines laws on abortion and health exception (*causal salud*) in Latin America and the Caribbean. Thirdly, it contextualizes abortion in Colombia and discusses progress on abortion jurisprudence by Colombia's Constitutional Court regarding the right to health and other related fundamental rights. Fourthly, it describes a set of judicial standards set by the Constitutional Court in relation to abortion and other fundamental rights to be applied in Latin America.

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KEYWORDS

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Abortion - *Causal salud* – Health exception – Reproductive rights – Constitutional Court of Colombia – Cairo International Conference on Population and Development



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# CASE STUDY ON COLOMBIA: JUDICIAL STANDARDS ON ABORTION TO ADVANCE THE AGENDA OF THE CAIRO PROGRAMME OF ACTION\*

Ana Cristina González Vélez and  
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## 1 Introduction

The International Conference on Population and Development (ICPD) held in Cairo in 1994 constitutes an important milestone in the field of abortion, reproductive health and rights in the international arena of human rights. Today, almost 20 years later, its agenda is still being actively pursued and some countries have succeeded in incorporating into their domestic law issues that are crucial for the attainment of sexual and reproductive rights (SRR), as well as for the effective enjoyment of the right to health. In this context, this study aims to identify and systematize the judicial standards established by the Constitutional Court of Colombia (hereinafter ‘the Court’) for solving cases involving abortion or Voluntary Interruption of Pregnancy (hereinafter VIP)<sup>1</sup> for assuring protection of the right to health, i.e. authorizing an exception known as *causal salud*, or ‘health exception’.

The term *causal salud*, or health exception, refers to the exception made to the punishable offence of abortion when the health or life of a woman is at risk as a result of pregnancy. In the human rights context, the concept of health covered by this exception should be understood as the highest possible standard of physical, mental and social health, in harmony with the concepts of well-being and lifestyle choices, which are the social determinants of health (GONZÁLEZ, 2008, p. 29).

In Latin America, the precedents established in Colombia in the abortion debate have been of great importance:

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\*This paper is part of a line of research developed several years ago by the *Bureau for Life and Health of Women in Colombia*. We are grateful for the collaboration of, and comments by, Juan Camilo Rivera and Paola Salgado Piedrahita.

*The use of international and comparative law by the Constitutional Court has brought Colombian women into contact with communities of women in other countries who face the same difficulties, to share experiences and common knowledge about abortion. The Court's rulings dignify women by exhibiting a profound understanding of the situations they face. The Constitutional Court's approach allows a contextual interpretation of the norms governing national and international human rights. By incorporating a gender perspective, the Court gives meaning to human rights in general, and particularly to the right of pregnant women to human dignity.*

(UNDURRAGA; COOK, 2009, p 17).

## **2 Commitments of the Cairo International Conference on Population and Development and review process after 20 years**

The Cairo Programme of Action is broad and ambitious, containing over 200 recommendations, with 15 goals in the areas of health, development and social welfare. An essential feature of the programme is the recommendation to deliver comprehensive reproductive health care (NACIONES UNIDAS, 1994, paras.7.1-7.11) covering family planning (NACIONES UNIDAS, 1994, paras 7.12-7.26), safe pregnancy and childbirth services, abortion (NACIONES UNIDAS, 1994, paras. 8.19-8.27), prevention and treatment of sexually transmitted infections – STI (including HIV and AIDS) (NACIONES UNIDAS, 1994, paras. 7.27-7.33), information and counseling on sexuality, and the elimination of harmful practices against women.

The Programme defined key aspects of reproductive health in an international legal document for the first time. Among its underlying principles, it explicitly states that:

*Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes. The human rights of women and the girl child are an inalienable, integral and indivisible part of universal human rights [...].*

(NACIONES UNIDAS, 1994, principle 4).

Principle 8 recognizes that:

*Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health. States should take all appropriate measures to ensure, on a basis of equality of men and women, universal access to health-care services, including those related to reproductive health care, which includes family planning and sexual health. Reproductive health-care programmes should provide the widest range of services without any form of coercion. All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so.*

(NACIONES UNIDAS, 1994, principle 8).

