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DEVELOPMENT AND HUMAN RIGHTS

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Juana Kweitel and Laura Trajber Waisbich**
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ABSTRACT

Organizations from Latin America met in mid-2012 in São Paulo, Brazil to jointly carry out a diagnosis of the impact of the dominant economic development models on human rights and critically evaluate the response strategies of the human rights movement to face this challenge. This article presents some of the thinking at a meeting organized by Conectas Human Rights, the Center for Studies on Law, Justice and Society (*Dejusticia*) and the Law School of the Fundação Getúlio Vargas.

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KEYWORDS

Economic growth – Development – Indigenous peoples – Consumption – Human rights movement – Environment



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DEVELOPMENT AND HUMAN RIGHTS: SOME IDEAS ON HOW TO RESTART THE DEBATE

César Rodríguez Garavito, Juana Kweitel
and Laura Trajber Waisbich

Although the human rights movement distanced itself from the debate surrounding economic development for a long time, in recent years interest in the subject has been rekindled. This renewed interest brings to light that true debate on the subject requires collective thinking on the conceptual and operational challenges of action.

This article presents some of the thinking at a meeting¹ held in São Paulo in May, 2012. Organized by Conectas Human Rights, the Center for Studies on Law, Justice and Society (*Dejusticia*) and the Law School of the Fundação Getúlio Vargas, the meeting brought together Latin American organizations to jointly make a diagnosis of the impact of the dominant economic development models on human rights and critically evaluate the response strategies of the human rights movement in the face of this challenge.

This article organizes the meeting's ideas around four areas of tension: 1.1) Development vs. economic growth; 1.2) Ecosystemic limits vs. demands for expansion of access to rights; 1.3) Property right vs. common good; 1.4) Us vs. them: new divisions and new alliances? Towards the end we include a section on thinking about how to strengthen the human rights movement's actions on this subject and offer some conclusions.

Notes to this text start on page 12.

1 Development and Human Rights: Four areas of tension

1.1 *Development vs. economic growth*

We frequently refer to economic growth as being synonymous with development. Nevertheless, economic growth, with its obsession for material accumulation and its negligence regarding environmental impact, has generated multiple incompatibilities from a human rights perspective.

In Latin America, the current economic model's negative impact on human rights is increasingly apparent. Even recognizing important results, such as the reduction in poverty and progress in terms of eco-efficiency and corporate social responsibility, it has become evident that mechanisms must be developed to place limits on the obsession for profit and, especially, to strengthen the State's ability to regulate. A weak State has less defenses against market interests.

In Latin America, after decades of neoliberal policies, the return to policies of economic development has translated into greater activism on the part of the State, which has assumed a central role. In both the previous and current periods of developmental policies, the State chooses and supports economic sectors that are transformed into "winners". Currently, it is left-wing governments in the region that take upon themselves the task of developing their countries, and, for this, they give preference to certain economic sectors. In contrast to the nineties, when the State's role shrank, we now have stronger States that consolidate their abilities to boost certain economic sectors and yet, at the same time, reduce their abilities to regulate and control.

In this scenario, economic growth takes precedence over any other value, and even over respect for human rights, especially for more vulnerable communities. Developmental policies and culture therefore aggravate tension between the sectors who are the beneficiaries of growth and those who must pay the cost of these policies. In this way, those who criticize the model, as well as those who are affected by it, are seen as "obstacles" to the country's growth. Repeatedly, both criminalization of those opposing these policies and denial of the rights of those affected are justified in the name of the intended collective well-being.

This tension also questions some of the characteristics of our representative democratic systems, given that the groups most often affected are very distant from the political and economic center and, consequently, face even greater difficulty making their voices and interests heard.

Part of the solution to these issues could come from finding ways of including ethics in the economy; reconciling economy and society, values and science. Amartya Sen offers a conceptual tool with which to do this. His conception of development as the expansion of the autonomous decision-making sphere of individuals (of abilities)² allows the instrumental reconciliation of the idea of democracy with human rights. Development as individual and collective autonomy suggests an emancipating model that is not imposed from outside, but one that is internal within societies, requiring information and intense public

debate. In fact, Sen's thinking is extremely contemporary, as demonstrated by the strategies of mobilization and litigation of many organizations in reaction to the recent initiatives of *open governments* and national laws ensuring access to information (such as in Peru, Brazil, Mexico etc.).

Development as an expansion of *abilities*, therefore, makes it possible to recuperate the idea of the Democratic State and revalorize it—not as a protection mechanism for private investment, but as protection for minorities against the majorities, for example, against a certain model of development that affects their cultural identity.

Popular participation can also be a way of setting certain limits on the model centered exclusively on economic growth. Prior consultation with indigenous peoples is an example of a mechanism that can guide the formulation and implementation of public policies and that promotes development taking into consideration the reality and the rights of those affected.³

1.2 Ecosystem limits vs. the demand for expanded access to rights

Amartya Sen enables us to link the question of human rights with that of development. However, a new dilemma arises: how to include the environmental dimension in Sen's model?

We know that the agenda of human rights organizations is based on making access to rights universal. Nevertheless, expansion of access presupposes the permanent expansion of consumption, and today this is unsustainable. Conceptually the dilemma is to try and reconcile the need to expand access to rights for all on a planet that is host to 7 billion inhabitants and the natural resources of which have a distinct limit. In other words, how can we reconcile the imperatives of social justice with those of environmental justice? Environmental justice has a special relationship with the classic issues of redistribution and recognition.⁴ But, until now, the juridical nexus between human rights and the environment remains very weak (with some exceptions, such as the constitutions of Ecuador and Bolivia or the International Labor Organization Convention 169).

Additionally, neither the right nor the economy is able to provide a tool to overcome this tension. The green economy model has turned into a form of "greenwash" and has not been able to stop the trend to destruction of the planet and the exhaustion of its natural resources. The new international division of the world's natural resources and labor de-industrializes the economies of Latin America (and Africa) and converts them into exporters of raw materials, while Asia concentrates on manufacturing and inclusion in the world market, and Europe and the United States consume the final product. How, therefore, can natural resources be used in a way that guarantees real social needs?

A possible answer lies in changing a model in which the world is dedicated to the consumption of private goods. The meaning and use of the economy must be changed – both in theory and in practice.⁵ The fight against poverty cannot be won without reducing inequality, which may require, in some cases (in the more developed countries), concrete limitations on consumption.

There is, nonetheless, some cause for optimism. With the social networks, new possibilities have arisen for social cooperation (including for cooperative consumption) and collective struggle for new forms of citizenship in an overburdened planet

1.3 Property rights vs. common good

The third dilemma concerns the tensions between old and new models of the management of material commons (such as the land) and intangible commons (such as knowledge).

	Current management models	Innovative management models
Material assets Example: Land	Private property: concentration	Indigenous lands: collective management
Intangible assets Example: Knowledge	TRIPS: Restrictions on access to medication Intellectual Copyright: restrictions on access to knowledge	Creative Commons Linux Wikipedia: free access Recent discussions in the World Health Organization (WHO) on health and innovation

With the canonization of private appropriation, the liberal development model as we know it, puts at risk common assets (such as water and biodiversity) through commercialization; this is illustrated in the intellectual property rights system's impact on the right to health. The productive monopoly represented by the patent system not only increases the cost of medicine and makes access difficult, but it has also stifled innovation. Numerous fatal diseases in underdeveloped nations continue to be ignored.

Something similar occurs in the case of the culture industry, where intellectual property at any price makes access to information difficult, affecting, and sometimes criminalizing, artists' and citizens' freedom of expression.

This phenomenon implies significant challenges for the human rights movement for at least two reasons:

- 1) The culture industry makes use of human rights vocabulary (author's rights) to defend private profit.
- 2) Many of the continent's governments are increasing protection of intellectual property and private monopoly as a way to promote "economic growth." Tensions between the patent system and the protection of the common good are frequent, for example, in Brazil where the Health Ministry has signed agreements with private laboratories to produce drugs – such as *atazanavir* – for HIV/AIDS.⁶

Although firmly rooted in the legal systems, individual property rights coexist with alternative models of production and collective property. Recent experiences are showing that the networks can also bring values (such as trust and reciprocity) to the system, which are fundamental to the collective management of tangible or intangible assets. As Yochai Benkler theorizes,⁷ the transforming potential of the new models can be seen in the advance of the internet economy in the collective management of intangible property (with experiences such as *Linux*, *Creative Commons* and *Wikipedia*, for example) or in the proposal of alternative models of consumption (such as *Cooperative Consumption*).

The concept of *commons* (those that are non-exclusive, which are not the property of anyone and allow shared use) can be a useful theoretical tool for questioning current models of commons management. The idea of common property not only affirms the primacy of the collective interest over individual interests, but it also specifically allows the idea of shared and collective management of some property, such as information and knowledge (*pure public commons*: those that are non-excluding and non-exclusive).

While communication and information technologies have allowed the expansion of the internet economy, collective management of natural resources has yet to become any substantial aspect of this debate. An important contribution is the collective management model for the lands of various indigenous peoples in Latin America. Nevertheless, studies of the economic feasibility of these collective models, as well as the question of how they can survive in economic and institutional environments where private property is predominant, need to be more thoroughly undertaken.⁸

1.4 Us vs. them: new divisions and new alliances?

Contrary to the previous dilemmas, the last point of tension refers not to the objective of protecting human rights but, rather, the human rights movement as a player in this process. Getting involved in development issues requires the movement to take a critical look at the traditional antagonisms and the traditional us-them dichotomies.

In the conceptual debate and, even more so, in the operational aspect, one can see a lack of clarity over the limits between allies and enemies. Frequently, the question of development radicalizes tensions within the human rights movement.

There is agreement over the fact that one of the movement's main challenges is to reconcile – conceptually and strategically – the duty of protecting the rights of those affected with the imperatives of the public good. It is not, however, easy to articulate criticism of development as the latter creates an alliance between various sectors (business, financial, technocracy and some union sectors). In this context, often those criticizing this model are seen as traitors.

The tensions between some human rights organizations and a part of the union movement are a good example of this complex relationship. In mining activities or infrastructure megaprojects, the protection of workers' interests – focused in the creation of jobs – does not always coincide with the interests of those affected, as with indigenous peoples and the local communities.

A second division arises between human rights organizations and the political left, especially in contexts in which pro-development governments come from the left. In this situation, today is common to see splits between a pro-development left and an environmentalist left.

A third division occurs in the positioning and strategies of the movement when faced with multiple challenges. While some organizations spend time questioning the collateral effects of the model (with tools such as Corporate Responsibility and strategic philanthropy), others envision a long-term goal, trying to change the structures of the economic model by attempting to produce a dialogue with alternatives going beyond the green economy. For those working with corporations, Ruggie's soft law can be a tool.⁹ For others, strengthening the hard law of the courts is the best alternative.

Contradictory views arise about the role of companies in building a bridge between players in the human rights movement and the world of development. For some, the incorporation of ethics into the economy needs everybody: state and market and, for this, Corporate Social Responsibility is a necessary advance bringing important changes. Inversely, there are others who see it as a form of marketing (or greenwashing) that has only worsened the overall situation.

At the same time, some claim it possible that companies are not homogenous and that there is room to maneuver by maintaining a dialogue. Is it possible to successfully formulate strategies for working with resistance efforts and, at the same time, attempt to bring about internal change? Whatever the answer, to involve itself in the question the movement must seek legitimate interlocutors in corporations for constructive dialogue and, simultaneously, overcome the legal hurdles to justice in cases of violations involving corporations.

2 Abilities the human rights movement should strengthen

Beyond the conceptual complexities inherent to the area of *human rights and development*, we can identify some of the collective deficiencies of the human rights movement in order to work on the issue and serve as a road map for thinking about future action.

Developing conceptual tools. The first hurdle is the lack of conceptual tools thinking of alternatives to the dominant model of economic development, whether by means of the network economy, or part of the commons model. Only the systematic accumulation of evidence will allow us to construct a minimum basis of information and understanding among the region's organizations. We must also act in a critical and purposeful manner, which includes intervening in the production of knowledge, especially in the juridical and economic sciences.

Rethinking the unity of action, the alliances and the most suitable forums. Today we need new allies and to identify increasingly trans-national spaces for the struggle. For this, we not only need strategies with proposals, but also ones that are creative

(such as dialogue and litigation in other forums such as the Courts of Auditors or the creation of scientific organizations that can contribute to the investigation of human rights violations as a consequence of economic growth initiatives). We also need to form multi-sector and multidisciplinary alliances, including with technically qualified people in other areas traditionally distant from human rights (for example biology and engineering). At the same time, we need to complement the work in the traditional arenas of action (institutions of the Nation-State or the universal human rights system) with work in various action units (for example, in bio-geographical zones) in which the processes we want to challenge take place (for instance, deforestation of the Amazon, consisting of various nation-states).

Mapping installed and available capacities. Finally, the mapping of our installed capacities is crucial to finding out what we still lack. It is also important to have a panorama of the players involved in the question, enabling us a clearer vision of possible partners, interlocutors, and opponents.

3 Conclusion

The first conclusion is that there is still no consensus on a human rights agenda concerning economic development, whether among human rights organizations or between the latter and other social sectors in each of our countries. Today we are facing a new wave of violence and criminalization against those who defend alternative values and an economic growth model understood as merely the expansion of consumption.

The second conclusion is that, in this context, our actions should be primarily local and case-dependent. But, it is precisely the connection of multiple, simultaneous local actions that end up disputing the global economic structure. In this sense, the local collective action strengthens (and is strengthened by) transnational collective action.

It is now possible now to intensify networks of collaboration and dissemination of information thanks mainly to the Internet and to the social networks. Some concepts such as trust and reciprocity emerge as challenges to the old models, principally of the neoliberalism and the developmentism.

The collective perception is that the best plan of action in this context is to continue discussing our particularities and insert them in a universal discourse; we must continue to act strategically at the micro level, case-by-case, but with a clear and solid discourse of principles.

Also pending are more in-depth discussions over whether the human rights arena is suitable to deal with these questions. Some hold that the discourse of rights, due to their principle-oriented nature and absolute values, could lead to tensions without solutions. In situations where the local communities are obliged to negotiate, the rights discourse that leaves less room for trade-offs could increase the likelihood of conflict and fail to lead to real solutions.

Only an accumulation of experiences leads to sustainable transformation. We must be persistent and creative if we are to succeed in transforming practices and ideas on economic development and human rights.

NOTES

1. The meeting was also seen as an opportunity to identify some issues for collective action in the short and medium terms. Taking part were 26 representatives from 24 organizations in Latin America.
2. Sen, Amartya. **Development as Freedom**. Oxford: Oxford University Press, 1999.
3. See César Rodríguez Garavito. *Etnicidad.gov: los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados*. Bogotá: Dejusticia, 2012.
4. See Nancy Fraser. *Justice Interruptus: Rethinking Key Concepts in a Post-socialist Age* (1997), *The Radical Imagination: Between Redistribution and Recognition* (2003), *Redistribution or Recognition? A Political-Philosophical Exchange* (2003), and *Scales of Justice: Reimagining Political Space in a Globalizing World* (2008) y Robert Melchior Figueroa. *Debating the Paradigms of Justice: The Bivalence of Environmental Justice*. Ann Arbor: University Microfilms International, 1999.
5. See Ricardo Abramovay. *Muito além da economia verde*. São Paulo: Planeta Sustentável, 2012.
6. See Working Group on Intellectual Property (GTPI), Brazilian Network for the Integration of Peoples (REBRIP), Letter of Concern of the GTPI regarding the Public-Private Partnerships announced by the government, April 19, 2011, available at: http://www.deolhonaspontes.org.br/media/file/Notas%20GTPI%20-%202011/Carta%20GTPI_Preocupa%C3%A7%C3%B5es_Final_Site.pdf. Last accessed at: Dec. 2012.
7. See Yochai Benkler. *The Wealth of Networks*. Yale: Yale University Press, 2006. Available at: http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf. Last accessed at: Dec. 2012.
8. See: Juan Camilo Cárdenas, *Dilemas de lo colectivo: Instituciones, pobreza y cooperación en el manejo local de los recursos de uso común*. Bogotá: Universidad de los Andes, 2009. Available at: <http://static.elespectador.com/archivos/2009/08/04ae547f65e425c3e20d939e355f3306.pdf>. Last accessed at: Dec. 2012.
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RESUMO

Organizações da América Latina reuniram-se em São Paulo, em maio de 2012, para desenvolver um diagnóstico acerca do impacto dos modelos dominantes de desenvolvimento econômico sobre os direitos humanos e avaliar criticamente as estratégias do movimento dos direitos humanos para responder a esse desafio. Este artigo apresenta algumas das reflexões do encontro, convocado pela Conectas Direitos Humanos, pelo Centro de Estudos de Direito, Justiça e Sociedade (*Dejusticia*) e pela Escola de Direito da Fundação Getúlio Vargas

PALAVRAS-CHAVE

Crescimento econômico – Desenvolvimento – Povos indígenas – Consumo – Movimento dos direitos humanos – Meio ambiente

RESUMEN

Organizaciones de América Latina se reunieron en San Pablo, en mayo de 2012, para realizar un diagnóstico conjunto sobre el impacto de los modelos dominantes de desarrollo económico en los derechos humanos y evaluar críticamente las estrategias del movimiento de derechos humanos para enfrentar este desafío. Este artículo presenta algunas de las reflexiones del encuentro, convocado por Conectas Derechos Humanos, el Centro de Estudios de Derecho, Justicia y Sociedad (*Dejusticia*) y la Escuela de Derecho de la Fundación Getúlio Vargas.

PALABRAS CLAVE

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ABSTRACT

Against the backdrop of criticisms concerning the absence of a genuine dialogue between human rights and development, and weak substantive cooperation among actors from both disciplines, the present article sets out how one category of human rights actors attempted to concretely engage with the development agenda. The study examines the contributions that a number of the United Nations (UN) special procedures, particularly those with mandates related to economic, social and cultural rights, have made in bringing fundamental principles specific to human rights law towards the core of development frameworks, with a specific focus on the UN Millennium Development Goals agenda. By concentrating on non-discrimination, participation and accountability, the use of indicators, and the obligations arising in the realm of international assistance and cooperation, it is argued that the UN special procedures have begun to pave the way for substantive convergence of the human rights and development paradigms.

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United Nations special procedures – United Nations special rapporteurs – Millennium Development Goals – Economic, social and cultural rights - Human rights - Development



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THE CONTRIBUTION OF THE UN SPECIAL PROCEDURES TO THE HUMAN RIGHTS AND DEVELOPMENT DIALOGUE

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1 Introduction

Human rights and development actors equally acknowledge that human rights play an essential role in the sphere of development and broadly agree on the fact that there are synergies between the human rights and development agendas. Despite this increasing recognition, there appears to be significant scepticism when it comes to developing constructive, operational strategies bridging the two paradigms. The human rights community has severely criticized development frameworks, such as the Millennium Development Goals (MDGs) project for neglecting human rights, while the development community pointed to an overall low level of substantive engagement by human rights actors (ALSTON, 2005; DOYLE, 2009). The article argues that the United Nations special procedures have taken up the challenge of contributing, in a substantive and concrete manner, both to the clarification of the nature of the relationship between human rights and development and to the integration of a human rights perspective in their specific focus areas.

By drawing on concrete examples from the work of the special procedures, and using the MDGs as a lens on the subject, this article assesses how the special procedures have engaged with the development agenda. This article provides an overview of the MDG project (part I) followed by an analysis of its relationship with human rights (part II), and sketches the contours of a dialogue between the human rights and MDGs agendas (part III). Part IV analyses the approaches adopted by the special procedures in their efforts to bridge development discourse and human rights perspectives. Part V addresses how the special procedures have begun to grapple with the post-2015 global development agenda.

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2 The Millennium Development Goals

Among the different levels of development policy frameworks, the article focuses on the Millennium Development Goals (MDGs), as they have dominated the last decade as the most prominent initiative on the international development agenda. The United Nations (UN) Millennium Summit, from which the MDGs emerged, was an unparalleled event in which 198 world leaders signed the Millennium Declaration, committing their nations to combating “abject and dehumanizing conditions of extreme poverty” and “making the right to development a reality for everyone” (UNITED NATIONS, 2000). In practice, the MDGs are a set of quantifiable goals to be achieved by 2015. The eight MDGs are designed to: eradicate extreme poverty and hunger (MDG 1); achieve universal primary education (MDG 2); promote gender equality and empower women (MDG 3); reduce child mortality (MDG 4); improve maternal health (MDG 5); combat HIV/AIDS, malaria and other diseases (MDG 6); ensure environmental sustainability (MDG 7); develop a global partnership for development (MDG 8). In order to define the goals with greater precision and make their attainment quantifiable, a set of corresponding targets and indicators have been inserted in each goal.

With less than three years to go to the MDGs’ target date of 2015, the picture sketched from available reports can be considered to be all but homogeneous. While progress has been achieved on a number of goals, setbacks can be identified as far as others are concerned (UNITED NATIONS, 2012). According to the latest Millennium Development Goals Report, advances can be noted for several health-related goals. As far as tuberculosis is concerned, projections suggest that the 1990 death rate from the disease will be halved by 2015, and global malaria deaths have declined (UNITED NATIONS, 2012, p. 44, 42). New HIV infections continue to decline and access to treatment for people living with HIV increased in all regions, although the 2010 target of universal access was not reached (UNITED NATIONS, 2012, p. 38-42). Yet, progress on gender equality can still be considered rather modest, with continuing discrimination in access to education, work and economic assets, and participation in government (UNITED NATIONS, 2012, p. 20-25). Although income poverty has decreased, the fight against hunger stagnates with slow progress in reducing child malnutrition (UNITED NATIONS, 2012, p. 72). Nearly half of the population in developing regions still lacks access to improved sanitation facilities and, by 2015, the world will have reached only 67 per cent coverage, which falls short of the 75 per cent needed to achieve the MDG target (UNITED NATIONS, 2012, p. 52-57).

3 Fencing off the playing field: the MDG-Human rights dialogue

The chosen focus is on the MDG initiative, as it provides an excellent lens through which to gauge the status of the debate on human rights and development. A fairly large body of literature has been devoted, over the last decade, to unearthing the overlaps and complementarities between human rights, the MDGs, and development discourse more generally. At a core level, human rights and human development share the ultimate objective of promoting human wellbeing, and both bury their

philosophical roots in the idea of developing capabilities enabling individuals to lead a free and dignified existence (UNITED NATIONS, 2007a). Moreover, most MDGs can be reframed in terms of international human rights norms on economic, social and cultural rights as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 2001, the UN Secretary-General explicitly stated that, “economic, social and cultural rights are at the heart of all the Millennium Development Goals” (UNITED NATIONS, 2001). These can be identified as the right to health, the right to education, the right to food, the right to housing, the right to water and sanitation, and the right to an adequate standard of living. If we take the right to health as an example, we can note that nearly half of the MDGs that focus on health-related issues touch upon fundamental aspects of the right to health (specifically, MDG 4, MDG 5, and MDG 6). Additionally, most of the other MDGs address the so-called “underlying determinants” of health, such as poverty and hunger, education, gender equality, empowerment of women, and access to safe drinking water and sanitation (ZAIDI, 2010, p. 122).

Goal 1 on the eradication of extreme poverty and its connected targets can be perceived as reflecting the right to an adequate standard of living, the right to social security, the right to work and the right to food. The relevance of the right to education is evident in Goal 2, as is the right to water and sanitation in Target 7.C. and the right to adequate housing in Target 7.D.¹ Parallels have also been drawn between MDG 8, which calls for the creation of a global partnership for development, and the obligations of international assistance and cooperation provided by Article 2(1) of the ICESCR (SEPULVEDA and NYST, 2012; SEPULVEDA, 2009). The foregoing overlap has been defined in relevant literature as factual convergence, as the intersection of the two paradigms does not automatically entail that the objectives of the MDGs will be aligned, at a *substantive* level, with the corresponding human rights obligations (MCINERNEY-LANKFORD, 2009, p. 52-53). In the words of another scholar, working out the multifaceted relationship between development and human rights requires more than simply stating that one “automatically implies, equals, or subsumes the other” (UVIN, 2002, p. 3).

Despite elements of factual convergence, practical convergence has been slow to come (ALSTON, 2005, p. 762). From the standpoint of the human rights community, in the course of the last decade several reasons have been advanced to explain this degree of separation. Some of the most frequently voiced concerns include the MDGs’:

Technocratic and reductionist nature, their lack of ambition, their failure to address root causes of poverty, their failure to factor in legal obligations pertaining to social rights, their gender-blindness, their failure to address poverty in rich countries, their weak accountability mechanisms [...] the potentially distorting character of target-driven policy-making, and the propensity of the MDGs to ‘crowd out’ attention to important issues that didn’t make it into the global list.

(DARROW, 2012, p. 60. *See also*: UNITED NATIONS, 2010; YAMIN, 2010; SAITH, 2006; AMNESTY INTERNATIONAL, 2010; CLEMENS et al., 2004; LANGFORD, SUMNER and YAMIN, 2010; POGGE, 2004; MCINERNEY-LANKFORD, 2009; LANGFORD et al., 2012).

Other critics point out that civil and political rights appear to be disregarded (ALSTON, 2005), targets are designed and implemented in a top-down manner (YAMIN, 2012), and the aggregates and averages which are employed by the MDGs actually conceal – and, therefore, may reinforce – inequalities (UNITED NATIONS 2010).

One of the most widely acknowledged criticisms levelled against the MDG initiative is, however, that the project has largely ignored human rights at the outset, both in the conceptualization and in the articulation of the goals: the MDGs neither refer to human rights explicitly, nor to international human rights treaties. Although the Millennium Declaration, the formal document which the MDGs build upon, makes substantial references to human rights, and contains a commitment to respect “all internationally recognized human rights and fundamental freedoms, including the right to development” (UNITED NATIONS, 2000), the actual MDGs are not expressed in a human rights language and do not advocate a rights-based approach to development (ALSTON, 2005; LANGFORD, 2010). The conclusion which appears to have been often reached is that convergence, both factual and practical, is ultimately limiting if it remains confined to a superficial, rhetorical level or if it is not anchored in normative, enforceable standards that generate obligations (MCINERNEY-LANKFORD, 2009, p. 54).

In response to such critiques, a large body of literature has emerged in recent years on the importance of ensuring that development endeavours like the MDGs are implemented in a way that is respectful of human rights, and the importance of using human rights obligations and techniques as concrete legal tools by which to advance the achievement of the goals (SANO, 2007; KURUVILLA et al., 2012). In particular, it has been argued that human rights, and in particular economic, social and cultural rights (ESC rights), provide not only solid “guiding principles,” but concrete “operational strategies” to tackle the problems which lie at the very core of development concerns: poverty, hunger, slum-dwelling, lack of education, gender inequality and disempowerment of women, child mortality, maternal ill-health, safe drinking water, and the need for environmental sustainability (UNITED NATIONS, 2002; UNITED NATIONS, 2008).

4 Human rights and MDGs: Still ships passing in the night?

Notwithstanding the criticism voiced by human rights advocates, it must be acknowledged that, at least on paper, the Millennium Development Goals Summit Outcome in 2010 marked a significant shift in vocabulary. The Outcome Document contains an explicit recognition that “respect for all human rights” is an essential prerequisite for the attainment of the MDGs, as well as development in general (UNITED NATIONS, 2010). The Document reaffirms the pledge of UN member states to “continue to be guided by the purposes and principles of the Charter of the United Nations and with full respect for international law and its principles” (UNITED NATIONS, 2010). Such commitments appear in the introduction of the document and are repeated throughout the text.

Despite the formal insertion of human rights commitments, it can still be questioned whether this represents a genuine step towards substantive convergence or whether adherence remains on the merely rhetorical plane. With the 2015 deadline approaching, the lack of practical action to truly situate the MDGs in a human rights framework and give human rights a concrete, operational significance points towards missed opportunities. Human rights seem, if anything, to be part of “the general policy narrative” rather than specific legal obligations deriving from binding international instruments (MCINERNEY-LANKFORD, 2009, p. 59). In conclusion, while P. Alston’s metaphor of “ships passing in the night” may, regrettably, still be a fitting general description for the dialogue between human rights and development (ALSTON, 2005), a number of ways forward in terms of mutual reinforcement can be identified within the remit of human rights actors. In this regard, the next section uncovers the contribution of the UN special procedures to bringing human rights commitments to the core of development.

5 The engagement of the special procedures vis-à-vis the MDGs

5.1 The mandate of UN special procedures

The UN special procedures on human rights are independent experts mandated by the Human Rights Council to promote and protect human rights. They include special rapporteurs, independent experts, special representatives of the Secretary General and working groups. Their mandates can be thematic, for example on torture or the right to food, or cover all human rights in a specific country.

The first special procedures were created in the 1970s and 1980s by the UN Commission on Human Rights to promote and protect civil and political rights (NIFOSI, 2005, p. 16). In 2006, the Human Rights Council replaced the Commission on Human Rights with the overall responsibility to enhance the protection and promotion of all human rights civil, political, economic, social and cultural rights, including the right to development. The mandate of the Human Rights Council was based on the recognition that “development and human rights are the pillars of the United Nations system, and [...] that development, peace and security and human rights are interlinked and mutually reinforcing” (UNITED NATIONS, 2006).

The Human Rights Council upheld the system of special procedures, and today, out of the thirty-five existing thematic special procedures, eight deal specifically with ESC rights and related issues: the Special Rapporteur (SR) on the right to education (1998), the SR on extreme poverty and human rights (1998), the SR on the right to adequate housing (2000), the SR on the right to food (2000), the Independent Expert on the effects of foreign debt (2000), the SR on the right to health (2002), the SR on the rights to water and sanitation (2008), and the Independent Expert in the field of cultural rights (2009). In addition, some special procedures have a cross-cutting mandate which involves addressing economic, social and cultural rights.²

Several typologies have been proposed to describe the methods employed

by the special procedures in their work. In 2005, the Office of the High Commissioner for Human Rights (OHCHR) listed the following activities: country visits or fact-finding missions; sending communications to governments; preparing thematic studies; recommending programs of technical cooperation; and interacting with the media (UNITED NATIONS, 2005). In recent articles, their activities have been described in terms of promoting and protecting human rights and undertaking country missions (GOLAY, MAHON and CISMAS, 2011; PICCONE, 2012). The non-confrontational approach guiding the activities of the special procedures may place them in the privileged position of meeting half-way the human rights discourse, with its legally binding normative content, and development discourse, with its emphasis on technical assistance and cooperation. The combination of legal and diplomatic skills provides the special procedures with the flexibility required to sustain dialogue concerning development programmes and the MDGs with a variety of stakeholders in the public and private realms (DOMÍNGUEZ REDONDO, 2009, p. 38).

Turning to the topic under scrutiny, the UN special procedures can be singled out, among UN human rights actors, as the most active in bridging the conceptual and practical distances separating human rights and the MDGs. They have played an important role both in the clarification of the framework to analyse the relationship between human rights and MDGs to the extent that it relates to their specific focus areas, and in the proposal of concrete ways in which a human rights approach can bring tangible benefits to development endeavours. A decade ago, the special procedures formally welcomed UN efforts to put into effect the MDGs and expressed their willingness to assist and contribute to the process through the functions of their mandates (UNITED NATIONS, 2002). At that time, however, their mandates provided no explicit competence to engage in the analysis of the relationship of human rights and development. Only the first SR on the right to health, P. Hunt, documented in 2004 and at his own initiative the relationship between the right to health and related MDGs (UNITED NATIONS, 2004). The absence of a clear mandate may be one of the reasons underlying the observations made by P. Alston, who noted with disappointment that, at that time, the MDGs discourse was “barely visible” in the work of the special procedures, and that no thorough examination of the MDGs had been undertaken.

In recent years, the Human Rights Council has supplemented the mandates of certain special procedures with the competence to make recommendations on strategies to achieve the MDGs.³ A review of reports submitted by a number of special procedures disclose a rather changed scenario from Alston’s depiction: it can now be stated that MDGs and wider development considerations are no longer merely mentioned or inserted as cursory remarks, but rather, substantive analyses have been performed and the topic has been subjected to in-depth scrutiny. This can be viewed as a welcome trajectory, especially if placed against the background of continuing exhortations on the need for “integration, mainstreaming, collaboration and analysis” between the two fields (UVIN, 2002, p. 1) and of the lack of a real dialogue as described above.

5.2 *The UN special procedures' analysis of the Relationship between Human Rights and MDGs*

The analysis performed by the special procedures hinges on the conviction that the measures taken to achieve the MDGs benefit from being firmly embedded in legal and institutional human rights frameworks. Under such frameworks, the beneficiaries of the measures addressing the MDGs become rights-holders, while the states and other development actors bear the responsibility for allocating resources in a manner that is respectful of human rights (UNITED NATIONS, 2010a, para. 69). In an article published in *The Guardian* on 21 September 2010, when world leaders were meeting in New York at the Millennium Development Goals Summit, the SR on the right to food, O. de Schutter, commented that a “major deficiency of the MDGs is their failure to recognize human rights as essential to any sustainable development strategy.” For the UN Special Rapporteur:

The world's one billion hungry people do not deserve charity: they have a human right to adequate food, and governments have corresponding duties, which are enshrined in international human rights law. Governments that are serious about making progress on development objectives should be asked to adopt a legislative framework for the realization of economic and social rights, such as the right to food or the right to health care.

(DE SCHUTTER, 2010).

Other examples of this core commitment can be found in reports by SRs on health, education and human rights, and extreme poverty. The SR on the right to health, A. Grover, advocated for a “claims and not charity” approach to development and explained that, in reframing development issues through the incorporation of a human rights framework, a shift occurs to a “more self-sustaining approach that imbues the former targets of development with genuine agency”, and this allows for realization of an entire set of rights previously considered “secondary, or less realizable” (UNITED NATIONS, 2011, para. 49). In sharing such a view, the SR on human rights and extreme poverty used a practical illustration: if states are concerned only with achieving Goal 2, namely universal primary education, then policies aimed at increasing the number of children registered in school would *prima facie* be sufficient in order to achieve the set objectives (UNITED NATIONS, 2010a, para. 71). However, disregard for considerations such as quality and equal access to education constitutes one of the main setbacks of these policies. If, in contrast, state policies address the circumstances that prevent children from accessing educational services, such as discriminatory practices, poverty, or lack of infrastructure, then states would not have only attained the MDG at stake, but would have also substantively improved the wellbeing of individuals concerned and advanced in their realization of human rights commitments (UNITED NATIONS, 2010a, para. 71).

In their 2002 Joint Statement on the MDGs, the special procedures on ESC rights and the Committee on Economic, Social and Cultural Rights agreed that the central role to be played by human rights in development endeavours has several hallmarks: providing a strong normative framework reinforced by binding legal

obligations; increasing the level of empowerment and participation of individuals; ensuring non-discrimination and attention to vulnerable groups; providing means of monitoring and accountability of various stakeholders involved in the development process through independent mechanisms; and reinforcing what they refer to as the “twin principles” of global equity and shared responsibility (UNITED NATIONS, 2002). A review of reports dealing with MDGs and development reveals that the parameters used by the special rapporteurs as their conceptual containers reflect the above principles, with a focus on non-discrimination, accountability, and participation. As will become apparent in the following sub-sections (a, b, and c), these three key principles are effective if they guide all the phases of the programming process, from assessment and analysis to policy and programme design and planning (including setting of goals, objectives, and strategies), implementation, monitoring, and evaluation (UNITED NATIONS, 2003).

It needs to be stressed that the MDGs are objectives to be achieved progressively over time. Human rights law, especially as it relates to ESC rights, also accommodates the principle of progressive realization of such rights. Nevertheless, the Committee on Economic, Social and Cultural Rights, which is the body entrusted to interpret and monitor the implementation of the ICESCR, stated that certain obligations under the ICESCR are of immediate application. Thus, when implementing policies and programmes in relation to the MDGs, states and development actors need to be mindful neither to undermine the realization of the human rights obligations of immediate nature, nor to unreasonably postpone the realization of those obligations of a progressive nature (UNITED NATIONS, 2011, para. 19). In their work in relation to the MDGs, special procedures have often advocated for the use of indicators to monitor this progressive realization, and they have insisted on the need to improve the efficiency of international cooperation and assistance (see the following sub-sections: d and e).

5.2.1 Principle of non-discrimination

As previously mentioned, one of the most often cited shortcomings of the MDGs lies in their aggregated formulation, which conceals the specific concerns of individuals or groups predisposed to discrimination, marginalization, exclusion, or vulnerability. Hardly visible in Goal 3 on promoting gender equality, the wording of the MDGs generally fails to address social discrimination and exclusion of minorities and marginalized groups (UNITED NATIONS, 2007b, para. 59) despite their recognition in the Millennium Declaration (UNITED NATIONS, 2000). At the time of writing (July 2012), the only MDG Report of the Secretary-General addressing the realization of the MDGs in respect to minorities and indigenous peoples is that of 2005. In this report, a passing reference is made in the context of Goal 2, where it is pointed out that a larger proportion of children belonging to minorities or indigenous peoples are not enrolled in school (UNITED NATIONS, 2005a). This reference is generic and does not contain any further indication as to the particular groups concerned. For this reason, in the design of development policies, development actors need to identify and address pockets of marginalization and exclusion. Ensuring that these persons

are considered as rights-holders in development policies may contribute to breaking patterns of discrimination faced by many of them.

From a human rights perspective, a genuine commitment to non-discrimination requires that the collection of data be disaggregated according to the prohibited grounds of discrimination. Development programming should also consider the employment of such data, which can be instrumental in identifying those groups or individuals who are marginalized and who are most vulnerable. Failing to take such an approach may contribute to keeping the aforementioned categories invisible and to widening the divide between those living in extreme poverty and those living in the proximity of the poverty line (UNITED NATIONS, 2010b, para. 36; UNITED NATIONS, 2007b, para. 22). If we turn to an example from the work of the special procedures, the SR on the right to adequate housing, when considering forced evictions, noted with concern that discrimination appears to have a considerable impact on forced eviction cases as ethnic, religious, racial and other minorities, as well as indigenous people, are far more likely than others to be evicted (UNITED NATIONS, 2004a, para. 39). Moreover, women belonging to minority groups suffer severe repercussions as a result of forced evictions. These consequences are reflected not only in the loss of homes, but also in the disruption of “livelihoods, relationships and support systems they were used to, breakdown of kinship ties, physical and psychological trauma and even increased morbidity and mortality” (KOTHARI, 2006).

The MDG reports reflect a strong preoccupation with the analysis of disparities characterizing urban and rural regions, although more needs to be done, as the grounds of sex, race, disability, political and religious belief, or age need to be incorporated in any serious scrutiny of discrimination practices. On this basis, the SR on the right to water and sanitation identified, in relation to target 7.C (halving, by 2015, the proportion of people without sustainable access to safe drinking water and sanitation) certain groups that may be potentially more vulnerable or marginalized: “women, children, inhabitants of rural and deprived urban areas as well as poor people, nomadic and traveller communities, refugees, migrants, people belonging to ethnic or racial minorities, elderly people, indigenous groups, persons living with disabilities, persons living in water-scarce regions and persons living with HIV/AIDS” (UNITED NATIONS, 2010b, para. 38). Similarly, the first SR on the right to food, J. Ziegler, placed considerable emphasis on the need to protect the most vulnerable groups in many of his reports. Amongst others, he focused on developing the legal framework of the right to food in relation to women, children, indigenous people, farmers and peasants, fisherpeople, and refugees from hunger (ZIEGLER et al., 2011, p. 23-67).

Moreover, the multiple forms of discrimination affecting women need to be addressed, as do asymmetrical power relations in the public and private spheres. The implementation of development programmes needs, therefore, to be preceded by comprehensive and disaggregated gender analyses assessing the vulnerabilities of women, girls, boys, and men. Gender sensitivity in programming for the achievement of the MDGs contributes not only to the attainment of the specific goals, but also to the mitigation of the root causes of the phenomena addressed by the goals, *inter alia* extreme poverty, illiteracy, child mortality, or inequalities between women and

men. To illustrate the emphasis placed by the special procedures on the importance of gender analysis, it is worth mentioning the call of the SR on extreme poverty and human rights for greater visibility of gender-specific issues and recognition of the need for gender equality as a development objective.

Efforts to shed light on the condition of disadvantaged, marginalized or discriminated groups should not be limited to addressing the cases of direct discrimination. The special procedures call for increased attention towards ensuring substantive equality in the enjoyment and realization of human rights for all. Societal practices, stereotypes, or legislative measures or policies that may hinder the enjoyment of human rights by certain individuals and groups need to be tackled. On this note, the SR on extreme poverty and human rights documented the difficulties of minorities or persons living in extreme poverty to access social protection programmes because of requirements of expensive identification documents or of birth registration documents in areas where birth registration is not practised (UNITED NATIONS, 2010a, para. 77). This illustration highlights the importance of analysing the implications of development programmes for local communities and the need to integrate human rights in the design of measures implementing such programmes.

5.2.2 Accountability

Accountability is undoubtedly one of the cornerstones, or the “raison d’être,” of a human rights-based approach to development (UNITED NATIONS, 2008, p. 15), and it has been argued that it is the element that “provides the clearest value-added” (GREADY, 2009, p. 388). Predictably, the majority of special procedures have tackled the issue when addressing the MDGs. It is beyond the scope of this article to delve into the multiple levels and avenues of accountability in a human rights context, however, in its simplest form, accountability from a rights-based standpoint emphasizes legal obligations and “requires that all duty-holders be held to account for their conduct” (UNITED NATIONS, 2004, para. 36). A rights-based approach considers the duties of “all relevant actors, including individuals, states, local organizations and authorities, private companies, aid donors and international institutions” (DARROW; TOMAS, 2005, p. 511).

If we once again return to the characteristics of the MDGs that make the project sit uneasily with human rights advocates, the “accountability gap” critique is quite high on the list, and some of the setbacks, or lack of progress, on the MDGs have been attributed to this lacuna. The monitoring framework set up under the MDGs is primarily constituted by a voluntary reporting scheme, which has more to do with the provision of information and “awareness advocacy” than with holding states and other relevant actors accountable (UNITED NATIONS, 2004, para. 39). Moreover, it is increasingly acknowledged that it will be difficult to attain MDG objectives without strong mechanisms to hold parties accountable for their performance (or non-performance) in connection with the goals, as “accountability without consequences is no accountability at all” (OHCHR; CESR, 2011, p. 3). Once again, at least formally, this rather large stumbling block has been acknowledged as, in 2010, the UN Secretary General stated that “The time has come for an accountability mechanism between

developed and developing countries [...] and between governments and their citizens, to ensure that MDG commitments are honoured” (UNITED NATIONS, 2010, para. 97).

For these reasons, the SRs commonly agree that human rights mechanisms can accommodate the requirements for strengthening accountability in relation to the MDGs. The SR on the right to health observed that, not only could existing human rights accountability mechanisms examine states’ actions in the implementation of the MDGs, but they would also constitute a “constant reminder of the crucial importance of accountability in relation to the Millennium Development Goals” (UNITED NATIONS, 2004, paras. 40-41). General agreement can be detected among the special procedures on the fact that the implementation of programmes in relation to the MDGs that fail to respect the human rights of beneficiaries need to be submitted to the scrutiny of independent and effective judicial, quasi-judicial, or administrative mechanisms. The availability of such mechanisms and their accessibility by all members in society implies that all individuals are equal actors in development, and that they are entitled to redress when their rights are violated. The accountability mechanisms need to meet certain technical requirements, especially to ensure that the more disadvantaged and disempowered individuals can access them. These include “guaranteeing confidentiality, allowing for individual and collective complaints, being sufficiently resourced, being independent from political interference, and being culturally appropriate and gender-sensitive” (UNITED NATIONS, 2010a, para. 91). According to the SR on water and sanitation, domestic courts, national human rights institutions, public expenditure reviews, or human rights impact assessments, as well as the UN Treaty Bodies and the special procedures, may inject existing MDG monitoring with crucial accountability dimensions (UNITED NATIONS, 2010b, para. 54; UNITED NATIONS, 2004, paras. 37-41).

In seeking to tackle accountability, dimensions that transcend domestic borders have also been addressed. For example, P. Hunt noted with concern that accountability is especially weak in relation to Goal 8 (a global partnership for development), as the existing MDGs monitoring scheme appears to be imbalanced towards scrutinizing developing countries, while developed countries escape accountability when failing to fulfil their international commitments (UNITED NATIONS, 2004, para. 43).

The conclusion that can be drawn from the foregoing discussion is a clear invitation by the special procedures towards giving more thought to the development of an appropriate, effective, transparent, and accessible framework for accountability, in the absence of which the chances of achieving development objectives are severely undermined.

5.2.3 Participation

Another core requirement of a rights-based approach rests on genuine participatory processes that include all the parties involved in and affected by development programmes and strategies. SRs have not only noted that development programmes may display participatory dimensions, but have also signalled that local communities are engaged in an inconsistent manner and in imbalanced power relationships (UNITED NATIONS, 2011, para. 51). This finding may also be derived from a reading of

the 2010 Outcome Document, which maintains uncertainty on whether participation is envisaged only as a matter of privilege in development programmes, or as a fully-fledged human right.

The SR on the right to health stated that participation contributes to the ownership of the programme by community members belonging both to majority groups as well as minority, marginalized, or vulnerable ones (UNITED NATIONS, 2011, para. 51). On this note, the Independent Expert on Minority Issues advocated for the establishment of meaningful dialogue with representatives of minority communities in the context of advisory committees or similar consultative bodies (UNITED NATIONS, 2007b, paras. 85, 104). Thus, participation is neither confined to consultations, nor to ensuring the mere presence of persons suffering discrimination, marginalization, or exclusion in the decision-making bodies. Effective participatory arrangements need to be streamlined in local decision-making structures (UNITED NATIONS, 2004, para. 25) and be supported by transparency and timely access to information (UNITED NATIONS, 2011, para. 18h). Therefore, participation plays an essential role in ensuring that all undertakings aimed at the achievement of the MDGs are “empowering and transformative, rather than the result of technocratic, top-down State policies” (UNITED NATIONS, 2010a, para. 89).

Furthermore, development planners also need to integrate gender-sensitive participatory methods. The actual and meaningful participation of women in the design of development programmes and measures, and in decision-making structures at community, regional, and national levels, is essential in order to amend recurrent situations of discrimination, realize women’s rights, and achieve gender equality and the empowerment of women as prescribed in Goal 3. The special procedures call for awareness-raising with regard to the challenges faced by women in becoming effective actors in development processes. The SR on water and sanitation added that an:

[a]nalysis of the political, economic, cultural and social causes of exclusion is required as part of any serious effort to promote genuinely participatory processes, including with a focus on literacy levels, language constraints, cultural barriers and physical obstacles

(UNITED NATIONS, 2010b, para 47).

5.2.4 The use of indicators for monitoring and evaluation

Effective monitoring and evaluation is another hallmark of the human rights-based approach to development, and efforts in this regard should be solidly anchored on human rights principles. In order to collect and correctly interpret disaggregated data, the process of setting adequate indicators is crucial not only at the preliminary stage of development programmes when needs are evaluated, but also at the stage of monitoring the implementation of the projects in question. Recent advances on human rights indicators, conducted under the auspices of the Office of the High Commissioner for Human Rights, may provide solid foundations and a source of inspiration for monitoring purposes, as well as a strong conceptual framework

(OHCHR; CESR, 2011, p. 67). A number of SRs, such as P. Hunt, C. de Albuquerque, and K. Singh, have contributed significantly to the development of indicators as they relate to the rights associated with their mandates.

In connection with the MDGs, the SR on the right to adequate housing emphasized that indicators attached to monitoring the implementation of the MDGs should not be confined to the targets established by the goals, but they should instead “capture the normative content” of rights (UNITED NATIONS, 2003a, para. 53). The SR on water and sanitation emphasized that the indicators used to monitor the progress made on achieving target 7.C were falling short of reflecting the full dimension of the normative content of human rights regarding availability, acceptability, accessibility, affordability, and quality. When this framework is applied to the MDG indicators, in the words of the SR on water and sanitation, “a much bleaker picture emerges” (UNITED NATIONS, 2010b, para. 32). To focus on one example, access to safe drinking water and sanitation can be merely viewed as physical access, but recast in human rights terms, physical accessibility is but one facet of the question. Physical access becomes meaningless if people cannot afford water and sanitation services, or if women cannot use them because they are not sex-separated, or if their privacy is not ensured (UNITED NATIONS, 2010b, para. 27). Furthermore, the Independent Expert on minority issues found that the collection of data on poverty with an individual or household focus falls short of capturing groups and social dimensions of poverty. The dynamics of poverty across groups is not well illustrated in analyses of vertical inequalities (UNITED NATIONS, 2007b, para. 39).