The above principle goes beyond traditional concepts of healthcare related to preventing disease and death, given that it promotes a more holistic view by addressing mental and physical health and other interrelated rights such as autonomy, and the right to information and education.

The Program of Action also states that countries should take measures to empower women and eliminate inequality (NACIONES UNIDAS, 1994, para. 4.4), and for that purpose it is necessary to eliminate all discriminatory practices, helping women to establish and realize their rights, including those related to reproductive and sexual health. It also emphasizes that:

*Countries should develop an integrated approach to the special nutritional, general and reproductive health, education and social needs of girls and young women, as such additional investments in adolescent girls can often compensate for earlier inadequacies in their nutrition and health care.*

(NACIONES UNIDAS, 1994, para. 4.20).

Moreover, the Program of Action urges governments and non-governmental organizations to strengthen their commitment to women's health and address the effects on women's health of abortions performed in unsatisfactory conditions as a major public health problem, and to reduce pregnant women's recourse to abortion by expanding and improving family planning services. It also states that in all cases:

*women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly in order to help to avoid repeat abortions.*

(NACIONES UNIDAS, 1994 para. 8.25).

Progress and challenges in the implementation of population and development strategies have been reviewed every five years (1999, 2004 and 2009). In this respect it is important to note that the Cairo+5 "key actions for the further implementation of the Programme of Action of the International Conference on Population and Development" (NACIONES UNIDAS, 1999) were adopted by the UNGA in 1999 as a tool to foster and facilitate the efforts of States in implementing their commitments.

These key actions included the following, which has a direct bearing on the subject of this paper:

*[...] abortion is not against the law; health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women's health.*

(NACIONES UNIDAS, 1999, para. 63, c).

In addition, governments were urged to strengthen their commitment to protect women's health in terms of availability and accessibility to healthcare in general.

In 2014 the ICPD pledges will be 20 years old. To mark this milestone, governments around the world are urged, in the light of the progress made, and despite the obstacles encountered, to renew their commitments to health and sexual and reproductive rights, and to set themselves fresh challenges in terms of goals, measures and actions as part of the new ICPD development agenda. The key objective is to determine States' new aspirations in this area. In this context, identifying judicial standards on abortion, as this study proposes, could serve as an invaluable tool for furthering the discussion on matters relating to guaranteed safe abortion, as well as for helping to guide the definition of future goals, measures and actions. These standards also provide a solid basis for tackling the urgent task of reviewing the approach to abortion as a criminal offence ('total criminalization'), given that this places at risk the protection and assurance of women's fundamental human rights.

### 3 Abortion in Latin America and the Caribbean (LAC)

In January 2012 the Guttmacher Institute released a report focusing on the reality of abortion in the world. According to this report Latin America has the highest rate of induced abortion in the world, with an estimated 32 out of 1000 women aged between 15 and 44 years having had at least one interrupted pregnancy. Africa comes second with 29 abortions per 1000, followed by Asia (28) and Europe (27). Although the rate declined in Latin America between 1995 and 2003 (from 37 to 31 per 1000), it is currently stable at 32 per 1000. Trends in the region tend to vary, with Mexico and Central America recording the lowest number (29 per 1000) (GUTTMACHER, 2012, p. 1).

The above figures again highlight the urgent need for States to regulate such practices and take a responsible approach to sexual and reproductive rights. We have consistently found that almost all the LAC countries have decriminalized abortion in cases of risk to a woman's life and/or health, in effect acknowledging what we refer to as *causal salud*, or health exception, in this paper.

While the scope and limitations of health exception vary from country to country, it can be argued that in most countries of the region the legal framework provides for "health" or "physical and mental health" to be regarded as legal grounds for voluntary termination.<sup>2</sup>

*Causal salud*, or health exception, is acknowledged in the legal framework of at least three main groups of countries that variously protect: (i) life; (ii) health in undifferentiated terms, i.e. overall health; and (iii) physical and mental health, or combinations of the same, e.g. countries that allow abortion to protect women's lives and health, or lives and physical/mental health. Finally, in certain countries, abortion is outlawed in all circumstances: Chile, Honduras, Nicaragua, El Salvador and the Dominican Republic. In all these countries, women have limited rights and are prone to risks and danger to their lives and health. In Venezuela, Paraguay, Panama and Guatemala abortion is permitted exclusively to protect the right to life.