The special procedures are also aware of difficulties in gathering data corresponding to the established benchmarks and indicators. According to the SR on water and sanitation, persons living in informal settlements, internally displaced persons, certain ethnic minorities, migrants, or persons with disabilities may not be adequately reflected in national censuses, administrative records, or household surveys (UNITED NATIONS, 2010b, para. 39). The collection of disaggregated data may require tactful methods informed by the situation of sensitivity towards asking individuals to publicly assert their ethnicity, religion, or mother tongue, especially in areas where such elements have been the object of discriminatory practices or even violence (UNITED NATIONS, 2007b, para. 68). Emergency situations and conflicts also decrease the capacity to collect data and obscure the assessment of humanitarian aid required (UNITED NATIONS, 2011a, para. 89). Nonetheless, where data is collected, the process ought to involve members of the community with methods and indicators that are relevant for the individuals concerned. Thus, human rights criteria provide an essential tool for the development of “more specific and contextually appropriate indicators” (UNITED NATIONS, 2010b, para. 33), targets, and benchmarks to ensure that development objectives are achieved in practice.

5.2.5 International assistance and cooperation

The implementation of human rights and of the MDGs is conditional upon the provision of adequate resources. In this sense, the ICESCR sets out obligations regarding international cooperation and assistance, while the MDGs, particularly

Goal 8, envisages the establishment of global partnerships for development. The common preoccupation of both frameworks to ensure access to resources consolidates the view that, only through collective efforts, societal grievances affecting individuals worldwide can be effectively tackled. In the absence of such resources, the SR on water and sanitation observed that not only certain aspects on the realization of the right to water remain dependent on resources provided for through international cooperation, but also that the realization of target 7.C lags behind as it is inadequately resourced (UNITED NATIONS, 2010b, para. 20).

A similar concern is shared by the SR on the right to education, who acknowledges the fact that resource constraints add to the factors impeding the full realization of the right to education and of progress in the achievement of Goals 2 and 3 (UNITED NATIONS, 2011a, paras. 4-6). The SR on the right to education added that the right to education, as stipulated in the ICESCR and in the formulation of Goal 2 and its related targets and benchmarks, leaves no doubt that all direct or indirect costs hindering the realization of this right need to be removed (UNITED NATIONS, 2011a, para. 20). In addition, the SR stressed that the need to ensure gender parity has to be accounted for in the provision of financial resources.

The SR on extreme poverty and human rights further commented that donor states are under the requirement to ensure coordination, predictability, and a long-term perspective in the provision of assistance (UNITED NATIONS, 2010a, para. 96), while recipient states are bound to an effective and optimal utilization of the resources (UNITED NATIONS, 2011a, para. 44), as well as to their distribution, taking into account regional socioeconomic disparities (UNITED NATIONS, 2011a, para. 46) and situations of emergency (UNITED NATIONS, 2011a, para. 60). The Independent Expert on foreign debt specified that only human rights-based approaches to aid programmes provide sufficient guarantees to meet the development challenges in recipient countries and concomitantly act towards the protection of the human rights of the individuals in those countries (UNITED NATIONS, 2011b, para. 93). The application of human rights approaches to aid programmes may contribute to the achievement of the MDGs while tackling the root causes of poverty, inequality, discrimination, exclusion and disempowerment (UNITED NATIONS, 2011b, para. 93). The recommendations of the Independent Expert for donor States focus on the conduct of human rights impact assessments to inform the design, implementation, monitoring and evaluation of their development progress (UNITED NATIONS, 2011b, para. 95). The SR on water and sanitation and the SR on the right to health also agree that the obligations arising in the framework of international cooperation are not limited to financial or technical assistance, but that rather they should be channelled towards creating an environment conducive to alleviating resource constraints (UNITED NATIONS, 2004, para. 32).

5.3 Methods employed by the special procedures

Having examined the principles that provide the conceptual and normative underpinnings for the special procedures' analyses, this section explores the methods employed to perform such analyses. The undertaking of the special procedures to assess the relationship between human rights and the MDGs reveals individual

initiatives, but also common approaches with regard to the structure of the thematic reports, development of arguments, outcomes, and methodologies.

To explore the relationship between human rights and MDGs, the special procedures have resorted to a variety of methods. As far as country visits are concerned, the Independent Expert on the effects of foreign debt conducted country visits to Australia and the Solomon Islands in 2011 (UNITED NATIONS, 2011b) and to Burkina Faso in 2008 (UNITED NATIONS, 2008a), where the primary objective was to assess the domestic development programmes and policies implementing the MDGs against the realization of ESC rights.

The dialogues initiated by the special procedures at the national level, coupled with recommendations stemming from country missions are extremely valuable, as they are context-specific and provide national authorities, civil society organizations, and other regional and international bodies with an understanding of whether the undertaken processes are adequately integrating human rights and pursue equally the realization of human rights and progress towards the achievement of the MDGs. These recommendations may also constitute a starting point for further advocacy policies, as well as legislative, political, administrative, or other measures.

Special procedures have also involved a number of stakeholders in the discussions concerning human rights and MDGs in the context of participation to seminars, forums, consultations at domestic, regional and international level, and dialogues with UN agencies, programmes and funds, as well as the OHCHR and treaty bodies. In this regard, the SR on the right to water and sanitation has worked closely with the WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, the main UN mechanism for assessing progress on Goal 7, on how to incorporate human rights criteria when discharging its monitoring functions, giving particular attention to measuring affordability, water quality, accessibility, and non-discrimination, in order to ensure that MDG monitoring assesses compliance with the normative dimensions of human rights obligations. It is reported that such an effort has also begun to pave the way for the elaboration of new goals and targets in relation to the post 2015 development agenda (OHCHR; CESR, 2011).

The thematic reports of the special procedures have also been informed by research studies and consultations with domestic actors. The Independent Expert on minority issues based her analysis and recommendations with regard to addressing the challenges faced by minority groups in the process of implementation of the MDGs on a comprehensive study of 50 MDG Country Reports and a number of Poverty Reduction Strategy Papers (UNITED NATIONS, 2007c). Another method to obtain concrete information at a national level on the implementation of the MDGs involved issuing questionnaires to national authorities. This method was used by the SR on extreme poverty and human rights and the Independent Expert on minority issues (UNITED NATIONS, 2010a, para. 5; UNITED NATIONS, 2007b, para. 13). They requested information on legislation, policy and practices for the identification of the most vulnerable groups, and specific initiatives taken to respond to the identified needs with a view to ensure participation and accountability in the context of their thematic concern.

Some SRs have actively engaged in negotiations for the advancement

of human rights-based approaches to the implementation of the MDGs and development programmes, in general. Since the beginning of his mandate in May 2008, the SR on the right to food, O. De Schutter, has urged states and international organizations to integrate the right to adequate food in their responses to the global food crisis, which seriously threatened the achievement of MDG 1 (UNITED NATIONS, 2008b; UNITED NATIONS, 2009a). In May 2008, he persuaded the Human Rights Council to organize a special session on the right to food and the global food crisis, in which Member States adopted a resolution at unanimity, calling for a rights-based approach to the fight against hunger (UNITED NATIONS, 2008c; UNITED NATIONS 2008d). A few months later, at a high-level meeting on food security held in Madrid on 27 January 2009, the UN Secretary General proposed to add the right to food as a ‘third track’ in the strategy to fight food insecurity and malnutrition.

6 Looking towards the future

The special procedures have also demonstrated a willingness to engage with the post-2015 development agenda, and to provide a human rights dimension to the formulation of new human development goals, targets, and indicators. Moving beyond individually led initiatives, a group of SRs and Independent Experts came together in view of the UN Conference on Sustainable Development (Rio+20 Conference) held in June 2012. The special procedures drafted an *Open Letter* concerning the practical integration of human rights in a sustainable development framework (UNITED NATIONS, 2012a). Their contributions are inspired by the understanding that policies targeted at the fulfilment of human rights, particularly ESC rights, also foster the achievement of development goals. In the document, they call upon the integration in the Rio+20 Outcome Document of *all* human rights, thus moving beyond a right-specific thematic approach. The special procedures stress that the implementation of the commitments emanating from the Rio+20 Summit needs to be carried out “through an inclusive, transparent and participatory process with all relevant stakeholders, including civil society” (UNITED NATIONS, 2012a). Moreover, they also propose a number of practical recommendations, including the establishment of accountability mechanisms both at the international and national levels for monitoring the objectives agreed upon at the Rio+20 Conference.

At the international level, the special procedures advocate for the establishment of a ‘Sustainable Development Council,’ modelled on the Universal Periodic Review of the Human Rights Council, in order to monitor progress towards the achievement of the Sustainable Development Goals (SDGs), which, at the time of writing, are under discussion. Likewise, at the national level, the special procedures recommend the establishment of participatory accountability mechanisms “through which people’s voice can be reflected and independent monitoring can be conducted” (UNITED NATIONS, 2012a). To reinforce their common position, the SRs O. De Schutter and C. de Albuquerque submitted specific proposals aimed at ensuring the coherence of the Rio+20 commitments with commitments in terms of the right to adequate food and right to safe drinking water and sanitation (UNITED

NATIONS, 2012b; UNITED NATIONS, 2012c). M. Sepulveda also contributed with a note on the role of comprehensive rights-based social protection in facilitating equitable and sustainable development (UNITED NATIONS, 2012d).

The joint contribution of the special procedures to the negotiations held during the Rio+20 Conference voiced the human rights concerns in the ambit of a forum bringing together UN Members States, UN agencies, and representatives of business and industry, children and youths, farmers, indigenous peoples, domestic NGOs, and local authorities.

7 Conclusion

It is widely acknowledged that the special procedures play a critical role in shaping the normative content of human rights, while at the same time assessing how states comply with such rights in practice and proposing concrete measures to improve respect for them (PICCONE, 2012). This role equips the special procedures with a rather unique opportunity to bridge normative work and practical, operational aspects concerning the implementation of human rights “on the ground.” In turn, this places the special procedures in an ideal position to scrutinize the intersection between human rights and development.

What has emerged from our survey is a gradual but steady willingness on the part of the special procedures to grapple, albeit at different levels, with development from a human rights standpoint. In particular, what has surfaced in the analysis is a commitment by the special procedures to strengthen the role of human rights in the process of implementation of the MDGs. This has yielded several positive results, among which we can highlight the outlining of a human rights-based normative framework to address the MDGs and other development activities, the identification of distinct challenges and stumbling blocks, the acknowledgement of best practices, and the recognition of opportunities for closer collaboration among the different thematic procedures. As an overarching consideration, when performing their analyses, most special procedures have actively sought to remove rights “from the heights of abstract declaration” and bring them towards “the front-lines of application” (GREADY, 2009, p. 385).

In responding to criticisms regarding the absence of a meaningful dialogue between human rights and development, and a lack of practical cooperation by actors on both sides of the disciplinary divide, the present article outlines how one category of human rights actors attempted to transcend rhetorical discussions and concretely engage with the development agenda. On a more general level, the article sketches a preliminary approach to look for concrete ways in which actors in the human rights field can play a role in development endeavours and pave the way for meaningful collaborations, with a hope that development actors will, in turn, engage with existing mechanisms provided by the international human rights architecture. The on-going, fervent discussion on potential successors to the MDGs in the post-2015 scenario and on how to shape a new development paradigm provides a fresh opportunity for genuine mutual engagement, and for human rights to be placed at the very core of the future global development agenda.

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NOTES

1. Target 7.C. sets out to halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation, while Target 7.D. seeks, by 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers.
2. A presentation of their mandates is available on OHCHR's website, at www.ohchr.org/EN/HRBodies/SP.

3. Human Rights Council, Resolution 8/11 establishing the mandate of the Independent Expert on extreme poverty and human rights, 18 June 2008, para. 2(d); Resolution 6/2 establishing the mandate of the Special Rapporteur on the right to food, 27 September 2007, para. 2(e); Resolution 6/29 establishing the mandate of the Special Rapporteur on the right to health, 14 December 2007, para. 2(h).

RESUMO

Contra o pano de fundo de críticas sobre a ausência de um verdadeiro diálogo entre direitos humanos e desenvolvimento e sobre a fraca cooperação substantiva entre os atores de ambas as disciplinas, o presente artigo expõe a forma pela qual uma categoria de atores de direitos humanos tenta concretamente se envolver com a agenda de desenvolvimento. O estudo analisa as contribuições de diversos detentores de mandato dos procedimentos especiais das Nações Unidas (ONU), particularmente aqueles com mandatos relacionados aos direitos econômicos, sociais e culturais (ESC), ao trazer princípios fundamentais específicos dos direitos humanos para o núcleo do marco do desenvolvimento, com um foco específico nos Objetivos de Desenvolvimento do Milênio (ODMs) da ONU. Ao concentrar-se na não-discriminação, na participação e na responsabilização (*accountability*), no uso de indicadores e nas obrigações surgidas no âmbito da assistência e da cooperação internacionais, argumenta-se que os relatores especiais e especialistas independentes da ONU começaram a pavimentar o caminho para a convergência substantiva dos direitos humanos e dos paradigmas de desenvolvimento.

PALAVRAS-CHAVE

Procedimentos especiais da ONU – Relatores especiais da ONU – Especialistas independentes da ONU – Objetivos de Desenvolvimento do Milênio – Direitos econômicos, sociais e culturais – Direitos humanos – Desenvolvimento

RESUMEN

En medio de críticas relativas a la ausencia de un verdadero diálogo entre los derechos humanos y el desarrollo y una débil cooperación en temas de fondo entre los actores de ambas disciplinas, el presente artículo describe la forma en que una categoría de actores de los derechos humanos intentó comprometerse en forma concreta con la agenda del desarrollo. El estudio analiza los aportes que han hecho diversos titulares de mandato de los procedimientos especiales de las Naciones Unidas (ONU), particularmente los que tienen un mandato relacionado con los Derechos Económicos, Sociales y Culturales (DESC), en pos de acercar los principios fundamentales específicos de las normas internacionales de derechos humanos al núcleo de los marcos de desarrollo, con especial atención a la agenda de los Objetivos de Desarrollo del Milenio de la ONU. Haciendo foco en la no discriminación, la participación y la rendición de cuentas, el uso de indicadores y las obligaciones que surgen en el ámbito de la asistencia y la cooperación internacionales, se argumenta que los procedimientos especiales de la ONU han comenzado a allanar el camino para una convergencia sustancial entre los paradigmas de los derechos humanos y del desarrollo.

PALABRAS CLAVE

Procedimientos especiales de las Naciones Unidas – Relatores especiales de las Naciones Unidas – Objetivos de Desarrollo del Milenio – Derechos Económicos, Sociales y Culturales – Derechos humanos – Desarrollo



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ABSTRACT

This article demonstrates the economic, social, and cultural values and meanings given to water with a focus on the relationships between this natural resource and indigenous communities. As vulnerable groups in today's society, indigenous communities often find that official approaches do not necessarily reflect their ways of life and worldviews and, in turn, limit their freedom and threaten their rights.

The author presents case studies in three countries, which were specifically selected to illustrate different ways to manage water resources. By analyzing the impacts that these regulatory systems have on indigenous people, these cases demonstrate the need to address water rights holistically, taking into consideration the need for sustainable and efficient use of the resource, as well as respect for the needs of indigenous communities.

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THE RIGHT TO WATER: UNDERSTANDING ITS ECONOMIC, SOCIAL AND CULTURAL COMPONENTS AS DEVELOPMENT FACTORS FOR INDIGENOUS COMMUNITIES*

Luis Carlos Buob Concha

1 Introduction

The words *Aqua Vitae* sum up the fundamental value of the natural element that has been most important to humanity through the ages: water. This resource transcends its simple chemical composition to support the survival and development of humans—not just from an organic-biological perspective—but also as part of the history, worldview, and essence of humankind.

As such, water has shaped the development of the earliest human communities near water sources, especially with the advent of agriculture. In addition to serving as a trade path and a communication network, water has facilitated the expansion of the human horizon, enabling commerce as well as the sharing and dissemination of knowledge (including culture, language, and practices) for centuries.

Water is also necessary for the development of various productive activities, such as fishing, tourism, mining, textiles, and refineries. It also serves as a power generator through dams and hydroelectric plants.

The mystical or even sacred attributes that different cultures give to this natural element endows it with such spiritual richness that it often ceases to be merely a symbol and becomes part of a group's deepest feelings and beliefs. For example, in Peru's highlands, they celebrate the "*Yarqa Aspi*" or "*Apu yaku pagapuy*," or the "festival of water." The worship of water in Andean culture has persisted through the ages and is manifested through offerings, rituals, songs, performances, and dances that pay homage and pray for rain and fertile land. Water's presence defines the communities and is closely linked to their worldview,

*The perspectives in this article are the sole responsibility of the author and are not representative of any institution.

their interpersonal and community relationships. According to a study by Ossio Acuña on the population of Andamarca in the Ayacucho region, the festival of water is like a fertility ritual, where the water from higher altitudes impregnates “mother earth” through irrigation canals. According to Acuña, there is a set of complementary opposites reflected at the festival in terms of values like fertility and unity, which is the Andean way of expressing the recreation of the social order (OSSIO ACUÑA, 1992, p. 312 y 315).

Meanwhile, population growth and the expansion of economic activities exert constant pressure on the ecosystems of coastal waters, rivers, lakes, wetlands, and aquifers. The use of water resources is complex because the way it is used for a particular need or activity can lead to disputes and hostilities that vary in the type and degree depending on the situation.

Water has a strategic value from an economic, social, and cultural point of view and this makes it a potentially contentious resource that can affect rights, freedoms and even the use of violence. This is especially relevant when different agents compete for control, access, enjoyment or possession of water and its various attributes, including quantity, quality, and opportunity (PEREYRA, 2008, p. 85). To this, we should add the complexity of its administration and the consequences originating therein. As an element that runs and flows through different territories and is used for different activities, water administration can benefit or harm entire populations.

For all these reasons, water temporally, spatially, and functionally cuts across people’s lives and has done so in different ways since time immemorial. It is no exaggeration to say that water provides for us from start to finish and takes on such importance that the future of humankind largely depends on the actions taken with regard to this resource. In addition, there has been a growing recognition in recent years of water access’s implications and its use for the achievement of a decent standard of living, as evidenced by the trend to frame water as a human right.¹

Indeed, using a human rights² approach to address the problems of water access and use, particularly with regard to indigenous communities’ own water management systems, allows for the acceptance of an innate human right to water, which not only informs the formulation and implementation of public policies related to water, but also transforms different conflicts into legal cases to fight for the protection, respect, and enforcement of that right at the national and international level.

Human rights, as positive categories, make normatively concrete and imbue with judicial security those values that are inherent to the human person and those that result from current ideas and power relations as well as from the conditions that demand their recognition as a basis for a dignified life. In this sense, human rights may be defined as the rights that every individual has before the State with the aim of preserving their dignity as a human being – not only excluding the possibility of State action in certain spheres of their lives, but also warranting actions that contribute for a dignified life.

In this respect, the juridical nature of water as a human right has gradually been defined in the past few decades. General comments from ECOSOC (in particular GC 15), international official documents (such as the ones released

by the United Nations special rapporteur on the right to safe drinking water and sanitation, Catarina de Albuquerque), as well as national and international sentences on the matter provide us with guidelines to understand the development of its normative content.

Although this article does go into great depth on the economic, social, and cultural aspects of water, it offers insights into these concepts through three water management case studies, with particular emphasis on their effects on indigenous communities. Normative systems should not remain oblivious to these fields, because they operate in relation to them and affect them directly or indirectly. How water regulation affects indigenous communities is critically important, not only because water is so valuable and important to society, but also because water is an emerging human right that is fundamental to the development of human beings.

2 Economic, social, and cultural aspects of water

This article defines the right to water as ECOSOC has defined it in GC 15:

The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

(CDESC, 2002, párr. 10).

Along this line of reasoning, water is understood as a vital, strategic resource for human beings and for their development, inclusion, and prosperity. In other words, water is understood as a good that, as a transversal and holistic element, affects different aspects and areas of human life. Depending on the contexts, uses, and demands for water, water resources fulfill certain functions and, in turn, lead to the attribution of certain values. As such, the use of this resource represents the combination of economic, social, and cultural interests that become concrete through regulation. Thus, there needs to be a comprehensive approach that takes into account the particularities of each context.

Although water resources are renewable in theory—that is, the natural cyclical physical process that produces water gives it reasonable permanence and stability, the constant pressure on the resource makes it a good that is sensitive to the ways it is accessed, used, and managed globally. Thus, water is not free from biased defenses or conflicts. The first thing to note is the relative scarcity of water in general terms, because it is a finite resource whose natural renewal process is highly vulnerable to the impacts of different human activities. As a limited resource, it is subject to being assigned an economic value in order to satisfy the different needs and interests that arise. In other words, water has an economic value as a natural resource.

Principle Four in the Dublin Statement on Water and Sustainable

Development³ states this in the following way: “Water has an economic value in all its competing uses and should be recognized as an economic good”⁴ (CIAMA, 1992, principle 4). Recognizing this economic component is a first step towards understanding the implications of regulation, because the decisions made about allocation in turn determine the rules under which this natural resource will be used.⁵ The way water is regulated also affects the status of water as a human right, since the prioritization, allocation and use of water will limit or allow, depending on the case, the effective enjoyment of the normative content of the right to water.

Ignoring the social and cultural value of water in the context of a policy or evaluation is dangerous because the unrestricted confidence that could be given to a single focus area is actually only a partial understanding and leaves aside the possible consequences and impacts that it could have in other areas. Therefore, it is appropriate to highlight the statement of the United Nations Educational, Scientific and Cultural Organization (UNESCO) that says: “considering water as a cultural good should indeed be understood as the recognition of the diverse socio-cultural dimensions of people’s engagement with water, such as identity, heritage, and sense of belonging” (UNESCO, 2009, p. 4).

We contend that water management should not only focus on economic efficiency, but also water’s social significance as a strategic element for human life, such as the environmental implications of water management or its impact on social structures and relationships within indigenous communities. Water management should also consider the underlying cultural values in order to better assess the impacts that a state action or omission could have on this human right, and thus whether or not the right has been violated.

The next sections will provide an overview of the case studies that look at how these components are interwoven and the impacts they have on indigenous communities.

3 Property and market rights: The case of Chile

The Chilean case is interesting because it is a country that is recognized around the world for having granted transferable water rights to individuals. The model implemented in Chile through the Water Code in the early 1980s has primarily focused on creating a water market, strengthening it through constitutional recognition of private property rights over water use, and through subsequent limitations on state intervention and regulatory authority (DOUROJEANNI y JOURAVLEV, 1999, p. 15-66; DOUROJEANNI y BERRIOS, 1996, p. 6-14; PEÑA, 2004, p. 13-24; DONOSO, 2004, p. 25-48; BAUER, 2002, p. 57-80; GENTES, 2006, p. 255-284).

The model was developed from the argument that legal regulations should favor private operators in the market, which would increase economic efficiency by directing the resource to the most valuable uses through a process of free market transactions and exchange. This has been made possible through information on market prices, which facilitates the comparison and coordination of scattered data (BAUER, 2002, p. 16).⁶

The Chilean regulations emphasize the private property rights related to

water use in order to create more legal certainty in the system. Yet, because the market system is based on private exchanges, the property rights must be exclusive, individual, and tradable to ensure efficient use and increased investment. Segerfeldt characterizes this system in the following way: “The introduction of clearly defined and tradable water rights is not only conducive to greater efficiency, it also results in the water going where it does the most economic good, which in turn spells greater prosperity.” He continues: “Property rights over water have a very positive effect on its consumption and its protection. The possibility of trading helps to get the maximum output possible” (SEGERFELDT, 2006, p. 54 y 57).

The last part of Article 19, paragraph 24 of the Chilean Constitution states: “[T]he rights of individuals over water resources, recognized or constituted in accordance with the law, will grant the rights holders ownership over them” (CHILE, 2005). Based on this premise, the Chilean Water Code focuses on creating a market for water rights, emphasizing the need to recognize property rights as a way to guarantee the former under the assumption that this would lead to efficiency in their allocation (DOUROJEANNI y BERRIOS, 1996, p. 6; BAUER, 2002, p. 57-80).

It is important to point out, however, that the 1981 Water Code originally considered water to be a public good⁷ with the state in charge of establishing property rights. That means that once the process to grant water rights was completed, ownership over these rights makes the asset the exclusive property of the right holder who can use the market as a way to reassign the good.

This unrestricted freedom in the use of the water resources under this model makes it possible for rights holders to: “i) use them or not, and direct them to the ends or uses that they wish; ii) transfer them separately from the land, to use them in any other location; and iii) trade them through typical market negotiations (sell, lease, mortgage, etc.)” (DOROUJEANNI y JOURAVLEV, 1999, p. 13). Thus, in practice, use of the rights granted corresponds to full property rights over the resource.

Therefore, this model favors the economic value of water, ensuring its ownership in order to achieve economic optimization. Studies have shown that the main consequences of this type of regulation in Chile has included the speculation and hoarding of water rights, which distort prices through monopolies and unequal negotiations; the presence of particular rights holders with extra power in the market; the existence of inadequate use—or non-use—of the resource; the generation of conflicts; the emergence of social problems; and impacts on environmental and cultural heritage that are often irreversible (BOELENS, 2007, p. 59-60; CASTRO, 2007, p. 240-260; GENTES, 2006, p. 255-284; DOROUJEANNI y JOURAVLEV, 1999, p. 31-62; BAUER, 2002, p. 171-178).

It should be noted that the establishment of water rights and their transfer in the market can also have negative impacts on those who are not involved in the transaction and thus are not part of the private exchange as well as on the environment and on societies’ social and cultural stability. If the effects of a particular inter-party transaction—or the use that it brings about—are not considered in a water allocation system, there is a risk that society will suffer a loss due to the high costs incurred by the erroneous and partial allocation and use of this natural resource.

Although the Chilean legal framework has given some recognition to local and indigenous rights,⁸ it has not adequately resolved the conflicts and damages that are caused by this system of water regulation, nor has it adequately protected the rights in question. This is basically because the local indigenous norms are counter to the value granted to water as a purely economic good. According to Boelens:

In Chile [...] empirical field studies indicate the disintegration, in particular, of indigenous systems: the individualization of water rights has increased insecurity and disorganization [...] decision-making rights are now tied to the economic purchasing power of individuals; [those with] more 'water actions' have more decision-making power, which contrasts with the collective interests of management in indigenous and peasant communities.

(BOELENS, 2007, p. 59).

For example, in a study on the interaction between local indigenous water rights and Chilean law, Ingo Gentes concludes: "The projects to transfer water from impoverished areas to economic centers, or the free exploration of groundwater, ignore borders, customs, practices and social and environmental damages" (GENTES, 2006, p. 278). This is reflected, for instance, in the impacts on marshes and Aymara communities in Lauca National Park that has resulted from the implementation of agricultural development policies that do not take into account the rights of the aymara communities settled in the area.. It is also evidenced in the conflicts between Colla communities and various actors over the use of water resources in the Copiapó river valley. These communities also have land tenure problems that affects their ability to access the lands and waters their ancestors used, which has led to the progressive loss of their water usage rights and has affects their subsistence activities (GENTES, 2006, p. 264-274).

Likewise, the former Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People made the following remarks after his official visit to Chile:

The issue of the right to land becomes more complicated when it concerns access by indigenous people to underground resources and other resources such as water and maritime resources, which are vital to their subsistence economy and traditional cultural identity. Various sectoral laws, such as the 1981 Water Code, despite a number of reforms made to them, facilitate and protect the registration of private property rights over resources that have traditionally belonged to indigenous communities. In the arid northern region, for example, access to water is vital to the lives of the Aymara, Atacameño and Quechua rural communities, but is often denied to them because the resources have been appropriated by mining companies. Along the coast of Araucanía, many Lafkenche families have had what used to be free access to their traditional fisheries and coastal resources restricted by the registration of vast stretches of coastline in the name of huincas, or non-indigenous persons, in accordance with the provisions of the Fisheries Act and to the detriment of the Mapuche communities.

(STAVENHAGEN, 2003, párr. 26).

He recommends to the Chilean government that “[b]oth in law and in practice, access by indigenous communities to the water and maritime resources on which they have traditionally depended for their survival should take precedence over private commercial and economic interests” (STAVENHAGEN, 2003, párr. 66).

Furthermore, despite the results of some legal cases,⁹ the recognition of cultural diversity and indigenous rights have been obstructed by dominant politics and economic power, both of which hinder ancestral community management practices and real community participation in decision-making about water resources. This limits the autonomy and cultural identity of indigenous communities, affecting their development and decreasing the availability of the resources they need for survival (BUDDS, 2007, p. 157-174; GENTES, 2007, p. 175-198).

4 The effective and beneficial use of water: The case of the Western United States

The experience of the western United States is also worth mentioning, because it is similar to the Chilean model in terms of the use of market incentives for resource allocation. In the United States, there is a long history of market-based systems to exchange water rights. However, in those states, the principle of effective and beneficial use of the resource prevails, which means that in order to exercise and maintain the right, the right holders must identify an intended use that is not contrary to the public interest (DOROUJEANNI y BERRIOS, 1996, p. 21).

Doroujeanni and Berrios, citing Gould, explain:

The incorporation of public interest in the transactions that take place under the water law of the western United States is expressed, according to Gould, in terms of the water management authority preventing the adverse effects of a use (or non use) of the resource from falling on other users. It goes beyond just damages to third parties, although they are of course covered. It includes indirect effects (like the social impact in a community if water is reallocated from agricultural use to mining, for example) and direct effects (such as environmental damages).

(DOROUJEANNI y BERRIOS, 1996, p. 15).

Importantly, the United States recognizes indigenous persons’ water rights. However, that recognition, according to Getches, continues to be an “imperfect model” that has “produced more paper than water that they [indigenous people] can actually use” (GETCHES, 2006, p. 227).

Since independence, indigenous rights under United States law were part of the development of national policies. Even though these policies recognized the right of indigenous peoples to occupy and govern their own territories, they sought the integration of native communities and allowed for wide intervention of Congress to limit and extinguish many of their rights. As a result, these communities were pushed into smaller and smaller spaces, called reservations, as settlers expanded across the west (GETCHES, 2006, p. 230).

However, in 1908, the United States Supreme Court issued the “doctrine

of reserved water rights” to ensure a sufficient source of water for reservations where indigenous people lived. This doctrine emerged from the *Winters v. United States* case, which used the experiences at the Fort Belknap Indian Reservation in Montana to determine that communities could use the water that was necessary to fulfill the purpose for which their reservations were created. Nevertheless, the precarious situation of these communities put them at a clear disadvantage in the competition with the settlers, so much so that the settlers—with the support of the federal government—built dams or diverted rivers, thereby impacting these indigenous rights (GETCHES, 2006, p. 234). For example, according to the National Water Commission in 1973: “In the history of the United States government’s treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations stands out as one of the sorrier chapters” (GETCHES, 2006, p. 235).

While the aforementioned court ruling was important, indigenous rights depend on a whole set of judicial decisions in order to be truly protected. Given that it is a common law system, progress was made based on the particulars of each case. In addition, it should be noted that the same approach leads to conflicts with other users of the same resource, because if indigenous water rights are not clearly established, this can create uncertainty for external agents that use the same water source (GETCHES, 2006, p. 235-251)¹⁰ and the process ends up being “mediated by the influence of extralegal factors” (GUEVARA GIL, 2009, p. 124).

Citing Getches once more:

Although reserved water rights [in the United States] are not meant to protect tribal cultural values, the water uses that are secured through those rights can promote them anyway. Cultural value systems sometimes create “demands” for water that can be satisfied through legally-recognized water rights.

(GETCHES, 2006, p. 251).

Finally, the case of the Pyramid Lake Paiute Tribe in Nevada provides an example of the community irrigation system (*acequia*) that developed in New Mexico and Colorado in the southwestern United States. Indigenous communities’ water rights, which had already recognized through the doctrine developed at the beginning of the last century, started to gain meaning and more effective protection as a result of long legal battles in the courts, pressure on legislators and rights advocacy strategies. This case also illustrates the conflicts between the Paiute tribe’s traditional water use for fishing and the competing uses of the dominant society. The reservation’s water was specifically diverted by irrigation projects, which had devastating effects on the culture and sustenance of the tribe. According to Wilkinson:

The story of the Pyramid Lake Paiute Tribe in Nevada, US, illustrates the difficulty of enforcing legal rights to water by indigenous people who competes with non-Indian water users and must use the legal system of the dominant society. The struggle of these people has resulted in success, but only after decades of legal and political maneuvering and nearly a century of being deprived of water.

(WILKINSON, 2010, p. 213).

The second case shows how the traditional use of water in community irrigation systems in New Mexico and Colorado has survived as a civil and social institution over the years. Even though the two states regulated water rights differently (HICKS, 2010, p. 225-226) and the official approach prevails (RIVERA y MARTINEZ, 2009, p. 323), respect of traditional norms—where cultural identity and social relationships are reflected—as well as the formal agreement allowing for local management, now allow a revaluation and respect for the use that indigenous communities make of water. According to Rivera and Martínez:

[...] applications to transfer water to uses outside the acequia communities are often protested with fierce intensity by the acequia irrigators. From the time of first settlement, and intrinsic to the community value of water in the contemporary period, land, place and identity are interdependent and not severable one from another.

(RIVERA y MARTINEZ, 2009, p. 324).

Citing Glick, they add:

[...] [the defense of the] protection of the acequia culture of New Mexico and southern Colorado as a viable development policy [is] important to the indigenous rights of traditional people around the world and [shows] how this direction also recognizes their role as repositories of local knowledge about the environment and agricultural sustainability.

(RIVERA y MARTINEZ, 2009, p. 329).

5 Vertical administrative policies: The case of Peru

The case of Peru presents a different picture, not in terms of guarantees of the local rights and traditional practices of indigenous people relative to water resources, but in terms of the permanence of an official model used for the access, use and transfer of those resources.

For forty years, the regulatory framework related to the policy and management of water resources was primarily governed by the General Water Act, which was approved through Decree 17.752 in 1969 and repealed by the Water Resources Act or law number 29338 in 2009. This Act reaffirms the inalienable, imprescriptible nature of domain over the resource, and the absence of private ownership rights over it.

Although there was great diversity in local realities and multifunctional water use, the official approach was to ignore those practices and be guided by references that were only applicable to certain interests. By decoupling formal legislation from the realities of water users and their water management systems, this approach generated conflicts and made it difficult to apply the laws because they were inconsistent with social interests and values (GUEVARA, 2009, p. 113-122; 2008, p. 147-162; 2007, p. 153-162). In contrast to Chile and the western United States, the allocation model used in Peru's 1969 Water Act was centered on the state and gave it direct administrative power by strictly limiting the ability of users to make decisions about water resources.

On topics ranging from the way to obtain water usage rights to the criteria used to allocate the resource (such as through the Crop Plan for agricultural uses), rates and contributions, water use transfers, and the organization of irrigators, many studies have shown inconsistencies between regulations and reality (HENDRICKS y SACO, 2008, p. 139-146). Thus, the inability to apply the complex regulations affects juridical security, which leads to the loss of collective rights and autonomous water management by indigenous communities. This impacts their identity, responsibilities and social structure; and, due to the inadequate responses to address this and the absence of integral solutions, it leads to the resurgence of conflicts. (BOELENs et al., 2006, p. 142-154).

For example, the case of the community of Cabanaconde, located in the lower part of the Colca valley in the Arequipa region, shows how local communities' rights were affected by the development of the Majes project in the 1970s and 1980s. This project channeled water from the mountains to the coast and turned thousands of hectares of desert into productive land. It also led to problems in the indigenous community's social, cultural and ecological fabric, significantly reducing access to and use of water resources while increasing the occurrence of famine and instability in the region (GELLES, 2007, p. 52-57).

Thirty years later, the development of another project, now called Majes Siguas II, is generating new protests and social conflicts. This time, the project has pitted the provincial Espinar government from the Cusco region and the Cusco regional government against the Peruvian Private Investment Promotion Agency (Proinversión) and the Arequipa regional government. This agro-industrial project is one of the largest in the area, and it aims to build the largest dam in the country to capture water in Cusco and transport it to Arequipa in order to irrigate thousands of hectares of barren land. The dam would also generate electricity through hydroelectric plants that they plan to build. Meanwhile, the peasant communities in Espinar would see a dramatic decrease in the supply of drinking water, and it would hurt their ability to subsist in that region.

The provincial government of Espinar and the regional government of Cusco filed two appeals on this conflict, which were later merged. One demanded an end to the violation of the Espinar population's rights to life, health and the environment, while the other demanded the annulment of the feasibility decision for the Majes Siguas II project. After the judiciary upheld the complaint in two courts, the Peruvian Constitutional Court heard the case when the national government filed a constitutional tort action arguing that the *res judicata* principle would have been violated when the sentence was executed.

The Constitutional Court issued its decision on November 8, 2011, siding with the national government and stating that the constitutional tort action was justified. Among other things, it also nullified the judicial resolution that had indefinitely suspended the Majes Siguas II project, ordered that a Comprehensive Water Balance Study be undertaken, and validated the Environmental Impact Assessment that had been under scrutiny (TC, 2011).

While there are assessments and critiques that could be made about this decision, the goal here is to show the impacts that this kind of decision has on the parties involved in terms of water use and the respect and guarantees afforded to

water as a human right. Rather than looking for a “peacemaking” resolution to a conflict, the judges should assess whether or not the rights of the indigenous communities in question are being threatened or protected. The right of indigenous communities to safely access and manage their own water systems is crucial not only to their material sustainability but also to their existence as a social and cultural structure. Failing to consider these aspects could generate harmful consequences that are difficult or even impossible to reverse.

These omissions are evident in the recommendations given to Peru by the Committee on the Elimination of All Forms of Racial Discrimination (CERD) in its 2009 report:

The Committee expresse[d] its concern at the conflicts that may arise as a result of the lack of consensus with regard to national policy on the part of Peruvian society as a whole, in all its multicultural and multi-ethnic diversity, in particular in the areas of education, development projects and environmental protection.

The Committee recommends that the State party conduct a participative, inclusive process aimed at determining which vision of the Nation best represents the ethnic and cultural diversity of a country as rich as Peru, since a shared and inclusive vision can guide the State party in drawing up public policies and development plans.

(CERD, 2009, párr. 41.23).

Despite this recommendation, we actually observe a rejection of the diversity of indigenous conceptions in the development of public policies, legislative initiatives and large-scale projects that significantly impact their resources and livelihoods as well as their traditional cultural practices. Indigenous uses for water are part of a social and cultural setting that is distinct from the official one and the relationships that are developed through the management of this resource, such as those cultivated through celebrations and local customs, can help support the life of these people. This sense of identity that ties them to the land fuels the demand for respect, participation, and physical access to the water resources in their territories.

Although the current Peruvian regulatory framework¹¹ has made some important advances, its operation, legitimacy and dynamics in practice remain to be seen. It is important to highlight the priority that this framework gives to integrated water management and watershed management (as geographic units in the hydrological cycle) rather than to individual sectors, which fragment the resource as if there weren't a number of different users and uses that depend on the same water source. This framework also recognizes water uses in peasant and indigenous communities by explicitly referencing ILO Convention 169 and recognizes water resources as a social, economic, cultural and environmental good. Finally, the framework focuses on greater empowerment to oversee the use and exploitation of this resource, through a National Authority as the lead agency as well as to providing water resource information in order to facilitate its management.

Nevertheless, it would be inaccurate to say that this regulatory framework is in line with the real plurality of uses and rights assumed by the different water users. The duplication of functions, the contradictions, and the gaps that emerge

in practice will generate the same problems as long as the changes that are made do not emerge as a result of the comprehensive and participatory consideration of tasks and responsibilities. In other words, institutional arrangements need to reflect the diverse local realities in Peru.

Taking this into account would strengthen the use of water in ways that fulfill the goals of sustainability, efficiency and equity, in addition to responding more appropriately to the economic, social and cultural aspects of water. If water management is not comprehensive, it will fracture the coexistence of its multiple and diverse uses and have with negative repercussions on its substance as a human right.

6 Final considerations

The three cases illustrate conflicts over the uses, meanings, and appropriation of water, as well as decisions about these issues and participation in water management. While it is not this paper's goal to analyze the theoretical political and economic models for the regulation of water resources, understanding and considering the effects of legal standards on water management and the different values and components that it is afforded is necessary for the development of the human right to water. This is because the normative systems that are implemented should not be alien to the human rights field when they operate in relation to those rights and directly – or indirectly – affect them. The lack of this kind of assessment in the construction of legal standards concerning the right to water means ignoring the components that make up the right and renders its protection incomplete.

The analysis of these three case studies demonstrate the relevance of water for human activities and needs, as well as the different kinds of relationships that have been established with regard to water, and its multifunctional nature, all of which make it a highly strategic and contentious resource. These case studies also present evidence for the threats to indigenous populations' enjoyment of and access to water due to the lack of a comprehensive approach, even when there is some kind of legal recognition of indigenous groups' particular needs regarding water. A piecemeal approach to water not only leads to global inefficiencies, but also affects fundamental rights and liberties, depending on the externalities and damages that are generated. If a court, legislator, or public policymaker does not consider these things, they will even more significantly affect the exercise of the right to water.

The cases presented show that the recurring problem of implementing universal solutions and models in a top-down, biased fashion ignores the way these policies impact people and communities in often lamentable and tragic ways. The cases also highlight the contradictions that arise when policies are applied without understanding the nature and dynamics of local rules governing water management in indigenous communities. As the Committee on Economic, Social and Cultural Rights (CESCR) stated:

The elements of the right to water must be adequate for human dignity, life and health [...] The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural

good, and not primarily as an economic good. The manner of the realization of the right to water must also be sustainable, ensuring that the right can be realized for present and future generations.

(CDESC, 2002, par. 11).

This articulation of the right to water is based on the application of the respect for and the promotion human rights, a concept that shall always be complex and incomplete, to human development, which results in a collective and individual expansion of people's freedoms and abilities for their improved welfare.

In arguing that human rights are based on the dignity of the person, these rights are always fluid and dynamic because they are part of an open, unfinished, evolving and historical product based on human dignity. In other words, indigenous rights to water will gain strength as awareness of ethical arguments and legislative and judicial protection increase.

As a result, we believe that raising awareness of traditional practices and social relations—as well as water management decisions—in indigenous communities will help to establish more effective protections for water rights and promote a regulatory framework that brings growth and development opportunities that are appropriate to their context. This does not mean idealizing the practices that are traditionally used, but rather critically and objectively studying them without taking them out of context or pulling them apart to apply to some development model or policy.

Until now, we have argued that, in evaluating the development dynamics and the different things that affect the legal protection and regulation of water, it is critical to keep in mind its economic, social and cultural components in order to balance the different rights and demands. Imposing regulations without considering the philosophy and perspectives of the indigenous groups can have devastating effects on their social structures, their economic relationships and their cultural interdependence.

To better understand this, we can turn to Boelens, when he writes: “water in Andean communities is often an extremely powerful resource. [It is] a foundation for productive, social and religious practices, and local identity [...]” (BOELENS, 2007, p. 51). He adds:

[...] However, the neo-liberal water laws (in, e.g. Chile) or top-down instrumental water policies (in, e.g. Ecuador and Peru) have not only neglected customary and indigenous water-management forms but have also had concrete, often devastating, consequences for the poorest people in society.

(BOELENS, 2007, p. 56).

By identifying the economic, social and cultural attributes of water and adding environmental and even political analyses, one can see how the diversity of values ascribed to it can lead to competing demands for the use of the same water resource that can have harmful effects on its users.

Water is also related to poverty, especially because access to drinking water

and adequate sanitation as necessities to achieve a minimum living standard for human dignity. This is evidenced by the concern expressed by the Human Rights Council:

[...] that approximately 884 million people lack access to improved water sources as defined by the World Health Organization and United Nations Children's Fund in their 2010 Joint Monitoring Program report, and that over 2.6 billion people do not have access to basic sanitation [...].

(CDH, 2010, p. 2).

Obviously, this deficit also has tragic consequences for life by leading to a proliferation of diseases related to water scarcity, the use of contaminated water or a lack of basic sanitation infrastructure, impeding development of those who have no access to it; and, even worse, raising mortality rates. Segerfeldt states, “water shortage accounts for 12 million deaths annually. In other words, every minute of every day, 22 people die because they cannot get enough safe water” (SEGERFELDT, 2006, p. 28).

By considering the economic, social and cultural components of water, we can no longer ignore concepts and externalities related to the use of water for all of the different activities. A comprehensive understanding of the forms water takes will help to design more complete systems that are adequate to protect the right to water as a sensitive natural asset and to create platforms for human development.

We conclude that it is wrong to reduce the significance of water to just one of its components by ignoring the other meanings that societies—and especially indigenous people—attribute to this resource. For them, water is not simply a natural resource:

It has important dimensions in the social structure and collective identity of indigenous people and communities. Thus, the debates and laws that do not consider the multiple meanings of water and other resources can have devastating effects on those people and communities, and lead to the emergence of opposition and resistance movements.

(GUEVARA, 2009, p. 125).

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NOTES

1. The United Nations General Assembly first recognized the right to drinking water as a human right through resolution A/RES/64/292, issued during the July 28, 2010 session.

2. According to the Office of the United Nations High Commissioner for Human Rights, this focus is "a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyze inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress" (OACDH, 2006, 15).

3. This Declaration was adopted as part of a technical meeting held prior to the United Nations Conference on Environment and Development, which took place in Rio de Janeiro in June 1992.

4. In developing this principle, it was said that it is essential to recognize the fundamental right of every human being to have access to clean water and sanitation at an affordable price. It was added that failure to recognize the economic value of water has led to wasteful and environmentally damaging uses of the resource. (CIAMA, 1992, principle 4).

5. Using the liberal political economy logic, for example, considering water as a scarce resource would require granting property rights in order to create an incentive scheme for rights holders, in such a way that it promotes the efficient use of this good and internalizes the externalities that could occur. Furthermore, under this model, those property rights should be embedded in a free market system to ensure that they are directed to the most valuable uses.

6. For some examples of cases where the operator of the drinking water distribution system was determined through a concession and the supply and quality improved as a result, see the

description in SEGERFELDT, 2006, p. 83-103.

7. Article 5 of the 1981 Water Code states: "Water is a national asset for public use and the right to use it is given to private individuals according to the provisions of this Code" (CHILE, 1981).

8. See: i) Law number 19.253, which protects indigenous lands and their natural resources, prohibiting any action that degrades them or threatens their depletion, explicitly stating that new rights to water can not be granted for aquifers that supply water to the property of indigenous communities (CHILE, 1993); and ii) Law number 19.145 which modified the Water Code, and which protects the aquifers that feed the wetlands in the northern regions of Tarapacá and Antofagasta (CHILE, 1992). There is also legal decree 1.939 from 1977 which prohibits the implementation of projects that inhibit the conservation of ecosystems and the environment (CHILE, 1977).

9. In 2004, for example, the Chilean Supreme Court ruled in the case "*Toconce vs. Empresas de Servicios Sanitarios de Antofagasta, ESSAN S.A.*", recognizing the Toconce indigenous community's rights to water, and establishing as case law that indigenous ancestral ownership of water, derived from customary practice, constitutes full ownership (GENTES, 2006, p. 271).

10. The author notes that the hidden impacts on non-indigenous peoples' rights to water are reflected, for example, in the tribes' struggle to make use of their water resources for cultural needs, which may sometimes affect the investments of hundreds of users who have depended on and made use of the water source belonging to the American Indian reservation for quite some time.

11. See Water Resource Law number 29338, approved on March 23, 2009, as well as its accompanying regulations in Supreme Decree number 001-2010-AG, approved on March 23, 2010.

RESUMO

Este artigo tem por objetivo evidenciar os valores e significados atribuídos à água, sob o enfoque de três componentes – econômico, social e cultural – com ênfase na relação entre os povos indígenas e este recurso natural. A análise se desenvolve considerando que, por se encontrarem em uma situação de vulnerabilidade nas sociedades atuais, tais povos constataam que as abordagens oficiais não necessariamente respeitam seus respectivos modos de vida e suas concepções de mundo, limitando sua própria liberdade como grupos distintos e ameaçando o gozo de seus direitos.

Será realizado um estudo de três formas distintas de gestão do recurso hídrico em relação aos seus efeitos sobre os direitos dos povos indígenas. Esta análise contribuirá para a observação da necessidade de abordar o direito à água de modo integral, tendo em vista o uso sustentável e eficiente dos recursos e respeitando as particularidades que surgem dentre os povos indígenas.

PALAVRAS-CHAVE

Água – Gestão hídrica – Direitos humanos – Povos indígenas

RESUMEN

El presente artículo pretende evidenciar los valores y significados que se otorgan al agua a la luz de tres componentes: económico, social y cultural, enfatizando la especial relación existente de los pueblos indígenas con este recurso natural. Esta aproximación se realiza dado que al encontrarse dichos pueblos en una situación de vulnerabilidad en las sociedades actuales, las aproximaciones oficiales no necesariamente respetan sus particulares modos de vida y concepciones del mundo, limitando su propia libertad como grupos diferenciados y amenazando el disfrute de sus derechos.