In countries where no definition or distinction is made of the type of health to be protected (i, ii or iii above), we start from the premise that health is viewed as an overarching concept in legal terms. Thus, the protection of health in its broadest

sense applies to Argentina, Bolivia, Colombia, Costa Rica,<sup>3</sup> Ecuador, Peru, Trinidad and Tobago, and Uruguay (total decriminalization up to week 12).<sup>4</sup>

LAC countries with legislation allowing abortion to prevent risk to “mental and physical health” are mainly Caribbean states such as Belize, Barbados, Jamaica, Saint Kitts and Nevis, Saint Lucia and Saint Vincent and the Grenadines.

The above table shows that differences exist in the various legislations regarding the scope of the right to health in Latin America and the Caribbean. This means that interpretations of the abortion laws are not uniform, paving the way to challenges to be constantly aired in favour of women’s effective and timely access to legal abortion, regardless of ‘risk to life’ considerations. However, given that the right to health is enshrined in international treaties and commitments, the scope of these legal provisions needs to be expanded in order to guarantee women’s rights, taking into account the fact that health is a state of complete physical, mental and social wellbeing and not merely the absence of disease.

A recent study published by International Pregnancy Advisory Services (IPAS) on the application of laws which criminalize abortion in Argentina, Bolivia and Brazil between 2011 and 2013, reveals a selective application of abortion laws as well as discrimination against and humiliation of women who choose not to be mothers (KANE, GALLI, SKUSTER, 2013). Women and health professionals are subject to investigations, prosecutions, preventive detentions and arrests. Offenders may be threatened or punished with fines, obligatory community service or even prison, and sentences ranging from a few days to several years. Most of the women who are detained are already marginalized because they are poor, Afro-descendants, young people or of indigenous stock, and have no recourse to competent legal defence (KANE, GALLI, SKUSTER, 2013, p. 4.)

It is therefore important to define judicial standards that can guide us towards a balanced interpretation of the right to health and other human rights enshrined in the international legal framework<sup>9</sup> and that are consistent with the Cairo Programme of Action and relevant international commitments adopted by the LAC States. These frameworks also acknowledge that safeguarding life involves protecting not only women's lives but also their health, human dignity and autonomy. Furthermore, it

**Table 1**

**ABORTION LEGISLATION IN LAC REGARDING ‘LIFE AND HEALTH EXCEPTION’<sup>5</sup>**

State	Life	Health (no adjectival refinement)	Physical and Mental Health
Antigua & Barbuda	Yes	No	Yes
Argentina	Yes	Yes	No
Bahamas	Yes	No	No
Belize	Yes	No	Yes
Bolivia	Yes	Yes	No
Brazil	Yes	No	No
Colombia	Yes	Yes	No
Costa Rica	Yes	Yes	No
Ecuador	Yes	Yes	No
Grenada	Yes	No	No
Guatemala	Yes	No	No
Haiti	Yes	No	No
Honduras	No	No	No
Jamaica	Yes	No	No
Mexico <sup>6</sup>	Yes	No	No
Nicaragua	No	No	No
Panama	Yes	No	No
Paraguay <sup>7</sup>	Yes	No	No
Peru	Yes	Yes	No
Saint Kitts & Nevis	Yes	No	Yes
Saint Vincent and the Grenadines	Yes	No	Yes
Saint Lucia	Yes	No	Yes
Suriname	Yes	No	No
Trinidad and Tobago	Yes	Yes	No
Uruguay <sup>8</sup>	Yes	Yes	No
Venezuela	Yes	No	No

must be taken into account that international and regional human rights mechanisms have repeatedly expressed concern about the consequences of illegal abortions, or abortions carried out in unsafe conditions, in terms of women's inability to exercise their human rights, and have thus advised States to liberalize abortion regulations and to ensure access to abortion in the instances established by law (GRUPO DE INFORMACIÓN EN REPRODUCCIÓN ELEGIDA, 2013, p. 14).