Para ello, se estudiarán tres formas diferenciadas de gestión del recurso hídrico en relación a sus efectos con los derechos de los pueblos indígenas. Este análisis nos ayudará a observar la necesidad de abordar el derecho al agua de manera integral, teniendo en cuenta el uso sostenible y eficiente del recurso y respetando las particularidades que emergen con los pueblos indígenas.

PALABRAS CLAVE

Agua – Gestión hídrica – Derechos humanos – Pueblos indígenas



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ABSTRACT

This paper proposes to demonstrate the need for the adoption of a new inclusive and intercultural paradigm for protecting the human rights of indigenous peoples in Latin America. Through a critical analysis of the jurisprudence of the Inter-American Court of Human Rights, the paper will identify some of the advances and limitations in the attempt to construct new alternatives for dealing with indigenous issues in the region. This analysis will be conducted through a study of the three fundamental parameters established by Court precedents thus far: the concept of the right to life with dignity, the protection of communal property, and the right of indigenous peoples to prior consultation.

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KEYWORDS

Indigenous peoples – Human rights – Inter-American Court of Human Rights – Life with dignity – Communal property – Prior consultation



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TOWARD A NEW PARADIGM OF HUMAN RIGHTS PROTECTION FOR INDIGENOUS PEOPLES: A CRITICAL ANALYSIS OF THE PARAMETERS ESTABLISHED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS*

Andrea Schettini

1 Introduction

In Latin America, indigenous peoples find themselves in a situation of extreme vulnerability, characterized by racial, social and economic discrimination. Estimated at between 35 million and 55 million (NAÇÕES UNIDAS, 2005, p. 48), the indigenous population is the poorest in the region, remaining on the fringes of the social, political and economic structure developed by Latin American countries (NAÇÕES UNIDAS, 2010).

This historic situation is a consequence of an unjust logic of colonization that continues to this day through discriminatory and exclusionary state policies that result in the progressive loss by indigenous peoples of their ancestral lands, the break-up of communities and the denial of their most basic rights (NAÇÕES UNIDAS, 2005, p. 50). While we recognize a change in posture by States, particularly over the past 20 years, with the adoption of domestic legislation and the ratification of international treaties, this change has been insufficient to guarantee the realization of the rights of indigenous communities.

This topic is extremely important in the current context of Latin America. Given the economic development models adopted by Latin American countries, one of the phenomena that should be receiving more attention is state and private

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intervention in indigenous areas for the execution of large-scale infrastructure and bioprospecting projects, and for the exploitation of minerals, hydrocarbons and other natural resources. Driven by these motives, States and multinational companies repeatedly violate the rights of indigenous peoples and, consequently, place their integrity and survival at risk (MONDRAGÓN, 2010, p. 31).

Given this backdrop, this paper proposes to demonstrate the need for the adoption of a new inclusive and intercultural paradigm for protecting the human rights of indigenous peoples in Latin America. Through a critical analysis of the jurisprudence of the Inter-American Court of Human Rights,¹ some of the advances and limitations in the attempt to construct new alternatives for indigenous issues in the region will be identified. This analysis will be conducted through a study of the three fundamental parameters established by Court precedents thus far: the concept of the right to life with dignity, the protection of communal property, and the right of indigenous peoples to prior consultation.

2 The modern Western paradigm of colonization

It is important to note that development has always been the argument used in Latin America to create a political discourse based on the notion of modernity and the capitalist model (QUIJANO, 2010, p. 49-51). The concept of development, adopted historically by Latin American States and reproduced to this day, is associated with an anti-democratic notion of the exploitation of nature, the commercialization of natural resources, and justified by a productivist and predatory ethic.

Within the current context of Latin America, we cannot lose sight of the fact that indigenous issues ought to be debated against a backdrop of the following two historical processes: (i) the coloniality of power, through which the hierarchy of races was introduced as a means of exploitation and social domination, with eurocentrism being imposed as the model of production and control of subjectivity (QUIJANO, 2005, p. 33); and (ii) the imposition of the hegemonic paradigm of Western modernity, based on individualism and anthropocentrism, the idea of linear and absolute progress, the opposition between society and nature, the commercialization of nature and privatization of the environment, and economicism, according to which quality of life and well-being are measured strictly by the criterion of economic development (ECHEVERRÍA, 1995, p. 140-155).

In addition to the economic and political dimensions, colonialism had a strong epistemological dimension that did not end with the independence of the colonies. According to Santos, colonialism was responsible for a genuine epistemicide, i.e. for the death of alternative knowledge and the subsequent liquidation and subalternity of the groups that subsisted on this alternative knowledge (SANTOS; MENESES; NUNES, 2006, p. 17). The same author explains that modern Western thinking is an abyssal thinking, since it is characterized by the impossibility of co-presence with other types of knowledge, imposing nonexistence, invisibility and non-dialectical absence on different knowledge (SANTOS, 2010, p. 32). As a result of the imposition of a form of hegemonic

Western knowledge, the knowledge of the indigenous peoples was reduced to irrationality and a condition of inferiority and, therefore, largely excluded from history.

Note that the modern Western paradigm, which is founded on the capitalist notion of development, is in direct contrast with the traditional lifestyles, cultural expressions, customs and practices of indigenous peoples, which are based essentially on their collective form of organization and on the spiritual relationship they have with their ancestral lands and with the environment. By ignoring the characteristics of indigenous peoples and preventing their participation in the decision making that affects their interests, the economic development policies established by States and international organisms in Latin America have excluded the indigenous population from the social, political and economic sphere, thereby subjecting them to the current situation of extreme vulnerability in which they find themselves.

Although these peoples are one of the groups that has suffered the most, and continues to suffer the most, from systematic violations of their rights through genocide and epistemicide, the passage of time has demonstrated their capacity for resistance and survival. The indigenous struggle, the result of the historic battle by these peoples against the paradigm of hegemonic modernity and resistance to coloniality, is essentially geared towards the construction of an alternative to the neoliberal capitalist economic system and the current model of power (MACAS, 2010, p. 15). The hegemonic civilizatory and developmental models in the region are reaching, if they have not already reached, complete exhaustion, illustrated by the serious climatic and environmental crises that we are experiencing (HUANACUNI, 2010, p. 18).

The analysis of indigenous issues in Latin America reveals, therefore, the need to go beyond the mere assertion of formal equality for indigenous peoples and demand the construction of alternatives that clear the way for a real decolonization of social, political and economic relations (QUIJANO, 2005, p. 34).

3 The inclusion of indigenous demands in the framework of International Human Rights Law

More recently, the inclusion of indigenous rights in the international human rights agenda has enriched the debate on this topic and strengthened the indigenous struggle to surmount the modern Western paradigm of colonization. Over the past two decades, due primarily to the resistance and activism of indigenous peoples, their demands have been progressively incorporated into the international order, gaining ground in the United Nations, the OAS and the regional human rights protection systems, among other international institutions (ANAYA, 2004b, p. 14).

As a result of this process, an innovative body of international norms and practices for the protection of indigenous peoples has emerged that seeks to recognize them as the subject of collective rights on the international level. Most notable are the creation of the UN Permanent Forum on Indigenous Issues in 2000, which met for the first time in May 2002; the adoption of ILO Convention

169 on Indigenous and Tribal Peoples in 1989; and, more recently, the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.

Nevertheless, the inclusion of indigenous demands and claims in the international legal framework does not preclude a criticism of International Human Rights Law. As Herrera Flores points out, it is always important to take a critical stance and question to what extent an immense normative and jurisprudential edifice can, in some way, break with the structure of dominance and exploration of the social, economic, political and legal relations of capitalism (HERRERA FLORES, 2009, p. 129).

Under the modern paradigm, International Human Rights Law has often served, historically, as an accomplice of the colonizing mentality that removed indigenous peoples from their lands and suppressed their cultures and institutions (ANAYA, 1996, p. 39). The cornerstone of the modern Western conception of human rights rests, originally, on the assertion of an abstract universalism that, by proposing a homogeneous identity and formal equality of all human beings, ends up overlooking essential characteristics that identify us and distinguish some people from others.

As such, modern law, through its abstract and universalizing rationality, has contributed to the exclusion of indigenous peoples from the legal and political sphere, by preventing a holistic vision of society and imposing Western lifestyles, organizations and social practices that are incompatible with the lifestyles of indigenous peoples (DANTAS, 2003, p. 97). Criticism of the abstract universalism of human rights is even more important when addressing indigenous issues, since the rights claims of these peoples are not only related to their abstract condition as human beings, but primarily to their concrete condition as indigenous peoples (ETXEBERRIA, 2006, p. 65, 70).

It should be pointed out that this paper does not intend to discredit International Human Rights Law as a possible instrument of change, as an effect and consequence of political struggle, but to make it clear that this is only one of the instruments available to indigenous peoples in the struggle against the colonial capitalist model that is still in place. The indigenous struggle extends far beyond the legal sphere.

Note that by opting to conduct a critical analysis of the decisions of the Inter-American Court on indigenous issues, we are not ignoring the inherent complexity of this matter, but instead, through this focus, identifying some limitations and advances in the construction of new alternatives for indigenous issues in the region. We recognize that, within this recent context of internationalization of indigenous demands, the jurisprudence of the Court has been playing an important role (RODRÍGUES-PIÑEIRO ROYO, 2006, p. 153), contributing in part to the break with the modern paradigm of exclusion and oppression of indigenous peoples in the Americas.

This paper will address three fundamental parameters developed by the court in its jurisprudence: the concept of the right to life with dignity, the protection of communal property, and the right to prior consultation. Note that only contentious cases that directly address these three parameters will be examined throughout the text.²

4 The concept of life with dignity in the jurisprudence of the Inter-American Court

In Inter-American jurisprudence, the right to life is understood not only as the right of all human beings to not be arbitrarily deprived of their life, but also as the fundamental right of all people to have access to the necessary conditions for life with dignity (CORTE IDH, 2010. *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 186; CORTE IDH, 2006. *Sawhoyamaxa Indigenous Community vs. Paraguay*, para. 150). Through this broader interpretation of the right to life, the Court has not only asserted the negative obligation of the State to not illegally deprive citizens of their lives, but it draws attention to the positive duty of the State to act and create the necessary conditions to guarantee life with dignity for all people.

In other words, the right to life in the jurisprudence of the Court is intrinsically linked to economic, social and cultural rights, with the State acting as a guarantor, meaning it has the responsibility to guarantee conditions conducive to the full development of individuals. This implies a guarantee of other fundamental rights, such as the right to work, to education, to health and to food, among others contained in the American Convention on Human Rights (ACHR) (GARCÍA RAMÍREZ, 2006, para. 18, 20).

This broader concept of the right to life as life with dignity, appears in Inter-American jurisprudence in three cases that specifically address the protection of the rights of indigenous peoples: *The Yakyé Axa Indigenous Community v. Paraguay* of 2005, *the Sawhoyamaxa Indigenous Community vs. Paraguay* of 2006 and the *Xákmok Kásek Indigenous Community vs. Paraguay* of 2010.³

In these three cases against the State of Paraguay, the indigenous communities, after being driven off their lands on account of the historic process of privatization of the Paraguayan Chaco, first claimed the return of their ancestral lands from the State. As a result of the failure of the State to demarcate and confer title to their territories, the members of the communities were prevented from accessing their lands, producing an extreme state of nutritional, medical and sanitary vulnerability that continually threatened the survival and integrity of these communities.

When analyzing the cases in question, the Court asserted that the State has the responsibility, in its capacity as a guarantor, to adopt concrete positive measures designed to genuinely protect the right to life with dignity, particularly in cases of people who are in a situation of vulnerability or risk. In the case of indigenous peoples, the Court emphasized that access to their ancestral lands and the use of natural resources are directly linked to the obtainment of food and, consequently, the survival of these peoples. (CORTE IDH, 2005, *Yakyé Axa Indigenous Community vs. Paraguay*, para. 162; CORTE IDH, 2006, *Comunidade Indígena Sawhoyamaxa vs. Paraguai*, para. 153; CORTE IDH, 2010, CORTE IDH. *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 186)

In the three precedents under analysis, the Paraguayan State was held responsible for violating the right to life with dignity of the members of the communities, since, by not permitting access to their ancestral territories, it deprived the communities of exercising their right to health, to education and to

nutrition, among other fundamental rights. The Court established, as reparations for violating the right to life with dignity, the obligation of the State to adopt regular and permanent measures to provide the affected indigenous community access to drinking water, public medical services, sufficient quantity and quality of food, adequate sanitation services and bilingual schools with the necessary material and human resources (CORTE IDH, 2006, *Comunidad Indígena Sawhoyamaya vs. Paraguay*, para. 230).

Note that while the assertion of the right to life with dignity is a pivotal step that should be recognized as an important victory in the protection of the rights of indigenous peoples, it is not sufficient to break with the modern paradigm of exclusion and exploration of these peoples. This is because the Court, in its jurisprudence, developed its conception of life with dignity strictly related to economic, social and economic rights which, while fundamental, are not capable of including the richness of the alternative ways of life of indigenous peoples and their eagerness for self-determination.

By asserting the right to life with dignity without an intercultural dialogue, i.e. without including the indigenous peoples themselves in the debate on what constitutes the essential conditions of life for these peoples, the conception of life with dignity has ended up being reduced to a Western notion of “well-being”. Consequently, the concept of life with dignity developed by the Court is constrained by the vision of the Western subject, contributing to the imposition of a Western way of life on these peoples.

Accordingly, the Court can and should go beyond its current conception of life with dignity, incorporating new discussions that have emerged in the Latin American context. This debate has progressed more quickly in some countries in the region but it has been gaining ground throughout Latin America in virtue of the development of the idea of “Living Well” of indigenous peoples, driven by the need to find new alternatives to the current economic and social model, which is in severe crisis.

Over the past decade, the renewal of the collective conscience of indigenous peoples in Latin American countries has been gaining new momentum, and traditional concepts such as *Sumak Kawsay* and *Suma Qamaña* – used by the indigenous peoples of Ecuador and Bolivia to criticize the current model of development and to assert the need for a cultural, social and political reconstruction – now constitute key elements of the discussion on the protection of the life of indigenous peoples in Latin America (HOUTART, 2011, p. 2).

Note that the concept of Living Well, developed through ongoing dialogue with indigenous peoples in the contemporary Latin American debate, is not coterminous with the defense of dignity and is very different from the concept of life with dignity adopted by the Court. As pointed out by David Choquehuanca, an Aymara Indian, the idea of Living Well attaches importance to community living, democracy, balance with nature, indigenous identity and its customs and traditions (CHOQUEHUANCA CÉSPEDES, 2010b). He explains that Living Well is more concerned with the identity of indigenous peoples than it is with dignity. The concept of life with dignity, since it is not open to an intercultural dialogue, asserts the need to improve quality of life without, however, requiring profound

structural changes, which ends up imposing a Western way of life on indigenous peoples (CHOQUEHUANCA CÉSPEDES, 2010a, p. 11).

According to Luis Macas, Living Well is a concept and a practice that is fundamentally community based, a collective construction founded on the coexistence of human beings with nature, a way of living and thinking that constitutes a fundamental pillar in the process of social construction of the community system in the Americas (MACAS, 2010, p. 17). Eduardo Gudynas, meanwhile, stresses how the concept contrasts with the conventional model of development – which defends obsessive, perpetual economic growth underpinned by the commercialization of nature. Instead, it pursues substantive changes through a commitment to quality of life and the preservation of nature. This author emphasizes that Living Well is not simply about assistance policies, insofar that it calls for profound changes in economic dynamics, in the production chain and in the distribution of wealth (GUDYNAS, 2010, p. 41-43).

The ideas of Living Well appear expressly in the constitutions of Ecuador and Bolivia, through the concepts of *Sumak Kawsay* and *Suma Qamaña* respectively. Although there are some doctrinal differences between these two concepts, their importance lies in the connection between the idea of Living Well and indigenous knowledge and traditions, and in the pursuit of structural changes in society. In both cases, there is a deliberate effort to revive the knowledge and conceptions that have been hidden for so long, and to give a voice to the indigenous peoples who have historically been victims of a silence imposed by colonization.

In the current Latin American context, significant changes have been occurring in this respect. Countries such as Ecuador, Colombia, Peru and Bolivia, after the constitutional reforms of the past two decades, have begun to recognize the pluri-cultural and multiethnic character of the configuration of the State (YRIGOYEN FAJARDO, 2003, p. 173), which is based on the possibility of various indigenous nations with their own economic, social, political and legal entities existing inside the same State (MACAS, 2010, p. 36).

One good example is the constitution of Bolivia, which recognizes 36 indigenous languages in addition to Spanish as official languages of the State. In Ecuador, meanwhile, the National Plan for Living Well 2009-2013 proposes a change of paradigm, through which the idea of indigenous Living Well is recognized as a reaction to the notion of neoliberal development. The new paradigm promotes an inclusive, sustainable and democratic economic strategy that goes beyond the extractivist notion of exploitation of nature (GUDYNAS; ACOSTA, 2011, p. 107-108).

Even though it is an open concept that is still under construction, Living Well is an important element in the struggle to surmount the modern paradigm of colonization. The concept challenges the rationality of the current model of development, its emphasis on merely economic aspects and the pursuit of unlimited progress. It contributes, therefore, to challenging the dualism that imposes the separation of society and nature, seeking to reestablish the harmony between man and the environment through criticism of the anthropocentric and utilitarian logic adopted by development policies in the vast majority of Latin American countries (HOUTART, 2011, p. 4).

This change of paradigm should always be viewed as a process and, therefore, it should not be considered something that is predetermined, but instead under constant construction (HOUTART, 2012, p. 2). The jurisprudence of the Court has taken some steps in this direction and provided important elements for the protection of the rights of indigenous peoples, but it has stopped short by limiting life with dignity to the guarantee of economic, social and cultural rights. Living Well, in contrast, changes the very ideas, radically questioning the concepts of development and progress, introducing alternative ways of conceiving the world, by restoring the relationship between quality of life and nature, and proposing concrete projects and political actions (GUDYNAS, 2011, p. 2). This concept is important because it gives a voice to indigenous peoples, casting doubt on the official narrative shaped by society and politics that concealed and justified centuries of oppression, exploitation and exclusion (ALIMONDA, 2012, p. 32).

Therefore, the criticisms made here are not intended to belittle the advances of Inter-American jurisprudence, but rather to address the need for greater openness by the Court to the current Latin American debate on Living Well and the quality of life of indigenous peoples.

5 Protection of communal property in the jurisprudence of the Inter-American Court

As the Inter-American Commission on Human Rights (IACHR) has itself pointed out, one of the main problems that is currently faced in the protection of the rights of indigenous peoples is the fact that these communities, without title deeds to their ancestral territories, are being severely affected by the implementation of projects, whether state or private, to exploit natural resources on their lands (CIDH, 2009).

Given this situation, the Court has played an important role in the consolidation of a conception of property that aims to go beyond the concept of private property imposed by the modern Western paradigm based on the divisibility of land, individual ownership, alienability, commercial circulation and productivity. This modern concept of property is entirely incompatible with the indigenous concept of territoriality, which draws on the idea of community and the holistic conception of the right to life (GARCÍA HIERRO, 2004, p. 4).

When addressing the right of indigenous peoples to communal property, the Court has adopted an alternative interpretation of this right, introducing a collective, cultural and social dimension of property, which has contributed to an intercultural debate on the communal property of indigenous peoples in Latin America (BRINGAS, 2008, p. 132, 144).

5.1 *The legitimacy of communal property of indigenous peoples*

According to the Court, the legitimacy of indigenous communal property is based primarily on the cultural, spiritual and material relationship of these peoples with their ancestral lands. This relationship exists, but also the right to reclaim their territories, including in cases when the community has been unwillingly separated

from their traditional lands, as occurs in the vast majority of cases in which indigenous peoples are forced off their lands (CORTE IDH, 2012. *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 146. CORTE IDH, 2006. *Sawhoyamaya Indigenous Community vs. Paraguay*, para. 132).

In the understanding of the Court, the relationship of indigenous peoples to the land is not merely a matter of possession or production, but a material and spiritual element which they must have the right to enjoy in full, including to transmit their culture and traditions to future generations (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, para. 149; CORTE IDH, 2006, *Sawhoyamaya Indigenous Community vs. Paraguay*, para. 118; CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 124, 131). Accordingly, the Court discards the modern paradigm and recognizes that territoriality acquires, for indigenous peoples, a transgenerational and cross-border dimension that goes far beyond the merely economic functions of the land. For indigenous peoples, the territory is much more than a simple geographic boundary; it is a spatial representation of their collective identity (TINEY, 2010, p. 9).

Note that the right to communal property has been granted to indigenous peoples in virtue of a criterion of traditional occupation, according to which the ancestral territories are defined based on the collective memory of the current generations who are still connected, physically or spiritually, to the lands being claimed (GARCÍA HIERRO, 2004, p. 7). The criterion of traditionality, in this sense, is not related to chronological time, i.e. it does not depend on how long a given territory has been occupied, but instead refers to the traditional way in which the territory is conceived by the community (SILVA, 1997, p. 782).

The conception of indigenous traditionality applied by the Court in its jurisprudence is in compliance with article 14 of ILO Convention 169 and with article 26 of the United Nations Declaration on the Rights of Indigenous Peoples that recognize the right of these peoples to the protection of their relationship with lands traditionally occupied and owned.

Taking this into consideration, the Court has asserted that, although the indigenous notion of land ownership and possession does not correspond to the classic concept of property, it deserves equal protection under article 21 of the ACHR that addresses the right to property in the Inter-American System. In its interpretation, the concept of property and possession acquires a collective meaning when related to indigenous communities, since it is not centered on the individual, but rather on the group as a whole (CORTE IDH, 2012. *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 145. CORTE IDH, 2006, *Sawhoyamaya Indigenous Community vs. Paraguay*, para. 143. CORTE IDH, 2001. *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, para. 149).

Furthermore, in the understanding of the Court, communal property consists not only of the territory itself, in its physical sense, but it also covers the right of indigenous peoples to freely enjoy their property and the natural resources found therein, in accordance with their traditions and customs (CORTE IDH, 2012. *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 145. CORTE IDH, 2007. *Saramaka People vs. Suriname*, para. 146). This position, based on ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, implies that these peoples

have the right to possess and control their territories and the natural resources found therein without any kind of external interference, while the States have the responsibility to guarantee them the right to manage and exploit their territories in accordance with their communal traditions.

It is important to point out that the rights of indigenous peoples exist independently from property titles or the state statutes that recognize them, which means that the exercise of indigenous territorial rights is not dependent on express state recognition or any formal property title (THORNBERRY, 2002, p. 352). Moreover, in the understanding of the Court, a legal system that conditions the rights of indigenous peoples to the existence of a private property title to ancestral lands cannot be considered a suitable system for the protection of these peoples (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 111).

Based on the traditional interpretation of communal property of indigenous people, the Court has established in its jurisprudence that: (i) traditional possession by indigenous peoples of their lands has the equivalent effect of full property title granted by the State (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, para. 128); (ii) traditional possession also entitles indigenous communities to demand official recognition of ownership and registration (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 215; CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 194); (iii) indigenous peoples who have unwillingly left or lost possession of their traditional lands still maintain the communal property rights thereto, despite the lack of legal title (CORTE IDH, 2005, *Moiwana Community vs. Suriname*, para. 133); (iv) indigenous peoples are entitled to restitution of their lands or to obtain other lands of equal size and quality even when these lands have been lawfully transferred to third parties in good faith (CORTE IDH, 2006, *Sawhoyamaza Indigenous Community vs. Paraguay*, para. 128-130).

5.2 *State obligations in the protection of communal property of indigenous peoples*

Historically, the extermination and domination of indigenous peoples is associated with the capitalist dynamic of dispossession that began with the colonial invasion and continued with the loss of lands on account of the expansion of the agricultural frontier, the extractivist pressure on natural resources, the development of large infrastructure projects and, finally, the pressure exerted by business on the systems of traditional knowledge and the biodiversity of indigenous territories (TOLEDO LLANCAQUEO, 2005, p. 85). Consequently, one of the front lines of decolonization must involve the defense of ancestral territories and the subsequent state recognition of this right (GRAY, 2009, p. 35).

The Court has played an important role in this sense. Through the legitimacy of the right to communal property of indigenous peoples, it has established that official recognition of their ancestral territories is not up to the discretion of the State, but is instead an obligation that imposes on the State the duty to delimit, demarcate and confer title of the land to the members of the communities. The delimitation and demarcation of indigenous ancestral territories is a precondition

for the exercise of their rights, and the State must therefore adopt special measures that guarantee the effective exercise of the right to communal property (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, para. 138).

Nevertheless, in the understanding of the Court, communal property, despite being considered a fundamental right, is not absolute and may be subject to certain limitations and restrictions. However, the Court has expressly determined that a State may only restrict the communal property of indigenous peoples when the restrictions are: (i) previously established by law; (ii) necessary and proportional; and (iii) intended to achieve a legitimate objective in a democratic society.

Although these requirements may be criticized for their imprecision, the Court has established that, when applied to indigenous communities, they must also take into account that any restriction on communal property may not amount to a denial of their traditions and customs, or threaten the subsistence of the community and its members. Note that subsistence does not just mean physical survival, but also covers the need to preserve and guarantee the special relationship of the indigenous communities with their traditional territories so they can continue to live their way of life in accordance with their cultural identity, social structure, customs, beliefs and traditions (CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku vs. Ecuador*, para. 156; CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 127, 128; CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 144-145).

In the case of limitations on communal property resulting from development projects and exploration concessions on indigenous lands that could affect, directly or indirectly, the way of life of these peoples, the Court has also determined that States must observe three essential requirements. First, the State must assure the effective participation of the members of the community in the planning and execution of any development or investment projects in their territory, and it must also obtain the free, prior and informed consent for large-scale projects that would have a major impact. Second, the State must guarantee that the members of indigenous communities benefit reasonably from any project that is developed on their land. Finally, the State must assure that prior environmental and social impact assessments are conducted by independent and technically competent entities in order to evaluate the potential risks and damage to the community (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 127).

5.3 Reparations established by the Court for violating communal property rights of indigenous peoples

In its jurisprudence to date, the Court has judged six cases dealing with the right to communal property of indigenous peoples.⁴ In each one, the Court declared that the States violated the right to property of the affected indigenous communities and established reparations that include restitution, satisfaction, non-repetition, as well as material and non-material damages. Some relevant aspects of the reparations ordered by the Court shall be addressed below.

First, the Court has established that, in terms of reparations, it is the duty of the States to adopt the legislative and administrative measures and any others that may be necessary to create an effective mechanism to delimit, demarcate and confer

title to the indigenous territories, with the full participation of the communities (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* para. 164). Note that the Court is not responsible for determining which ancestral territory is to be demarcated. This is an obligation to be fulfilled by the State in dialogue with the indigenous peoples, respecting their values, uses and traditions (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 216, 217).

Moreover, the Court understands that the States, in protecting the right to communal property of indigenous peoples, first have the duty to prevent the communities from being dispossessed from their traditional lands or impeded from making use of them. Nevertheless, if an indigenous community is prevented from accessing its ancestral territories and the resources necessary for its subsistence, the States must assure the right of restitution of these territories even when they are in the lawful possession of private owners. This is because returning ancestral lands to indigenous communities is considered by the Court to be the measure that comes closest to full restitution. Until the ancestral territories have been demarcated and returned to the communities, the Court has determined that the States must abstain from any act that could cause its agents or third parties to prevent the community from developing its particular way of life (CORTE IDH, 2001, *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* para. 163; CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 194; CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 291).

Moreover, in the event that a State is unable, on objective and reasoned grounds, to adopt the necessary measures to return the ancestral lands, it must provide the affected indigenous community with alternative lands of equal size and quality, which must be chosen by agreement with the members of the community, respecting their own consultation and decision procedures (CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 217; CORTE IDH, 2006, *Sawhoyamaza Indigenous Community vs. Paraguay*, para. 136, 210; CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 281-286).

On the subject of non-material damages, the Court has said it is necessary to take into consideration the special significance of the land for indigenous peoples. Any deprivation of access to the ancestral territories results in suffering and anguish, and in irreparable damage to the life, identity and cultural heritage of the indigenous communities (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 79, 194, 200; CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku*, para. 315 e 322; CORTE IDH, 2005, *Yakye Axa Indigenous Community vs. Paraguay*, para. 202, 203).

It is worth pointing out that the position of the court on reparations has been subject to criticism, because although it recognizes the collective character of the communal property of indigenous peoples, it maintained for a long time a traditional position that was limited to declaring a human rights violation and its respective reparation only in relation to the members of the communities individually, without doing the same, explicitly and directly, in relation to the indigenous community as a collective and an independent subject (VIO GROSSI, 2010).

This position is based on the interpretation of article 1.2 of the ACHR, which defines the concept of “person” as the human being, and the individual as the holder of rights and freedoms. However, the individualization of victims may

go against the very culture of indigenous peoples, proving to be inadequate, useless and unjust, since it imposes on the community the need to list all its members in order to litigate in the Inter-American System (CHIRIBOGA, 2006, p. 47).

In 2012, in the judgment of the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, the most recent case to date on the violation of the rights of indigenous peoples, the Court took the first step towards altering its position, by expressly declaring that the injured party of the human rights violation analyzed in the judgment was the Sarayaku people and, therefore, they should be considered collective beneficiaries of the established reparations (CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku*, para. 284). This new position adopted recently by the Court strengthens the indigenous struggle and enables the realization of their claims to communal property, since the claims are always made in the name of the community and not as the individual property of each member of the community (COURTIS, 2009, p. 61). It is hoped, therefore, that in future cases the Court will consolidate this position and assert that indigenous communities are autonomous collective subjects.

In conclusion, on the matter of the protection of the right to property of indigenous peoples, the jurisprudence of the Court illustrates the importance of viewing communal property within a new paradigm that takes into consideration the unique collective way of life of these peoples. Note that communal property is distinct from the liberal concept of private property typical of modern civil law. The construction of a new paradigm for the protection of indigenous rights, therefore, reveals the need for us to understand the communal property of ancestral territories as an institution with its own characteristics, based essentially on the specific relationship of these people with the land and necessarily analyzed in conjunction with their customs and traditions.

6 The right of indigenous peoples to prior consultation in the jurisprudence of the Inter-American Court

The right of indigenous peoples to prior consultation on matters of their interest is one of the most difficult and controversial issues of international law (RODRÍGUEZ GRAVITO; MORRIS, 2010, p. 11). The participation requirement, in addition to being a right of these peoples and a duty of the States, is a necessary condition for the realization of respect for the cultures, ways of life, traditions and rights of indigenous communities (SALGADO, 2006, p. 95).

ILO Convention 169 on Indigenous and Tribal Peoples, ratified by 15 States of Latin America and the Caribbean,⁵ is the international instrument that most clearly addresses this issue, by establishing in article 6 that governments have the duty to consult the peoples concerned through appropriate procedures, respecting their representative institutions, whenever legislative or administrative measures are adopted that could affect them directly. In other words, the States have the obligation to make available the necessary means for indigenous peoples to participate freely and equally at all levels of decision making on policies and programs that could in some way affect their lives.

In accordance with articles 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, these peoples have the right to participate in all decisions that affect their interests, and also to maintain and develop their own decision-making institutions. Accordingly, it is the duty of the State to consult and cooperate in good faith with the indigenous peoples concerned, through their own representative institutions, in order to obtain their free, prior and informed consent for adopting and implementing legislative or administrative measures that could affect them.

In the Inter-American System, meanwhile, article 23 of the ACHR enshrines the right of all citizens to take part in the conduct of public affairs, directly or through chosen representatives; the right to vote and be elected; and the right to have access, under conditions of equality, to the public service of their country. Moreover, the right of indigenous peoples to prior consultation has been recognized by the Court as being present in the ACHR, based on a socially informed reading of article 21 of the Convention in relation to communal property (ABRAMOVICH, 2009, p. 22).

Nevertheless, despite the existence of an international normative framework on the subject, some ambiguities concerning the right of indigenous peoples to consultation and participation still remain, particularly in relation to whether these peoples can veto the action of the State when it conflicts with their interests (ANAYA, 2005, p. 7). This begs the question as to whether it is enough to hold prior consultations to hear the opinion of indigenous peoples, or whether, in addition to consultation, the free, prior and informed consent of the indigenous communities is required for the State or third parties to implement the measures that affect in the interests of these peoples.

Analyzed from the perspective of the indigenous communities, consultation and participation should be conceived not just as a means of exercising their political rights, but also, and primarily, as a necessary means of expressing their self-determination (CLAVERO, 2005, p. 46), by virtue of which, according to the UN Declaration on the Rights of Indigenous Peoples, in articles 3 and 4, all peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development. Consequently, in exercising their self-determination, indigenous peoples ought to have the right to autonomy and self-government in matters relating to their internal and local affairs.

Viewed as a human right, self-determination is the assertion that all human beings, individually or as groups, have the right to exercise control over their own destinies and participate equally in the construction and in the development of the governing institutional order in which they live, so that it may be compatible with their ways of life (ANAYA, 2004a, p. 197).

One of the corollaries of the right to self-determination is the recognition that indigenous peoples have the right to reject or veto actions of the State in their territories when these actions could affect their physical or cultural integrity. It is vital that indigenous peoples receive all the information necessary so they can freely reach a decision on the advantages or disadvantages of allowing the State to develop activities on their ancestral territories (MACKAY; BRACCO, 1999, p. 74). The right of indigenous peoples to participation and consultation, with the recognition

of consent as a necessary requirement, is therefore a condition that is inherent to the exercise of the right to self-determination by indigenous peoples.

This position is established in the UN Declaration on the Rights of Indigenous Peoples, which determines in articles 19 and 32 that States must obtain the free, prior and informed consent of the indigenous peoples before adopting measures that could affect their interests, whether these measures are legislative or administrative.

The States, meanwhile, in the vast majority of cases, have adopted a limited interpretation of the right of indigenous groups to prior consultation, according to which the duty to consult is fulfilled after engaging in dialogue with the communities, while the result of this dialogue is in no way binding on the State (RODRÍGUEZ GARAVITO; MORRIS, 2010, p. 80). This same position is adopted by ILO Convention 169, in article 6.2, according to which the consultations must be undertaken in good faith with the objective of achieving an agreement or consent, although this is not a condition that must be met by the State.

The indigenous organizations involved in the drafting of ILO Convention 169 consider the principle of consultation contained in the Convention to be inadequate, since it does not reflect the need to require States to take into account the opinion of the indigenous peoples when implementing projects in their territories (SALGADO, 2006, p. 100). According to this interpretation, consent is viewed merely as the desired outcome of the consultation, and not as an essential condition for these peoples to exercise their self-determination. This raises doubts about the real and effective participation of indigenous communities in matters of their interest, since an action or policy by the State or third parties on indigenous ancestral territories may be considered legitimate even without their consent.

In the Inter-American System, the Court has already established and has been further developing its jurisprudence on the subject, having ruled on the right of indigenous peoples to prior consultation in three cases⁶ to date.

In its first judgment on the subject, in the case of *Saramaka People vs. Suriname*, in 2005, the Court analyzed how the State granted private companies concessions for the exploration of natural resources in the ancestral territories of the Saramaka people, without any prior consultation with the members of the community. According to the Court, before issuing concessions for the exploitation of natural resources within traditional territories and, therefore, restricting the rights of the indigenous and tribal peoples on their communal property, the States must put in place three safeguards: guarantee the effective participation of the affected communities; ensure that reasonable benefits are shared with the members of the communities; and perform prior environmental and social impact assessments. The Court added that the State has the duty to ensure the effective participation of the members of indigenous and tribal peoples, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan or project within their ancestral territory (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 79, 142, 146).

On the right to consultation, the Court has asserted that: (i) the consultations must be made in advance and in good faith, through culturally appropriate procedures and with the objective of reaching an agreement between the parties; (ii) the States

must ensure that the communities are aware of the potential risks, including environmental and health risks, in order that the proposed project to be implemented in their territory is accepted knowingly and voluntarily; (iii) the consultation must take into account the traditional methods of decision-making of the indigenous and tribal communities (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 133).

It is important to point out that, in the case in doubt, the Court explained the difference between consultation and consent. According to its understanding, consultation is always necessary, but the prior consent of the community is only required in the case of large-scale projects that would have a major impact within the ancestral territory (CORTE IDH, 2007, *Saramaka People vs. Suriname*, para. 134, 153, 154).

Some years later, in the case of the *Xákmok Kásek Indigenous Community vs. Paraguay*, in 2010, the Court analyzed a situation in which the State, without previously consulting the community, established a private nature reserve on part of the indigenous ancestral territory, within which indigenous occupation and traditional activities such as hunting, fishing and growing crops was prohibited. The Court determined that the States have the obligation to ensure the effective participation of the members of the community in any decision that could affect their traditional lands. It also warned that the declaration of nature reserves, even when established by law and allegedly intended to preserve the environment, could constitute a new and sophisticated mechanism to obstruct indigenous claims to their right to communal property (CORTE IDH, 2010, *Xákmok Kásek Indigenous Community vs. Paraguay*, para. 169).

More recently, in 2012, in the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, the Court examined a situation in which the Ecuadorian State granted a permit to a private oil company to carry out oil exploration and extraction activities inside the ancestral territory of the Sarayaku People without previously consulting its members. In addition to expressly recognizing the international responsibility of the Ecuadorian State, the Court in its judgment made a point of highlighting the importance of the right to prior consultation for the protection of indigenous peoples, by asserting that: (i) the obligation to carry out prior consultation, in addition to being a conventional standard, is also a general principle of International Law; (ii) it is the duty of the State to carry out prior consultation with indigenous peoples, a duty that cannot be delegated to third parties; and (iii) the violation of the right to prior consultation of indigenous peoples directly affects their cultural identity, their customs, their worldview and their way of life (CORTE IDH, 2012, *Kichwa Indigenous People of Sarayaku*, para. 164, 198, 220).

It is important to point out that the Court, in its jurisprudence, has partially broken with the limited position adopted by States and by ILO Convention 169 on the requirement for free, prior and informed consent of the indigenous communities. According to the understanding of the Court, in cases that may have a major impact on the integrity of the indigenous community, the State has the obligation not only to carry out prior consultation, but also to obtain the consent of the community.

Nevertheless, this move has only been partial, since consent is only required for large-scale projects planned in indigenous territories. The requirement for consent only in special cases, although a significant step, continues to raise doubts about the effective participation of members of the communities in matters of

their interest, since even projects that have a medium or small effect on the way of life of an indigenous community can cause irreparable damage to its cultural integrity. In this respect, consent in Inter-American jurisprudence is still largely considered a desired outcome and not an essential condition for indigenous peoples to exercise their self-determination. Note that when we talk about the need for the consent of indigenous peoples on matters related to their territories and natural resources, we are dealing with lands and resources that would not even exist were it not for the non-predatory indigenous system of organization. What is needed, therefore, is to abandon the idea that indigenous peoples are merely “guardians” of their territories and natural resources, while the administration and control of these resources remain in the hands of the States (CLAVERO, 2005, p. 46).

Therefore, to construct a new paradigm of human rights protection for indigenous peoples, it is necessary to recognize the right to self-determination of these peoples in all its dimensions in order to guarantee that, through effective participation, they can enjoy the freedom and autonomy necessary for the preservation of their physical and cultural integrity. The Court has already taken an important step in this direction, but it still needs to go further and recognize the intrinsic relationship between consultation, participation and the necessary consent of indigenous peoples for the exercise of their self-determination.

7 Final considerations

This paper sought, through a critical analysis of the jurisprudence of the Inter-American Court of Human Rights, to demonstrate the need to break with the modern Western paradigm of colonization, which is oppressive and exclusionary, and commit to the construction of a new inclusive and intercultural paradigm for protecting the human rights of indigenous peoples in Latin America.

The Court, though its jurisprudence, has been assuming an important role in the realization of this change of paradigm, seeing as it has: (i) contributed in part to the development of the concept of life with dignity applied to indigenous peoples; (ii) broken with the modern concept of private property, by asserting the right to communal property that is collective and intercultural in nature, and more recently recognizing indigenous peoples as collective subjects of rights; and (iii) asserted the need for States to guarantee the right of indigenous peoples to prior consultation on matters of their interest, establishing important guidelines for Latin American countries on this subject.

However, despite these significant advances, criticisms of the Court have been presented throughout this paper, inasmuch as its jurisprudence still has some limitations that could and should be overcome in order to ensure the effective protection of the human rights of indigenous peoples.

First, the Court needs to effectively promote an intercultural dialogue with indigenous communities over its conception of life with dignity, so as to not restrict the concept of life with dignity to a Western vision, limited to the guarantee by States of the exercise of economic, social and cultural rights. While these rights are fundamental, they are insufficient to encompass the richness of the way of life

of these communities, in particular the spiritual relationship they have with their territories and with nature.

Second, this paper identified the need for the Court to consolidate its most recent position adopted in the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, to recognize indigenous peoples as collective subjects of rights. In the context of indigenous peoples, the individualization of the victims, which was required until this case, has proven to be incompatible with their form of community organization.

Finally, the paper criticized the position of the Court over the right of indigenous peoples to consultation, according to which the consent of these peoples is largely considered a desired outcome and not an essential condition for the exercise of their self-determination. The requirement for consent only in special cases, although a significant step, continues to raise doubts about the effective participation of these peoples, since even projects that have a medium or small effect on the way of life of an indigenous community can cause irreparable damage to its cultural integrity.

Therefore, the intention of this paper, by analyzing the jurisprudence of the Court, was to identify the advances and limitations of its action, demonstrating the breakthroughs achieved and the obstacles to be surpassed in the construction of a new intercultural and inclusive paradigm for protecting the human rights of indigenous peoples in Latin America.

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NOTES

1. The Inter-American Court is the judicial body of the Inter-American Human Rights Protection System. This system was developed in the second half the 20th century within the framework of the Organization of American States (OAS) and it currently operates through two bodies: the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights. The IACHR is an autonomous institution whose function is to promote the observance and defense of human rights in the Americas and to serve as an advisory body to the OAS on human rights. As part of its mandate to promote and defend human rights, in 1990 it decided to create the Rapporteurship on the Rights of Indigenous Peoples, whose primary purpose is to facilitate the access of these peoples to the Inter-American System. The Court, meanwhile, as a judicial institution, performs two distinct functions: adjudicatory, consisting of analyzing cases and ordering provisional measures on violations of the American Convention on Human Rights (ACHR) committed by States Parties; and advisory, through which the Court interprets the ACHR or any other treaty relating to the protection of human rights in the Americas. Note that the adjudicatory function only applies to States that have expressly accepted the contentious jurisdiction of the Court. Finally, its decisions are not binding on the States.

2. We decided not to analyze the provisional measures ordered to date, but instead to focus on the contentious cases that directly address the three parameters. The cases to be developed throughout the course of this paper are: *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012); *Xákmok Kásek Indigenous Community v. Paraguay* (2010); *Saramaka People v. Suriname* (2007);

Sawhoyamaxa Indigenous Community v. Paraguay (2006); *Moiwana Community v. Suriname* (2005); *Yakye Axa Indigenous Community v. Paraguay* (2005); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001).

3. It is important to stress that in the case of the Kichwa Indigenous People of Sarayaku v. Ecuador (2012), although the Court analyzed the violation of the right to life, it did not specifically address the topic of life with dignity. In this case, the Court asserted that the Ecuadorian State was responsible for violating article 4 of the ACHR, since it placed the lives of the members of the Sarayaku People at risk by permitting a private company conducting oil exploration on its ancestral territory to use high-powered explosives, which exposed this people to constant danger (INTER-AMERICAN COURT OF HUMAN RIGHTS. *Kichwa Indigenous People of Sarayaku v. Ecuador*, para. 249).

4. *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* (2001), *Yakye Axa Indigenous Community vs. Paraguay* (2005), *Sawhoyamaxa Indigenous Community vs. Paraguay* (2006), *Saramaka People vs. Suriname* (2007), *Xákmok Kásek Indigenous Community vs. Paraguay* (2010) and *Kichwa Indigenous People of Sarayaku vs. Ecuador* (2012).

5. Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru, Venezuela and Nicaragua.

6. It is worth noting that the Court mentions the importance of consultation for indigenous peoples in other cases, but only in the three precedents examined in this paper does the Court specifically address this topic in depth.

RESUMO

Este trabalho tem por objetivo demonstrar a necessidade de adoção de um novo paradigma, inclusivo e intercultural, de proteção dos direitos humanos dos povos indígenas na América Latina. Por meio de uma análise crítica da jurisprudência da Corte Interamericana de Direitos Humanos, são apontados alguns avanços e limites na tentativa de se construir novas alternativas para as questões indígenas na região. Esta análise será realizada por meio do estudo de três parâmetros fundamentais estabelecidos pela Corte em seus precedentes: o conceito de vida digna; a proteção da propriedade comunal; e o direito à consulta prévia dos povos indígenas.

PALAVRAS-CHAVE

Povos indígenas – Direitos humanos – Corte Interamericana de Direitos Humanos – Vida digna – Propriedade comunal – Consulta prévia

RESUMEN

El objetivo del presente trabajo es demostrar la necesidad de la adopción de un nuevo paradigma inclusivo e intercultural de protección de los derechos humanos de los pueblos indígenas de América Latina. Por medio de un análisis crítico de la jurisprudencia de la Corte Interamericana de Derechos Humanos, se presentan algunos avances y limitaciones de las propuestas de construcción de nuevas alternativas para las cuestiones indígenas en la región. Este análisis será realizado a través del estudio de tres parámetros fundamentales establecidos por la Corte en los precedentes existentes hasta el momento: el concepto de vida digna; la protección de la propiedad comunal; el derecho a la consulta previa de los pueblos indígenas.

PALABRAS CLAVE

Pueblos indígenas – Derechos humanos – Corte Interamericana de Derechos Humanos – Vida digna – Propiedad comunal – Consulta previa



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ABSTRACT

Over the past several years South Africa has experienced economic growth that could be expected to have filtered down to the poor in the form of access to rights. Constitutionalism, characterised by separation of powers with checks and balances coupled with human rights monitoring institutions, provides an enabling environment for growth to reach the poor. Yet, despite the existence of this environment in South Africa, an increase in access to rights has not been seen. The paper thus investigates the challenges faced by democratic institutions in ensuring that growth reaches the grassroots in terms of human rights.

This paper analyses the relationship between rights and economic growth, examines the South African context, and shows that constitutionalism failed to transform growth into rights for the needy. It goes on to assess the impediments faced by democratic institutions in translating growth into access to rights.

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KEYWORDS

Growth – Economic and social rights – South Africa – Development and human rights – Judiciary



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CAN ECONOMIC GROWTH TRANSLATE INTO ACCESS TO RIGHTS? CHALLENGES FACED BY INSTITUTIONS IN SOUTH AFRICA IN ENSURING THAT GROWTH LEADS TO BETTER LIVING STANDARDS

Serges Alain Djoyou Kamga and Siyambonga Helaba

1 Introduction

In the contemporary development discourse, economic growth is perceived to be “the major instrument for promoting the well-being of the people.” (SENGUPTA, 2008, p. 40). Therefore, the advent of economic growth in a country is generally followed by the expectation that the standard of living of its population will be improved. However, in several countries, economic growth does not filter down to the masses in the form of access to rights. In these countries, poverty, illiteracy, hunger, lack of health care, and unmet basic needs are the features of everyday life for millions of people. The achievement of development, understood in terms of economic growth, is not followed by the enjoyment of the right to development (RTD), which entails the realisation of civil, political, and socio-economic rights (SENGUPTA, 2006).

Notwithstanding the exception of autocratic China, where strong growth has to some extent led to increase in welfare of the poor (ZHANG, 1993; ROZELLE, ZHANG, HUANG, 2000, XINHUA NEWS AGENCY, 2006; MONTALVO and RAVALLION 2010; WANG, 2011), this paper argues that constitutional democracy, or constitutionalism characterised by separation of powers, coupled with independent monitoring institutions and justiciable socio-economic rights provides an enabling environment for economic growth to reach the grassroots level in the form of human rights realisation. The paper investigates challenges faced by democratic institutions in translating economic growth into access to rights in South Africa, where although economic growth and constitutionalism are realities, the translation of growth into the realisation human rights for the poor remains insufficient.

This paper first explores the relationship between rights economic growth

and human rights realisation. Second, it examines constitutionalism, democratic institutions, and the socio-economic environment in the South African context. This section also demonstrates that growth has not yet resulted in the full realisation of human rights. Third, it assesses challenges faced by democratic institutions mandated to ensure the realisation of human rights. The fourth section concludes with recommendations for translating economic growth into access to rights.

2 The relationship between rights and economic growth

The relationship between rights realisation and economic growth becomes immediately apparent when one looks at the nature of the obligations imposed by the key international human rights instruments focusing on socio-economic rights. The International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, Article 2(1) of the ICESCR obliges member states:

To take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The treaty envisages that the rights contained therein are not to be realised overnight, but are progressively subject to the resources at the disposal of state parties. Thus, the role of resources available to the state is acknowledged as pivotal in realising the rights in the Covenant. This paper argues that economic growth is key to generate the resources necessary to realise the rights and will next discuss the importance of that relationship.