#### **4 Abortion in Colombia**

The following brief overview of the situation in Colombia, based on available statistics on legal/illegal abortion, provides some idea of the difficulties that Colombian women have had over the years to access sexual and reproductive health services.

A study done by the Guttmacher Institute found that 1 out of every 26 Colombian women had an abortion in 2008, and that approximately 29% of all pregnancies ended in abortion. In the same year 400,400 induced abortions were performed, representing an increase of over 25% compared to the estimated total for 1989 (288,395). The actual abortion rate has not changed substantially over the past twenty years, but the increased number of abortions largely reflects the larger number of women of reproductive age in the country (GUTTMACHER, 2011, p 6).

Colombia's abortion rate is slightly above the average for South American countries, estimated by the World Health Organization (WHO) to be 33 abortions per 1000 women in 2003. According to the limited data available for other Latin American countries with similar laws to those of Colombia, the abortion rate in Colombia is slightly higher than that of Mexico (33 per 1000 in 2006), substantially higher than that of Guatemala (24 per 1000 in 2003), and much lower than that of Peru (54 per 1000 in 2000) (GUTTMACHER, 2011, p. 10).

The Guttmacher study clearly highlights the need to remove institutional and bureaucratic obstacles for women seeking a legal abortion, and to ensure that such women are cared for by health institutions that have the mandate, skills and facilities needed for delivering legal, safe procedures. "Six out of 10 health institutions in Colombia with the capacity to provide post-abortion care fail to do so, and around 9 out of 10 of these do not provide legal abortion services" (GUTTMACHER, 2011, p 27).

As for access to legal abortion, Colombia's Ministry of Health and Welfare reports that 954 procedures of Voluntary Pregnancy Interruption were performed between 2008 and September 2011 within the constitutional framework developed since Judicial Ruling C-355 (2006). This would appear to be a significant understatement, probably reflecting under-reporting of cases by healthcare providers.

#### **5 Constitutional Court decisions on abortion**

The Constitutional Court has played an important role in protecting the basic rights of people in Colombia, especially the rights of women, with emancipating potential (UPRIMNY; GARCIA VILLEGAS, 2002, p. 72). In the case of the latter the Court has moved towards unlocking the potential of women by addressing issues such as the protection of economic, social and cultural rights (SEPÚLVEDA, 2008, p. 161 and

162), including the right to health. The Court has also made key pronouncements on sexual and reproductive health (YAMIN; PARRA-VERA; GIANELLA, 2011, p. 103).

In April 2005, the organization *Women's Link Worldwide*, through the lawyer Monica Roa, filed a suit challenging the unconstitutionality of the provision under the Penal Code which held abortion to be a criminal offence in Colombia. Roa's approach was predominantly based on comparative law, international human rights law and public health arguments (SIERRA JARAMILLO; ALFONSO SIERRA, 2008, p. 86). WLW's main objective was to seek to decriminalize abortion in all circumstances.<sup>10</sup>

In May 2006, under Ruling C-355, the Court concluded that the law criminalizing abortion in all circumstances imposed a disproportionate burden on women and manifested ignorance of fundamental rights recognized both by Colombia's Constitution and by international treaties on human rights. The Court thus decided, with Ruling C-355, that abortion, provided the pregnant woman agreed, would not be regarded henceforth as a crime in one of the following circumstances: (i) when continuation of the pregnancy would endanger the life or health of the woman; (ii) in the event of severe foetal abnormality incompatible with life; and (iii) in the case of sexual violence (COLOMBIA, 2006, sentencia C-355).<sup>11</sup>

Court ruling C-355 was seen as a breakthrough and, although it failed to guarantee free exercise of motherhood, it certainly responded to a public health predicament by acknowledging the problems that could result from the continuation of pregnancy in extreme circumstances (DALÉN, 2011, p. 19).