2.1 The instrumental importance of economic growth for rights

The 1990 UNDP Human Development Report (HDR) is considered the first major attempt to evaluate a correlation between growth and the standard of living in countries (RANIS, 2004). The HDR set out to “capture better the complexity of human life,” which was to be done by providing a “quantitative approach to combining various socio-economic indicators into a measure of human development” (UNDP, 1990). In doing so, the UNDP’s approach marked a departure from the dominant economic approach whose “excessive preoccupation with GNP growth and national income accounts has... supplanted a focus on ends by an obsession with merely the means” (UNDP, 1990). The dominant approach achieved its human development index using such indicators as life expectancy, literacy, and GDP as components of the index. However, this approach lacked measures of political freedom and income inequality.

As pointed out above, there is no doubting the role of economic growth – translating into increased revenue for the state – in realising rights, albeit progressively (UNDP, 2003). However, it is not just the growth that is important to decrease poverty levels, but the nature of such growth. The growth has to be sustainable. This is not

only necessary for the progressive realisation of rights, but also because individuals in poverty are vulnerable to recession (MCKAY; VIZARD, 2005).

Another key factor in securing the progressive realisation of rights is the distributional pattern of growth. For instance, in the 1970s and 1990s, Brazil and Pakistan, respectively, experienced fast but extremely unequal growth that resulted in little poverty reduction and increased the level of inequality (EASTERLY, 2001). These instances support the case that unless growth is distributed or shared through all income levels of the population, there will be no human development manifested through the achievement of rights. For example, as a result of oil revenues, Indonesia is said to have experienced a strong growth pattern, distributed among the poor and the wealthy, for thirty years prior to the 1997 crisis. The Indonesian government's commitment to shared growth over this period translated into remarkable poverty reduction in rural areas (TIMMER, 2005).

It is important to reiterate that while there is now a clear correlation between growth and an improvement in the people's standard of living, growth does not automatically translate into access to rights and therefore poverty reduction. As stated above, the nature of the growth is a crucial factor. For growth to translate into access to rights (and therefore to reduce poverty), it must have a particular distributional pattern. This means growth must be distributed among all income levels of society, particularly those living in poverty (EASTERLY 2001; MCKAY and VIZARD, 2005). The existence of effective institutions, both governmental and independent, to curb corruption and mismanagement in the state, can ultimately ensure that resources generated by the growth are used in a manner that prioritises the poor.

2.2 The instrumental importance of rights for economic growth

The three most significant rights instrumental to economic growth are the rights to health, food and education. These rights place several obligations on the state. First, the state must ensure that there is no interference in the exercise of these rights by an individual. Second, where individuals are unable to access these rights, the state is required to provide access to these rights. Third, the state is obliged to create awareness around the rights.

As stated above, the enjoyment of these rights has an impact on growth. To ensure productivity and sustainable growth, people must be healthy, have adequate food, and be educated. According to UNDP, economic growth cannot be sustainable without enjoyment of a better standard of living (UNDP, 2003).

Studies confirm the importance of higher schooling levels, increased life expectancy, better maintenance of the rule of law and lower fertility rates (related to female empowerment), as being key determinants of economic growth (BARRO, 1996). Each of these findings has been confirmed by many empirical studies. Education stands out as having the strongest impact on labour productivity. For example, in the area of agriculture, data from Ghana, Malaysia and Peru shows that a farmer's schooling is responsible for annual increase in output of 2% to 5% (RANIS, 2004). Furthermore, it is estimated that in Indonesia there was an increase in wages of 1.5% to 2.7% for each additional school built per 1,000 children (DUFLO, 2001).

3 The South African context

3.1 South Africa and constitutionalism

Constitutionalism entails a system of government characterised by separation of powers between the executive, the legislature, and the judiciary. It is a system where democratic elections, accountability, good governance, and respect for human rights characterise the government's activities. According to Fombad (2011), constitutionalism “encompass[es] the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations” (FOMBAD, 2007, p. 7). Thus, key indicators of constitutionalism include: the constitutional protection of freedoms and fundamental rights in a bill of rights, the separation of powers, an independent judiciary, the judicial review and the presence of independent institutions to monitor democracy (FOMBAD, 2007).

According to the preamble of the South African Constitution (1996), the Constitution was adopted “to heal the divisions of the past, and to establish a society based on democratic values, social justice and fundamental human rights,” as well as to “improve the quality of life of all citizens and free the potential of each person.” Hence, it is characterised as a “transformative constitution” (KLARE, 1998). Klare defines transformative constitutionalism as:

[A] long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

(KLARE, 1998, p. 150).

The South African constitutionalism is characterised by separation of powers between the executive, in charge of implementing the law; the legislature, which makes the law; and the judiciary, in charge of enforcing the law. Not only is the judiciary independent, but judges are also obliged to consider international law and may consult foreign law when interpreting the Bill of Rights (section 39 of the Constitution). This provision enables the court to apply international treaty law that South Africa is not a party to at the domestic level.

Furthermore, Chapter 9 of the Constitution establishes independent monitoring institutions to support constitutional democracy. These institutions are the Public Protector the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the

Auditor-General, and the Electoral Commission. Their objectives are to ensure government accountability and respect for human rights. These institutions also provide the necessary checks and balances needed for economic growth to trickle down to the masses.

However, this constitutional arrangement is insignificant for many because of the high levels of poverty and inequality in the country. According to Sibanda, South African constitutionalism has failed to ensure social justice, which is linked to its neoliberal ideology and as such cannot improve the lives of the poor (SIBANDA, 2011). Echoing Pieterse's view, Sibanda believes that judges hide their preference for "political structures and rights discourses associated with classic liberalism ... and accordingly condoning the inequalities occasioned, reinforced and sustained by the unfettered operation of classical liberal economic and social structures." (SIBANDA, 2011, p. 489). Put differently, judges follow neoliberal tenets in the constitutions, which renders fundamental rights impotent in the face of social injustice.

However, the problem does not lie in the neoliberal features of the Constitution, rather, as Klare argues: "[T]he South African Constitution, *in sharp contrast to the classical liberal documents*, is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission." (KLARE, 1998, p. 153, emphasis added).

In the same vein, Pieterse portrays the South African Constitution as a fundamentally social-democratic model, different from the traditional, liberal model of constitutionalism which is not conducive to social justice, (PIETERSE, 2005, p. 156) and as such leads to the "achievement of certain tangible results or outcomes" (BRAND, 2009, p. 2-3).

The constitutional model found in South Africa is more likely to translate economic growth into human rights realisation for the poor. As Justice Langa's view states: "Without proper respect for the rule of law [embodied in the South African constitutionalism], legal guarantees of human rights cannot be effectively implemented and remain relatively meaningless [and that] respect for the rule of law is also of central relevance to economic development" (LANGA, 2011, p. 448). This view is also shared by Ghai who believes that the path to the realisation of the RTD goes absolutely through constitutionalism at national level (GHAJ, 2006). This is because a strong separation of powers, the existence of independent monitoring institutions, and a justiciable bill of rights comprising socio-economic rights constitute an enabling environment for economic growth to filter down to those living in poverty.

Nevertheless, for economic growth to translate into human rights realisation in a constitutional democracy, the state, as the duty-bearer must adopt rights-informed legislations and social policies that follow a distributional pattern of focusing on the poor (MCKAY; VIZARD, 2005), and ensure the availability of financial and human resources for the implementation of such policies. Moreover, it is in a climate of constitutionalism that a vibrant media and civil society thrive, and in turn these actors help to monitor government activities.

3.2 The South African socio-economic context

Besides establishing a strong constitutionalism, South Africa secured itself a place amongst the economically and politically influential nations on the international plane. It is a member of the G20 group of nations and belongs to a bloc of fast growing developing economies comprised of Brazil, Russia, India and China, known as BRICS. Major donors are pulling out of South Africa as they regard the country as a middle-income country with a GDP Per Capita of \$11,100 in 2011, up from \$10,900 in 2010 and \$10,700 in 2009 (CIA, 2012). These figures suggest that South Africa's economy has been expanding at relatively fast pace. To ensure that this growth trickles down to the poor, the government adopted numerous policies informed by the 1994 African National Congress (ANC) Manifesto that pledges to improve the standard of living for all in the country, including those living in poverty. These policies include the 1996 Reconstruction and Development Programme (RDP), the 1996 Growth, Employment and Redistribution (GEAR), the Accelerated and Shared Growth Initiative- South Africa (ASGI-SA) (2004-2014), and the 2010 New Growth Path (NGP).

In 2004, after realising that the GEAR did not yield the expected results, the government decided to launch the (2004-2014) Accelerated and Shared Growth Initiative-South Africa (ASGI-SA) to supplement GEAR. An important component of ASGI-SA was the industrial strategy known as Broad Based Black Economic Empowerment (BBBEE) characterised by the training and integration of black entrepreneurs in the business sector through access to credits and other facilities. Though the BBBEE had created many black entrepreneurs, it was also been criticised for creating a new elite, instead of advancing democracy and bringing resources to the poor (MAKHUNGA, 2008, p. 52 and 55). In fact, various policies did not produce positive results because of endemic corruption and mismanagement especially at local government level. (AUDITOR-GENERAL SOUTH AFRICA, 2012).

Notwithstanding the aforementioned and subsequent policies, South Africa remains one of the most unequal societies. This is illustrated by the following data: the Development Indicators from 2010 show that 49% of persons in South Africa live below a poverty line of R524 per month (approximately 75 US dollars per month) (THE PRESIDENCY, 2010, p. 23). The official unemployment rate in South Africa was 25% (excluding discouraged work-seekers) in 2010 (THE PRESIDENCY, 2010, p. 20-21). Moreover, the unemployment rate for youth in the age group of 15-24 years was 51% (NATIONAL PLANNING COMMISSION, 2011, p. 11). Furthermore, the gini coefficient, a widely used measure of inequality of income or wealth distribution, has risen from 0.68 in 1996 to 0.73 in 2001 (SAHRC, 2010). The Theil Index, which measures inequality within and between groups, while indicating a decline in between-group inequality, shows that inequality within race groups has increased (SAHRC, 2010). For instance, almost two-thirds of all jobless people are below the age of 35, the majority of whom are black youth (NATIONAL PLANNING COMMISSION, 2011, p. 11). In this vein, the statistic published recently by the National Planning Commission show that in the country, the "poorest 20% of the population earns about 2.3 percent of national income, while the richest 20%

earns about 70% of the income” (NATIONAL PLANNING COMMISSION, 2011, p. 9). This led to the comment that “South Africa’s levels of income inequality are amongst the highest in the world” (LIEBENBERG; QUINOT, 2011, p. 443). From this evidence, the SAHRC draws the conclusion that this lack of progress in reducing poverty and inequality in South Africa “has a direct impact on the progressive realisation of economic and social rights enshrined in the Constitution” (SAHRC, 2010). This happens in the midst of a constitutional democracy and raises the question of the role of the constitutional institutions in ensuring that economic growth reaches the poor in the form of access to rights. Put differently, this raises questions of the challenges faced by these institutions in fulfilling their mandate. These questions will be the focus of the following section.

4 Challenges to translating economic growth into access to rights

It is in the context of South Africa’s constitutional democracy, characterised by the separation of powers, that challenges to translating economic growth into access to rights will be examined. These challenges can be divided into three categories: first, challenges faced by the government, second, those linked to the separation of powers, third, and those faced by the chapter 9 institutions in discharging their mandate.

4.1. Challenges faced by the executive branch of the government

First, given South Africa’s three levels of government -- the national, provincial and local governments -- there are numerous challenges faced in the realisation of human rights. These include: incapacity to co-ordinate poverty-reduction programmes between various government departments and the three spheres of government (LIEBENBERG, 2000). Related to this, and due to lack of consultation, government is often incapable of appropriately identifying the needs of communities, which is compounded by the communities’ lack of awareness and therefore not utilising available programmes to improve their lives (HELEBA, 2011; LIEBENBERG, 2000). Furthermore, in order to help those at the lowest rung of the poverty ladder, government at local level has an indigence policy, requiring persons to register in order to receive certain basic services for free. However, because the policy requires people to present themselves as poor, people often feel ashamed to do this and end up paying for basic services such as water and sanitation and electricity that they would otherwise receive at no cost (HELEBA, 2011). Access to justice is a related problem -- for instance a South African study showed that despite the constitutional provision subjecting all evictions to a court order, only 1% of all evictions in the country go through a court (LANGFORD, 2009, p. 95). In fact, those who know their rights often lack the means to acquire a lawyer who can assist them. Langa correctly in points out that “[l]egal representation remains beyond the financial reach of many South Africans and it is true that more money ensures better representation” (LANGA, 2006, p. 7).

Second, the lack of skill, corruption, and lack of accountability of government officers, especially at municipal level, presents a barrier to the government’s ability to

turn economic growth into human rights realisation. (AUDITOR-GENERAL SOUTH AFRICA, 2012). According to the Auditor General, only 5% of municipalities achieved clean audits during the fiscal year 2011-2012. This is due to, among other things, the “lack of consequences for poor performance and transgressions at more than 70% of the [municipalities] and [a] lack of minimum competencies of officials in key positions (most evident in the financial discipline) at 72% of [municipalities]” (AUDITOR-GENERAL SOUTH AFRICA, 2012). These findings are particularly worrisome as municipalities are at the frontline of service delivery, and therefore, the level of government at which economic growth is transformed into rights realisation. Consequently, there is a need to capacitate civil servants at local, provincial, as well as national levels and -- more importantly -- ensure their accountability.

Third, in addition to the corruption and incapacity of government officials to deliver services, another significant challenge faced by the country is the AIDS pandemic, which weakens the labour force and affects the efficiency of the country's social security systems (TSHOOSE, 2010). In addressing these challenges, the government adopted the Local Government: Municipal Systems Act, 2000. The act aims, among other things, to: “[P]rovide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all.”

However, the high number of services delivery protests that have gripped the country since 2005 shows that the progress achieved by this legislation is not enough to ensure basic services for all.

Fourth, economic growth is often a result of the private sector's investment, which despite creating jobs, aims first and foremost to make money, ensuring better lives for all is not the first priority. Nevertheless, according to the South African Constitution, “[a] provision in the Bill of Rights binds a natural or a juristic person, if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right” (section 8 of the Constitution). Accordingly, even companies should comply with that duty imposed by the Bill of Rights. For this to happen, the state has to make sure that companies comply with their responsibilities and obligations to protect and promote human rights.

Though the private sector can, to some extent, improve the living standards for those who can afford to buy its goods, the liberalised market does not improve human rights for the poor. This was seen in Africa in the 1980s when, under the rule of free market, the international financial institutions imposed the Structural Adjustment Programme, which led to privatisation and resulted in lack of education, reduced access to health care and food, and other social ills (SHAH, 2010). It could be argued that the recent economic meltdown characterised by high levels of unemployment, hunger and poverty in Europe and America shows that free market economics policies need substantial revision. Furthermore, free market policies lead to the expansion of the private sector, which becomes more powerful than states and has a reputation for violating, or at least participating in the violation of, human rights. (See *SERAC vs. NIGERIA*, 2001; *DOE vs. UNOCAL*, 2001; *PRESBYTERIAN CHURCH OF SUDAN vs. TALISMAN ENERGY*, 2001; BENETT, 2002).

4.2. Challenges linked to the separation of powers: how the courts 'waste away' the rights of the poor

According to section 165 of the Constitution, “the judicial authority is vested in the courts,” mandated to “apply the law and the Constitution impartially without fear, favour or prejudice.” South African courts are among those that “have rescued [socio-economic rights] from controversies over legitimacy, legality and justiciability” (LANGFORD, 2009, p. 91). In doing so, the Constitutional Court, in particular, has handed down important socio-economic rights judgements that are characterised by “the clarity of the judicial reasoning and reliance on explicit constitutional rights” (LANGFORD, 2009, p. 91).

The right to housing (section 26 of the Constitution) was adjudicated in the seminal case of *Government of Republic of South Africa and Others vs. Grootboom and Others*, 2000. In this case, a poor community living in shacks had been evicted from a privately-owned property after having applied to the government for low-cost housing. Because they lacked housing, they occupied a nearby sports field and set up makeshift structures. The Cape High Court called upon the government to provide shelter to the applicants based on section 28 (1)(c) of the Constitution, which provides for children’s rights to housing. When the matter reached the Constitutional Court, it held that the government’s housing program was in breach of section 26 (2) of the Constitution, providing for the right to housing. The question before the court was to investigate whether the legislative and other measures taken by the state to realise the right were “reasonable.” The court held:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public measures could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

(GROOTBOOM, para. 41).

To meet the standard of reasonableness, the court stated that the government programme had to be comprehensive, well-coordinated, and capable of responding to the needs of the needy and most vulnerable (paras. 38-39). The programme should also be flexible and make appropriate provision to meet short, medium, and long-term needs (para. 43 and 46). Moreover, considering the government’s challenges, the court acknowledged that the right to housing shall be realised progressively. Accordingly, it noted that “accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time” (para. 45).

In this case, although the state had invested money and resources, and taken legislative and other measures within its capacity to achieve the progressive realisation of the right to housing, it nevertheless failed the reasonableness test for failing to ensure that the housing programme “provide[s] relief for those in

desperate need” (para. 64 and 68). Those in desperate need are not to be ignored in the interests of an programme focused overall on medium and long-term objectives (para. 66). This means the housing programme must appropriately, and as a matter of urgency, cater for those who have no roof over their heads. Ultimately, the court ordered the government to provide temporary housing to the affected families.

This case is interesting to assess the extent to which economic growth can trickle down to the poor in the form of access to rights. Indeed, opponents to the incorporation of human rights into development initiatives often argue that the human rights discourse does not pay sufficient attention to cost (MCKAY; VIZARD, 2005), or to the need to prioritise some choices and act progressively or in sequence. Nevertheless, the court in *Grootboom* clearly emphasised the need to ensure a progressive realisation. In other words, the court recognises that the realisation of human rights entails choices and sequencing and also acknowledges the need to consider the availability of resources in terms of budgets.

Even though the *Grootboom* judgment was not speedily implemented, and Irene Grootboom, the principal applicant died homeless, this judgement was the first one to highlight the positive duty of the state to realise socio-economic rights and to give direction on how the courts could enforce these rights. It also led to the adoption of a housing assistance programme for those in desperate need in August 2003: the Housing Assistance in Emergency Circumstances, Chapter 12, National Housing Code (LIEBENBERG, 2006, p. 178).

Besides *Grootboom*, the Constitutional Court took giant steps in promoting socio-economic rights through cases it adjudicated. For example, it ordered the government to immediately remove the barriers that hinder the distribution of Nevirapine in public hospitals for the sake of protecting mother-to-child transmission of HIV/AIDS (*The Minister of Health and Others vs. Treatment Action Campaign and Others* 2002), and protected the right to social security (section 27 of the Constitution) for “everyone,” including permanent residents in the country (*Khosa vs. Minister of Social Development* (2004)). In addition, the right to basic services, such as water (*Residents of Bon Vista Mansions vs. Southern Metropolitan Local Council* [2002]; *Mazibuko vs. City of Johannesburg and others* [2008]) and electricity (*Joseph vs. City of Johannesburg* (2010)), were enforced by the Constitutional Court. The right to sanitation was recently enforced by the Western Cape High Court (*Ntombentsha Beja & others vs. Premier of Western Cape & others*, (2010)). This judicial responsiveness to socio-economic needs has arguably enabled South Africa’s relative growth to trickle down to the poor in the form of access to rights.

However, a closer look at the adjudication of socio-economic rights reveals that courts are hindered in their action by challenges linked to separation of powers. The separation of powers doctrine allocates specific tasks and responsibilities to each arm of government. In this scheme, lawmakers enact the laws, the executive implements the legislation, and the task of the judiciary is to enforce the laws. The judiciary refuses to take a decision that is not (in principle) within its area of competence, and will defer the matter to other branches of government that have more expertise on the matter (LIEBENBERG, 2009). In Mclean’s words, “the [c]ourt is mindful of its role in a transitional democracy, and extremely cautious about overstepping the mark in

any way” (MCLEAN, 2009, p. 210). According to Brand, in such circumstances, the court uses the “[J]udicial strategy of deference, of deferring to the other branches of government those questions that they feel incapable of deciding, or with respect to which they feel democratically illegitimate, or which they feel threaten their institutional integrity or security, or require them to violate principles of separation of powers” (BRAND, 2011, p. 618).

However, instead of ensuring citizens’ well being, the doctrine of separation of powers may lead to their disempowerment, especially when the courts decline to adjudicate questions that call on them to check on other branches of government and hold them accountable for their actions. This has been the case in socio-economic rights adjudication. In South Africa, the practice of judicial deference that forsakes the poor is used quite frequently by the courts (for a thorough analysis of judicial deference, see MCLEAN, 2009; KAPINDU, 2010).

This kind of judicial deference by the Constitutional Court “wastes away the rights of the poor” (BILCHITZ, 2010). Brand notes that “[t]he employment by courts of the strategy of deference results in courts refusing to decide issues claimants place before them, which sometimes results in their claim being rejected]” (BRAND, 2011). Davis is of the view that the courts miss the opportunity to ensure social justice, but go backward in entrenching “traditional legal techniques,” which cannot lead to poverty eradication. (DAVIS, 2010, p. 93).

For Sibanda, notwithstanding the rights-realisation ideas included in the South African transformative constitutionalism, the efficiency of the courts in addressing poverty is hindered by “the prevalence of a liberal democratic constitutional paradigm in South African constitutional discourse” (SIBANDA, 2011, p. 486). In other words, the liberal ideology in the South African Constitution hinders the courts’ ability to bring justice to the poor in turning growth into human rights realisation. This view; however, cannot be squared with Klare’s, who argues that the South African Constitution is completely different from the non-distributive classical liberal documents.

Notwithstanding Klare’s optimism, it is our contention that the transformative and redistributive character of the Constitution has been tarnished by judicial deference. The court is expected to interpret and give content meaning to the rights in the Constitution, not to abrogate “its very role which is to adjudicate fundamental rights” (BILCHITZ, 2010, p. 595).

It could be argued that judicial deference is a violation of Section 167 (4) (e) of the Constitution that compels the Constitutional Court to decide whether “Parliament or the President has failed to fulfil a constitutional obligation.” This mandate of the court to ensure the enforcement of the state’s constitutional obligations was underlined in *Grootboom* (para. 94).

Therefore, deferring matters to the executive and Parliament in a context where the Constitutional Court is obliged by the Constitution not to do so is very problematic. Even when the cases involve specific technical issues, the courts should seek the necessary expertise and avoid judicial deference, which is the consecration of “liberal hegemon[y]” characterised by a large state bureaucracy that excludes the poor from the democratic process on the ground that the state has the necessary

expertise to solve problems (SANTOS; AVRITZER, 2007). However, it could be argued that deference basically benefits the poor that constantly elect the ANC at national and provincial levels. In other words, the ANC mandate from the grassroots level shall resolve the matter to the benefit of the poor. Unfortunately, this does not always happen, and the high numbers of service delivery protests, along with the explosion of socio-economic rights and evictions litigations in the country, show that judicial deference has been failing the poor.

From this perspective, Brand argues that judicial deference in socio-economic rights cases turns poverty into a technical matter that is depoliticised and becomes almost impossible to be solved by the court and the applicant (BRAND, 2011). This defers the matter to the executive or legislative branch of government and illustrates the “top-down” approach to socio-economic transformation, which is non-participatory and keeps the poor at the margin of development. This approach stands in sharp contrast with development studies and economics discourses, which contend that “sustainable and viable socio-economic transformation is only possible with broad participation by a range of social actors other than the state in development processes” (BRAND, 2011, p. 633). From this perspective, it could be argued that economic growth will not filter down to the poor in the form of human rights if the courts use judicial deference to encourage a “top-down” approach for the distribution of growth.

Moreover, judicial deference essentially calls upon the executive and the legislature to fix the problem that they initially failed to address, and which led to the litigation in the first place. The end result is that the claimant has no option but to remain impoverished, despite economic growth. This is so because the executive that could not ensure that growth trickles down to the poor is asked by the court to remedy the situation, which it is unable or unwilling to do.