Subsequently, from 2007 to 2012, the Court ruled on 10 petitions<sup>12</sup> from women requesting a legal abortion on the grounds set forth in C-355. In these cases the Court was able to identify various impediments generated by different health institutions aimed at denying women access to VIP, and was obliged to reiterate its position in favour of protecting a broad spectrum of women's basic rights, including their right to health.

### 5.1 *The right to health*

The Court has ruled that health is a fundamental constitutional right, "a state of complete physical, mental and social well-being and enjoyment of the highest attainable standard of health by an individual" (COLOMBIA, 2008b, sentencia T-760-08). The Court has addressed three issues concerning the right to health of women petitioning for a VIP: (i) pregnancy as a result of sexual violence; (ii) a woman's right to diagnosis; and (iii) the duty of the State to guarantee women access to health services throughout the entire country.

The Court has recognized, for example, that health can be affected when pregnancy results from rape:

*[...] rape, apart from being a violent act, constitutes aggression, humiliation and submission, and carries with it short term and long-range impacts of an emotional, psychological and existential order, including damage to [women's] health caused by pregnancy and sexually transmitted disease.*

(COLOMBIA, 2008a, sentencia T-209-08).

The Court has also argued that since diagnosis is part of the right to health, women requesting a VIP should have tests to determine whether their physical or mental health would be put at risk by an abortion. Furthermore, the Court has declared that the State must ensure that abortion services in the cases provided for under Colombia's national legislation must be "available throughout all the national territory" and that women must be able to access these services at whatever level of complexity it is required. Finally, the Court ruled that all health agencies should possess sufficient qualified staff to ensure a satisfactory VIP result (COLOMBIA, 2009b, sentencia T-388-09).

### *5.2 The right to human dignity and autonomy*

The right of women to decide autonomously on VIP is intimately linked to their right to human dignity, according to which every human being is free to choose "to live as he wishes." In this regard, the Court has declared that human dignity protects the "freedom of an individual to choose a particular lifestyle under the social conditions in which the individual develops" (COLOMBIA, 2009b, sentencia T-388-09).

Moreover, the Court has argued that the autonomous right of a woman to decide on an abortion applies to the protection of all women regardless of their age. In this regard, current legislation, according to the Court, is an "*impermissible barrier*" given that its premise is "to prevent pregnant girls under 14 years of age from freely consenting to voluntary termination of pregnancy when their parents or legal guardians do not agree with this procedure" (COLOMBIA, 2009b, sentencia T-388-09). In short, when the wishes of the pregnant under 14-year-old girl are overruled, her right to human dignity is effectively infringed.

### *5.3 The right to information*

The Court has held that information on reproductive health involves two clearly distinct obligations. On the one hand, the State has the duty to ensure that women have "comprehensive and appropriate information to enable them to fully and freely exercise their sexual and reproductive rights" (COLOMBIA, 2009b, sentencia T-388-09), and that information on sexual and reproductive rights "helps individuals to make free and informed decisions regarding intimate aspects of their lives" (COLOMBIA, 2012, sentencia T-627-12).

On the other hand, the State must refrain from "censoring, withholding or intentionally misrepresenting health-related information, including sex education," and also "ensure that third parties do not limit a person's access to information" (COLOMBIA, 2012, sentencia T-627-12). To protect this duty, the Court has instructed public authorities not to distort the content of its previous rulings on sexual and reproductive rights, especially in relation to abortion (COLOMBIA, 2012, sentencia T-627-12).

### *5.4 The right to privacy*

The Court has held that to promote women's access to justice, the judicial authorities must not divulge the identity of any woman seeking an abortion or disclose any information that might lead to her identity being revealed. The Court has taken full



cognizance of the fact that in Colombia exercising the legal right to request a VIP runs the risk of the individual involved being subjected to moral and religious censure. According to the Court,

*[The] possibility of being subjected to this kind of opprobrium can deter a woman from going to court to demand her fundamental right to VIP and, for this reason, keeping her identity confidential seeks to keep her out of the public eye, thus protecting her from exposure to public censure and creating favorable conditions for her to access justice.*

(COLOMBIA, 2012, sentencia T-627-12).

### ***5.5 The right to justice***

The Court has argued that women are a group traditionally discriminated against in terms of access to justice. Fearing moral or religious gender bias by judges, many women prefer not to go to court, thus leading to “the perpetuation of violations of their rights and of their status as a discriminated group” (COLOMBIA, 2012 sentencia T-627-12).

To address this situation, the Court has established a set of rules intended to remove the barriers which deter women from going to court. These include the following: (i) all private individuals have a right to conscientious objection, but when these subjects exercise judicial functions or serve as Judges of the Republic, they cannot resort to conscientious objection to avoid deciding a case; (ii) given that women’s right to autonomy must be protected, judges are not authorized to comment on the feasibility or relevance of a particular medical procedure because this appraisal is incumbent on the relevant qualified medical personnel (COLOMBIA, 2009a, sentencia T-009-09).

## **6 Standards on abortion, the right to health and other human rights**

“Legal standards” are formulations through which abstract fundamental rights (health, life, dignity, information, autonomy etc.) are developed and given concrete expression for the purpose of defining specific responsibilities for their protection and guarantee. In the case of access to abortion, the usefulness of extending these standards more widely to other countries outside Colombia is reinforced by the fact that they are based upon an international framework of human rights as well as on the existence of health exception and the recognition by other Latin American States of the obligation to protect the right to health.

These standards could pave the way towards progress on the sexual and reproductive rights (especially abortion) agenda to mark the 20 years of implementation of the Cairo Programme of Action. Ensuring access to VIP on health exception grounds implies protection of the right to health and other associated rights and amounts to defending the sexual and reproductive rights of women.

- a) **Reproductive self-determination:** the decision to have a VIP or not, assuming that abortion is not a criminal offence, and even where risk to overall health is involved, is entirely that of the woman concerned.
- b) **Respect for lifestyle:** women's right to dignity includes their right to freely make decisions about their own lifestyle.
- c) **Health as a holistic concept:** it is the duty of the State to allow women to have a VIP when their health is at risk in any of the three forms - physical, mental or social. It should be recognized that in cases of rape a woman's health is at risk.
- d) **Diagnosis:** the attending physician has an obligation to fully diagnose a woman's state of health and to take any necessary steps when it is a case of confirming the existence of risk for implementing health exception procedures.
- e) **Protection of privacy in legal and medical matters:** obliges all the practitioners involved in a case of VIP (including judges) to keep the identity and clinical record of the woman confidential.
- f) **Timely information provided for women about how to access VIP:** the State must provide appropriate, comprehensive and reliable information for women. Moreover it should generate information outreach mechanisms such as publicity campaigns, and foster education on aspects related to sexual and reproductive rights.
- g) **Free consent of girls and adolescents and handicapped women:** the State must ensure that children can express their consent freely when their parents or legal representatives are opposed to a VIP. Women with disabilities can do the same through their parents or another person acting on their behalf, without additional formal requirements.
- h) **Prohibition on imposed barriers:** this includes preventing third parties from interfering with the legal and timely VIP procedure by imposing obstacles such as requests for further requirements, ignoring the woman's autonomy and posing administrative impediments, thereby unjustifiably prolonging the procedure; or collectively or institutionally claiming conscientious objection to the procedure.
- i) **Guaranteeing services throughout the country and at different levels of complexity:** the State must ensure that abortion services are available throughout the country at all the levels of complexity required.
- j) **Number and quality of health professionals:** the State must ensure that all health agencies have sufficient numbers of qualified staff to undertake VIP.
- k) **Limits to court intervention:** judges are not permitted to rule on the medical aspects of VIP. Furthermore, it is not necessary for women to appeal to any judicial body in order to request clearance for a VIP authorization.

Over the 20 years since the Cairo Programme of Action was signed, efforts on the

abortion front have focused on guaranteeing abortion in cases permitted by law. However, the fact that women still face obstacles even in the best legal environments means that we need to think of ways in which we could genuinely progress towards meeting the Cairo commitments and truly push back the frontiers on this issue. Health exception and the standards set by the Constitutional Court of Colombia are of special importance since they serve not only to encourage moves towards legal abortion but also to contribute to efforts to decriminalize abortion as a way of protecting and guaranteeing women's right to health and other related rights.

Colombia's constitutional development and experience could contribute further to the implementation of the Cairo Programme of Action (which provides that in States where abortion is not a criminal offence they must ensure that it is safe), by encouraging States to broadly interpret the justification for abortion from a human rights point of view, avoiding disclaimers, restrictions or undue delay, and thereby to ensure women's access to abortion when they consider their health to be at physical, mental or social risk. These standards could well form the basis of efforts to identify new goals such as revising laws that at present totally criminalize abortion, and to seek new objectives and specific measures that could guarantee effective access to legal abortion in a safe and timely manner in those cases where the law makes exceptions, always based on respect for women's human, and especially their sexual and reproductive, rights.

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## NOTES

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1. The term Voluntary Interruption of Pregnancy (VIP) is used in Colombia in Ministry of Health documents. It is a broad term, not linked to the number of weeks of gestation or foetal viability but rather to the wishes of the woman within the context of the grounds for abortion permitted by the country's Constitutional Law.
2. As mentioned before, some countries prefer the term Legal Termination of Pregnancy (LTP). In Colombia we use Voluntary Interruption of Pregnancy (VIP) since it has a broader meaning, not being subject to medical opinions regarding the viability of the foetus (normally at 22 weeks gestation).
3. However, we found that in Costa Rica, for example, article 121 of the Criminal Code states that "abortion is not punishable when performed with the consent of the woman by a medical doctor or, in the absence of a doctor, by a qualified obstetric, providing the procedure is carried out in order to prevent danger to the life or health of the mother and cannot not be avoided by other means" (COSTA RICA, 1970, art. 21). In practice, abortion on health grounds has never been applied, since doctors refuse to do this, claiming the non-existence of relevant protocols. Similar problems occur in Peru, Ecuador and Argentina.
4. In Uruguay, abortion was decriminalized in October 2012 in all circumstances up to 12 weeks gestation, provided the pregnant woman meets certain requirements, including appearing before an interdisciplinary panel to be informed about current adoption and maternity programmes. In addition, abortion is permitted with no gestational limit in cases of sexual violence (up to week 14), risk to the woman's life and health and in the event of fetal malformation.
5. See González, 2011, p. 11.
6. In Mexico, each federal state has autonomy to regulate in this area. In Mexico City abortion is permitted under the health exception mechanism and in all cases up to 12 weeks, while in other states abortion is a criminal offence.
7. Paraguay's Penal Code article 352 notes that " [...] will be exempt from liability providing evidence is presented that the abortion has been performed in order to save the lives of women endangered by pregnancy or childbirth" (PARAGUAY, 1997, art. 352). This amounts to indirect decriminalization.
8. Total decriminalization of abortion up to 12 weeks and *causal salud* as an exception, with no time limit.
9. A recent study shows the impact of the dissemination of information and training on abortion on health grounds in Latin America, and how a regional process of discussion and training to healthcare providers conducted in 2009-2010 has had a favourable impact on the views and practices of health professionals in Argentina, Colombia, Mexico and Peru, where women request abortion on the grounds of health - interpreted in its 'broadest' sense (GONZÁLEZ, 2012, p. 28).
10. Litigation on abortion in Colombia has been viewed as a first foray into strategic litigation in favour of women's rights. Many lessons have been learned from this about how to manage the media and promote advocacy as a way of influencing public opinion from a public health and human rights angle.
11. The robust approach to the reproductive rights of women by the Colombian Court is not reflected in the German and Spanish rulings on abortion. Although our Court has limited itself to ruling that the criminalization of abortion is unconstitutional only in extreme cases, the judges' insistence on the use of the criminal code as a last resort suggests that their approach could be extended to normal pregnancies when the woman decides she is not ready to embrace motherhood. Meanwhile, abundant evidence exists to show that treating abortion as a criminal offence is not effective as a means of reducing abortion rates (UNDURRAGA; COOK, 2009).
12. Constitutional Court of Colombia, Court Rulings: T -171 -07 (COLOMBIA, 2007a), T -988 -07 (COLOMBIA, 2007b), T -209- 08 (COLOMBIA, 2008a), T -946- 08 (COLOMBIA, 2008c), T -009- 09 (COLOMBIA, 2009a), T -388- 09 (COLOMBIA, 2009b), T -585- 10 (COLOMBIA, 2010), T - 363-11 (COLOMBIA, 2011a), T -841 -11 (COLOMBIA, 2011b) and T -627 -12 (COLOMBIA, 2012).

## RESUMO

Este texto faz parte de uma linha de pesquisa desenvolvida há vários anos pela Mesa pela Vida e a Saúde das Mulheres na Colômbia, orientada para identificar e analisar os avanços a favor dos direitos das mulheres que solicitam interrupção voluntária da gravidez ou aborto, em especial através do acompanhamento de decisões judiciais. O texto aborda quatro questões fundamentais. Em primeiro lugar, identifica os compromissos decorrentes do Programa de Ação da Conferência Internacional sobre População e Desenvolvimento do Cairo relacionados com o acesso ao aborto e à proteção da saúde reprodutiva. Em segundo lugar, apresenta um breve estudo sobre as leis sobre aborto e sobre o permissivo legal para a interrupção da gravidez em caso de risco à saúde da mulher (*causal salud*) na América Latina e no Caribe. Em terceiro lugar, contextualiza o aborto na Colômbia e discute os avanços da jurisprudência da Corte Constitucional da Colômbia sobre aborto no que diz respeito ao direito à saúde e outros direitos fundamentais relacionados. Em quarto lugar, propõe um conjunto de normas fixados pela Corte Constitucional em relação ao aborto e outros direitos fundamentais a serem aplicados na região da América Latina.

## PALAVRAS-CHAVE

Aborto – *Causal salud* – Permissivo por motivo de saúde – Normas – Corte Constitucional da Colômbia – Conferência Internacional de População e Desenvolvimento – Conferência Internacional sobre População e Desenvolvimento – Cairo

## RESUMEN

El presente escrito hace parte de una línea de investigación desarrollada desde hace varios años por *La Mesa por la Vida y la Salud de las Mujeres* en Colombia, orientada a identificar y analizar los avances a favor de los derechos de las mujeres que solicitan la interrupción voluntaria del embarazo o aborto, en especial a través del seguimiento de decisiones judiciales. El texto aborda cuatro cuestiones fundamentales. En primer lugar, identifica los compromisos emanados del Programa de Acción de la Conferencia Internacional sobre Población y Desarrollo de El Cairo, relacionados con el acceso al aborto y la protección de la salud reproductiva. En segundo lugar, se presenta un corto estudio sobre las leyes sobre aborto y causal salud en América Latina y El Caribe. En tercer lugar, contextualiza el aborto en Colombia y discute los avances de la jurisprudencia de la Corte Constitucional de Colombia sobre aborto, en relación con el derecho a la salud y otros derechos fundamentales relacionados. En cuarto lugar, propone un conjunto de estándares fijados por la Corte Constitucional en relación con el aborto y otros derechos fundamentales para ser aplicados en la región de América Latina.

## PALABRAS CLAVE

Aborto – Causal salud – Estándares – Corte Constitucional de Colombia – Conferencia Internacional de Población y Desarrollo – Conferencia Internacional sobre la Población y el Desarrollo – Cairo

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INTERVIEW WITH SHELDON LEADER

Transnational Corporations and Human Rights

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CRISTINA RĂDOI

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CARLA DANTAS

Right of Petition by Individuals within the Global Human Rights Protection System

### SUR 18, v. 10, n. 18, Jun. 2013

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FERNANDA RIBEIRO ROSA

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LAURA PAUTASSI

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