However, categorising South African courts as mere deferring institutions could be wrong. The flexibility of the South African separation of powers doctrine was highlighted by P Chaskalson in the case of *Executive Council Western Cape Legislature & Others vs. President of the Republic of South Africa & others* (1995). When confronted with difficulties, South African courts have often moved away from judicial deference to use what Brand calls the “judicial prudence” approach (BRAND, 2011, p. 633), characterised by a broad consultation of other branches of government, institutions, experts, dialogue with the parties, and even members of the public who may not have an interest in the case. (*Blue Moonlight Properties 39 (Pty) Ltd vs. Occupiers of Saratoga Avenue* (2009); *ABSA Bank Ltd v Murray* (2004); *Cashbuild (South Africa) (Pty) Ltd vs. Scott* (2007); *Lingwood vs. The Unlawful Occupiers of R/E of Erf 9 Highlands* (2008)).

There is room for improvement in the functioning of the South African courts. They can use the model of apex courts as seen in Colombia, Argentina, and India, where the involvement of experts is broadened to assist the court with technical issues.*

* See, for example, the Colombian Constitutional Court decision T-760/2008, the Argentinian Supreme Court in *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/dños y perjuicios (danñerivados de la contaminación ambiental del Río Matanza-Riachuelo)* and the Indian Supreme Court case of *People’s Union for Civil Liberties v Union of India* (Writ Petition [Civil] 196 of 2001) *Right to Food Campaign*.

However, most importantly, our courts shall always be ready to ensure compliance with the Constitution and the law “impartially and without fear, favour or prejudice” (section 165 of the Constitution). In this vein, whenever the state does not comply with the law of the land, it is the constitutional duty of the court to say so and issue appropriate remedies (*TAC* case, para 99). Failure of the courts to use this approach hinders their ability to adequately address the needs of the poor. The readiness of the courts to clearly give a substantive content to the law and call on the state to comply will enhance the prospect for translating economic growth into access to rights.

Lastly, it could also be argued that the judiciary in enforcing such laws as the Extension of Security of Tenure Act, 1997 (ESTA) whose objective, *inter alia*, is to make it difficult to evict people from farms, may have brought about unintended consequences. The argument could be that by enforcing this objective of the act, the courts have facilitated the displacement of South Africans from farms and benefited illegal or undocumented migrant workers. Nevertheless, we wish to point out that ESTA gives effect to section 26(3) of the South African Constitution which prohibits evictions without a court order. Section 26(3) protects “everyone” in South Africa. And “everyone” includes, for instance, migrant workers from beyond South African borders. However, only legal or documented migrant workers benefit from this protection. Thus, any displacement of South Africans by undocumented migrant workers from outside South Africa would be against the law, and the judiciary should not be complicit in this.

4.3 Challenges faced by independent monitoring institutions

As previously alluded to, Chapter 9 of the South African Constitution establishes independent institutions to support its constitutional democracy. Although these institutions have specific mandates, all of them aim to check the government, by keeping it accountable, and turn South Africa into a society characterised by social justice (MURRAY, 2006). In fulfilling their mandates, these institutions examine the implementation of human rights, engage the government, the legislature, and civil society to ensure that all the rights in the Constitution become a reality. These institutions are vital for South Africa’s constitutional democracy.

However, these institutions face serious challenges in the execution of their duties and responsibilities. The first challenge is linked to their independence. In this respect, though the appointment and dismissal of office holders under Chapter 9 of the Constitution (with the exception of the Commissioners on the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities), requires the support of the majority of members of Parliament (sections 193 & 194 of the Constitution), the dominant ruling party, the ANC, enjoys majority in Parliament and can therefore rubber-stamp the appointment or dismissal of whomever it pleases. Murray observes that in a situation of total domination by one political party like in South Africa, “super majorities for appointment and dismissal are rendered ineffective in securing inter-party support because the governing party can choose the incumbents of

the Chapter 9 institutions” (MURRAY, 2010, p. 133). In this context, it becomes difficult to differentiate between the government and officeholders under Chapter 9 of the Constitution who are sometimes perceived as the cronies of the ANC. In fact, the perception of this situation was visible during the 2004 elections when several members of the Commission for Gender Equality appeared on the ANC party lists (MURRAY, 2006).

Moreover, the leniency of the former Public Protector, Lawrence Mushwana, to the ANC was exposed in 2005 through the oil gate party funding scandal. In this case the oil company known as IMVUME made a payment of R11 million to the ANC, which payment the Public Protector refused to investigate on the ground that “he could not follow the money as his mandate did not extend to oversight of non-state entities such as Imvume and the ANC” (FAULL, 2011).

There is a need to ensure the independence of Chapter 9 institutions and one way of achieving this is to ensure that officeholders of the institutions do not concurrently serve in political parties. If Chapter 9 institutions officeholders also hold offices in political parties, they should simply resign or decline appointment to Chapter 9 institutions (PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, 2007; LANGEVELDT, 2012, p. 2).

Further on the issue of independence, in April 2012, the Minister of Higher Education and Training accused the Public Protector Madonsela of being selective in her investigation as many members of the government were investigated (OPPELT, 2012, p. 5). It could be argued that this unnecessary pressure on the Public Protector aims to remind and warn her that she will need a majority of the ANC in order to be reappointed to the office. This threat to the Public Protector is uncalled for, because the ANC (with the support of its alliance partners) is the ruling party under which “patronage, tender manipulation, lack of control, flouting procurement processes” and other forms of corruption have flourished (OPPELT, 2012, p. 5). Increased investigation of members of the ruling party by the Public Protector has brought on petty accusations against the office of the public protector. The ruling party has recently stated: “Madonsela’s decision to attend a political party rally was ill-considered, as it opens her office to perceptions of political bias” (OPPELT, 2012, p. 5). This petty accusation of bias should be viewed as a threat because Madonsela is a woman who attended a National Women’s Day event, which happened to have been organised by the main opposition, the Democratic Alliance. As correctly observed by Oppelt, if there was a real a bias in Madonsela’s work, the ANC would have happily pointed it to her by now. Such threats may hinder the independence of the Public Protector, who may close her eyes to the ruling party’s mischief.

The second challenge faced by Chapter 9 institutions has to do with their ability to monitor human rights violations within the three spheres of government: national, provincial, and local (NEWMAN, 2003). For instance, in the *Grootboom* case, when the Constitutional Court called upon the Human Rights Commission to monitor state’s compliance with its decision (para 97), the Commission complied and reported back to the Court. However, the Commission’s report was not broad enough, as it focused only on the order of the court linked to the particular

community whose conditions had given rise to the case. It did not examine the court's broader order urging the state to develop and implement a rational housing policy (NEWMAN, 2003; PILLAY, 2002). In such circumstances, the monitoring has some failings and state's failure to implement human rights may not be noticed.

The third challenge faced by Chapter 9 institutions has to do with the ignorance of the public at large. People do not know where these institutions are located or when and how to approach them. For instance, members of the society are not aware of the role of the Public Protector and consequently do not bring cases of corruption or human rights violation to her attention (MADONSELA, 2010). Furthermore, those who are aware do not bring cases or avoid the role of whistle-blowers for fear of reprisal or victimisation (MADONSELA, 2010).

The Human Rights Commission also struggles to ensure civil society participation in the collection of information and the formulation of recommendations, which are needed to prepare the report (LIEBENBERG, 2006). Similarly, the much-needed civil society participation in advocacy and supervision of the commission's recommendations is also lacking (LIEBENBERG, 2006). The unproductive relationship between the Commission and civil society was summarised in these words: "The form and especially the regularity of their interaction is less than satisfactory. They only meet intermittently as and when there is a need – at seminars, to celebrate Human Rights Day, upon request to compile a report of a hearing, or to assist with an investigation" (DEMOCRACY AND GOVERNANCE RESEARCH PROGRAMME OF THE HUMAN SCIENCES RESEARCH COUNCIL, 2007, p. 36).

Even the Parliamentarians do not understand the work and functioning of Chapter 9 institutions. As a result of this, Parliament is not "making full use of the [Chapter 9] institutions to complement its oversight of the executive and to brief members of Parliament on various matters of public interest on which the institutions may have reported" (LANGEVELDT, 2012, p. 3). In resolving this problem, Parliament set up an Office on Institutions Supporting Democracy to be in charge of harmonising Parliament work with Chapter 9 institutions (LANGEVELDT, 2012, p. 3). Though this process is on going under the leadership of the Deputy Speaker of Parliament and the Office referred to above, its progress is slow, as indicated by the example of the South African Human Rights Commission (LANGEVELDT, 2012, p. 3). The Commission constantly complains of lack of co-operation with Parliament which does not respond adequately to its recommendations and reports (LANGEVELDT, 2012, p. 3).

There is a strong need to raise awareness and educate people on the role and value of accessing Chapter 9 institutions. Amongst other means of raising awareness, media such as television, radio, and social networks can be used to communicate developments in Chapter 9 institutions (LANGEVELDT, 2012, p. 4).

The fourth challenge hindering Chapter 9 institutions is related to capacity. These institutions are overburdened by the large number of complaints resulting from the high levels of corruption and other malpractices in the country. Not only do these institutions lack resources to tackle corruption and ensure that growth reaches the poor, their mandate and powers limit their efficiency. This is aptly explained by Oppelt in these terms: "Like the auditor-general, whose annual reports offer distressing

insights into weak government financial systems [the Public Protector Office] can only make recommendations. And like the auditor-general, the public protector acts as a mere sentinel to failing administration.” (OPPELT, 2012, p. 5).

In fact, besides the auditor’s general office, which is financially self-sufficient as a result of audit fees it charges, the other Chapter 9 institutions have low operating budgets. Therefore, it is important to increase the amount of money allocated to these institutions and, crucially, to standardise their budgets to eradicate the perception that these institutions are answerable to government departments that pay their bills (LANGEVELDT, 2012, p. 1).

As far as their mandate is concerned, these institutions have an express mandate to monitor government activities and, therefore, cannot take decisive action like the judiciary or other branches of the government. In fact, they have very few teeth to fulfill their mandate efficiently. Langeveldt observes: “They do not have the power to take disciplinary action against government officials. Their role is purely investigatory and administrative” (LANGEVELDT, 2012, p. 1).

Nevertheless, these institutions are empowered to investigate and even take matters to courts when necessary. Therefore, their weakness is not linked to their lack of power but, to the fact they do not use the power derived from their authority efficiently (PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, 2007). In fact, when the power of the Public Protector was used efficiently through investigation, it yielded positive results such as the dismissal of two ministers and the suspension of a police commissioner for misconduct by the President of the Republic (BAUER, 2011).

5 Conclusion

The aim of the paper was to investigate the challenges faced by South African democratic institutions in turning growth into access to rights. To attain this objective, the paper looked at three main issues. First, it focused on the relationship between rights and economic growth. Second, it examined the South African context. Third, and finally, it examined some challenges faced by democratic institutions to translating economic growth into access to rights.

On the first issue, the paper demonstrated that there is a relationship between rights and economic growth. It was shown that growth is instrumental for rights realisation and that the converse is also true. In this perspective, the increase of resources as a result of growth is an enabling factor that should allow the state to comply with its role as a duty bearer of rights. The paper also showed complementarity between rights-based and economic approaches to human development. It concluded that either approach on its own is inadequate to achieve human development.

On the second issue, focusing on the South African context, the paper demonstrated that the country is a democracy with strong features of constitutionalism. It also showed that the economy has blossomed and that the country is now considered as a middle income economy. Nevertheless, notwithstanding the adoption of pro-poor policies, there is much more to be done for the growth to fully reach the poor in the form of access to rights.

Third, it was argued that South Africa's constitutional model provides an enabling environment for growth to translate into rights realisation for the poor. However this can only happen if the democratic institutions set up in terms of Chapter 9 of the South African Constitution to monitor implementation of human rights are effective. The myriad of challenges facing not only these Chapter 9 institutions, but the courts and government were highlighted. The main challenges revolve around the lack of capacity, and skill as well as accountability of public servants at the government level. As for the courts, the impact of their role is diluted by sometimes deferring various issues related to the well-being of the poor to the executive and legislature. Chapter 9 institutions' main barriers include the lack of general awareness by the public, human and financial capacity and the general perception that they are extensions of the ruling party.

To enhance the prospects of translating growth into access to rights, the challenges identified above should be attended to decisively. This can be done through capacity building and accountability of public servants at government level; the judiciary should take its responsibility and be ready "to interpret the Constitution without outside interference and to invalidate government action that infringes on the constitutional values" (GORDON; BRUCE, 2006, p. 30). Citizens at large must be educated about Chapter 9 institutions, which must be allocated more human and financial resources. Finally, the perception that officeholders of Chapter 9 institutions are mere extensions of the ruling party can be removed by ensuring that officers in these institutions are not related to political parties in any way.

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RESUMO

Ao longo dos últimos anos, a África do Sul experimentou um crescimento econômico que normalmente deveria ter sido filtrado para os pobres na forma de acesso a direitos. Embora na China autocrática o crescimento tenha aumentado o bem-estar dos pobres, este artigo sustenta que o constitucionalismo caracterizado pela separação dos poderes com freios e contrapesos, acompanhado por instituições de monitoramento dos direitos humanos tais como existem na África do Sul, oferece o ambiente propício para que o crescimento alcance os pobres. No entanto, isso não acontece na África do Sul. O artigo investiga, portanto, os desafios enfrentados pelas instituições democráticas no sentido de fazer com que o crescimento atinja as bases em termos de direitos humanos.

Nessa investigação, o artigo analisa a relação entre direitos e crescimento econômico, examina o contexto sul-africano e mostra que o constitucionalismo não conseguiu transformar o crescimento em direitos para os necessitados, para depois avaliar os obstáculos enfrentados pelas instituições democráticas na busca de traduzir o crescimento em acesso a direitos.

PALAVRAS-CHAVE

Crescimento – Direitos socioeconômicos – África do Sul – Desenvolvimento e direitos humanos – Poder judiciário

RESUMEN

En los últimos años Sudáfrica vivió un crecimiento económico que, normalmente, debería haberse filtrado hacia abajo, hacia los sectores más pobres, en la forma de acceso a derechos. A excepción de la China autocrática, donde el crecimiento mejoró la calidad de vida de los sectores más pobres, en el presente trabajo se argumenta que el constitucionalismo caracterizado por la separación de poderes, con equilibrio de poderes, junto a instituciones que velan por los derechos humanos, como sucede en Sudáfrica, generan un ambiente propicio para que el crecimiento llegue a los más pobres. Sin embargo, esto no sucede en Sudáfrica. El artículo investiga los problemas enfrentados por las instituciones democráticas para garantizar que el crecimiento llegue a las bases, en términos de derechos humanos.

El presente estudio, analiza la relación entre derechos y crecimiento económico, examina el contexto sudafricano y muestra que el constitucionalismo no consiguió transformar el crecimiento en derechos para los más vulnerables, luego de evaluar los obstáculos enfrentados por las instituciones democráticas para traducir crecimiento en acceso a los derechos.

PALABRAS CLAVE

Crecimiento – Derechos socioeconómicos – Sudáfrica – Desarrollo y derechos humanos – Poder judicial



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INTERVIEW WITH SHELDON LEADER

TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

By Conectas Human Rights

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

Original in English

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

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

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

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

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

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

Notes to this text start on page 113.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What role do universities and NGOs play in this discussion?

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

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

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

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

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

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

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

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

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

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

NOTES

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

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

3. UK Bribery Act 2010 c. 23.

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

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

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

The petition for certiorari was granted by the U.S. Supreme Court on October 17, 2011. Oral argument took place on February 28, 2012.

One week later, on March 6, the Court requested supplemental briefing on the question of whether the statute encompasses violations committed outside the territory of the United States.

Supplemental briefs were filed with the Court in the summer of 2012, and re-argument took place on Oct. 1, 2012. A decision is expected during the first half of 2013. See International Human Rights Clinic, Human Rights Program at Harvard Law School at: <http://harvardhumanrights.wordpress.com/criminal-justice-in-latin-america/alien-tort-statute/kiobel-v-royal-dutch-petroleum-co>. Last accessed on: Dec. 2012.

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



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ABSTRACT

This article analyzes the Brazilian State treaty-reporting system, particularly its role as monitoring the realization of the right to health. We conducted a thorough study of the Brazilian system by analyzing the legal competencies of the agents responsible for the treaty-reporting process and the governmental agents' perception of this process. Finally, we analyze the two Brazilian Reports (2001 and 2007) submitted to the Committee on Economic, Social and Cultural Rights (CESCR). Our analysis focuses on article 12 (right to health) and is structured according to the report's contents and based upon General Comment No. 14. We conclude there is a gap between the CESCR's requirements and the content of Brazil's reports. We stress that, in the public health field, Brazil has not adequately accomplished its reporting commitments. Consequently, effective measures must be adopted to address these deficiencies in order to avoid the conclusion that Brazil's human rights commitments are nothing more than a political strategy attempting to occupy relevant international positions in a cosmopolitan arena.

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KEYWORDS

Treaty-reporting system – Right to health – National Human Rights Institutions



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RIGHT TO HEALTH IN BRAZIL: A STUDY OF THE TREATY-REPORTING SYSTEM

Aline Albuquerque and Dabney Evans

1 Introduction

Although the United Nations (UN) human rights system is made up of internationally recognized instruments and organs, it faces a problem regarding the monitoring and evaluation of human rights—especially the right to health established by the International Covenant on Economic, Social and Cultural Rights (ICESCR) Article 12. Within the UN human rights system there are different human rights monitoring mechanisms that can be understood as charted-based or treaty-based bodies. Many criticisms have been made by researchers about the efficacy of States' commitment to the reporting, individual complaints and other procedures, which monitor human rights. In this research we focus on one organ of the treaty-reporting system.¹ Specifically, this study is based on the reports that States must submit to the Committee on Economic, Social and Cultural Rights (CESCR), in accordance with the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR). While acknowledging that other monitoring mechanisms are important to guarantee human rights compliance, we understand that the treaty reporting system is fundamental to human rights culture—mainly because nongovernmental organizations share this mechanism—and support the participation of civil society in the process of human rights implementation.²

One of the fundamental problems with this system is the lack of material and human resources guidance from the treaty bodies, as well as state disregard and misinterpretation of the expectations of the reporting process. More specifically with regards to the right to health, although reports are a cornerstone tool, they “are frequently incomplete and do not follow a consistent pattern in discussing state obligations resulting from Article 12” (TOEBES, 1999). Further, it is often observed that “in their reports States parties are not unlikely to present a distorted

Notes to this text start on page 138.

picture of the (health) situation in their country, possibly in order to circumvent difficult questions of the Committee” (TOEBES, 1999).

In addition, Article 12 of the ICESCR, dealing with the right to the highest attainable standard of health, contains its own unique set of challenges. First, “the issue of monitoring the right to health raises more questions than answers” because various factors interfere in it, for instance, the contentious nature of the right to health and the notion of progressive implementation which guides resource allocation (WORLD HEALTH ORGANIZATION, 2002). Health is an important human condition because it permits the development of all human capacities. According to Sen, liberties and capacities depend on our health realizations (SEN, 2010). Here we study in detail the processes by which states prepare reports with an eye towards building national level capacity to fulfill the right to health.

Given this purpose, the current study has the capacity to contribute to improving the reality of the right to health globally; to test our theory we have chosen the state of Brazil. Brazil is an important case, given that it has both ratified the ICESCR and maintained a constitutional amendment³ on the right to health. The Brazilian Supreme Court has established that the right to health is justiciable, as such the Brazilian model “is characterized by a prevalence of individualized claims demanding curative medical treatment (most often drugs) and by an extremely high success rate for the litigant” (FERRAZ, 2009). Furthermore, Brazil ranks 84th in the Human Development Index and its rates of health index shows that the Brazilian government has been failing to face underlying determinants of health, such as childhood nutrition, potable water, and sanitary conditions (KLIKSBERG, 2010). The health indicators and the mandatory aspect of the right to health—which is reflected in the individual demands taken to the Judicial Power—show that Brazil still has a long way to go towards successful right to health implementation. This is also evident in the country’s failure in monitoring this right by means of the reports sent to the CESC, a subject that will be dealt with in this article.

With an eye towards the ICESCR reporting system and the right to health, this article highlights the lack of state structures to cope with the reporting process, specifically the fact that there is no agency mandated with this kind of task and the scarcity of human resources qualified to support this task. We investigate the process by which the Brazilian government has been drawing up its reports to the CESC, and whether Brazil has been implementing the recommendations of reports submitted to Brazil by the CESC, with particular attention to the right to health. This study does not focus on the processing of reporting procedure inside the CESC, as the processing of reports, including backlog of reports, sources of information and rapporteurs and working groups are not within the scope of this analysis. The major purpose of this study is to observe and constructively evaluate the participation and compliance efforts of Brazilian state mechanisms to improve its human rights performance, specifically in regards to the right to the highest attainable standard of health.

The methodological approach was as follows: first, we examined how

the process of comparing other countries to Brazil can lead to a reflection on the latter's treaty-reporting system; second, we analyzed interviews with government actors who are experts in the Brazilian treaty-reporting process in order to gather information about the scope of elaborate reports and follow-up recommendations; third, we propose a model to the Brazilian treaty-reporting system by analyzing specific parts of Brazilian CESCER reports concerning the right to health; finally, we copy with the Brazilian state treaty-reporting system in the field of health.

2 An overview of the global treaty-reporting system

Before dealing specifically with the Brazilian government's treaty-reporting, we will start with a general review of the treaty-reporting system. The aim here is solely to illustrate how other states have handled their reporting obligations and follow-up recommendations. This is not a quantitative study and large inferences are not made based on this. The comparison of treaty-reporting mechanisms allows us to develop a contextual description and classification (LANDMAN, 2002). Contextual description allows one to learn about how states have faced this obligation to create reports and implement human rights recommendations. Classification may simplify the object of examination of the organization. In this section, comparisons are made between a few countries, focusing on the similarities and differences among their classifications (LANDMAN, 2002). We begin with a contextual description based on our research and afterwards we propose a classification.

In order to gain knowledge about the treaty reporting system process in different parts of the world, National Human Rights Institutions (NHRIs) were contacted by electronic message, including the National Human Rights Institutions Forum and its global list of NHRIs.⁴ NHRIs were chosen because, according to the Principles relating to the Status of National Institutions (The Paris Principles), which were adopted by the U.N. Commission on Human Rights and by the General Assembly in 1993, such institutions have the responsibility to contribute to the reports which states are required to submit to UN bodies and committees. In fact, NHRIs are defined as bodies, which are established by states under their constitution, or, by law or decree, and their functions are specifically related to promote and protect human rights (REIF, 2000). Considering that NHRIs have specific competence in the human rights field and do not have information that other national bodies possess, they were the best sources of information about state treaty-reporting process.

The list of NHRIs provided by the Office of the High Commissioner for Human Rights (OHCHR) includes 18 NHRIs in Americas, 33 in Europe, 25 in Africa and 21 in Asia-Pacific. The total is 90.⁵ A questionnaire was sent with three questions to all NHRIs registered in the Forum asking: 1) which agency holds the competency and authority to make and submit reports to the CESCER; 2) which agency holds the competency and authority to follow-up on and measure the implementation of recommendations made by the CESCER; 3) if the state has

law, rule or policy that defines the process of reporting. The questionnaire was sent in four languages: English, Portuguese, Spanish and French. Nine NHRIs answered our questionnaire.

It is not easy to gather information from NHRIs. For instance, the OHCHR conducted a survey through questionnaires distributed to NHRIs around the world in January 2009, to capture data on NHRIs. The OHCHR received responses from 61 NHRIs out of roughly 90 around the world: 19 from Africa, 9 from the Americas, 12 from the Asia-Pacific and 21 from Europe (UNITED NATIONS, 2009b). Although our response rate was low, the responses did come from NHRIs located in each of the four global regions: Americas, Europe, Africa and Asia-Pacific. In the Americas, Paraguay and Peru sent information; in Europe, Portugal and Spain; in Africa, Namibia, Mauritius and Nigeria; in the Asia-Pacific, Jordan and East Timor. Therefore, given the number of NHRIs that now exist, the examples provided in this study can only provide a limited view of contemporary treaty-reporting processes.

The nine questionnaires returned showed that, in relation to agency competency, states did not have one specific body to make and submit reports to the CESC, the only exception to this being Portugal. Both the Ministry of Justice and the Ministry of Foreign Affairs hold such competency in Nigeria, Peru, and East Timor. The Ministry of Foreign Affairs alone holds this competency in Spain. Paraguay and in Jordan, a country where the Human Rights Committee integrates the process of human rights reporting. In Mauritius, the Attorney General's Office holds this power and in Namibia it is delegated to the Ministry of Justice attached to the International Cooperation Unit.

Only Spain and Portugal show a distinctive aspect concerning their NHRIs. In Spain, the NHRI, called "Defensor del Pueblo," has been participating in the reporting process by gathering data and contributing separate information on the issue object of the CESC report. For example, during the process of preparing the Universal Periodic Review, the Spanish NHRI gathered human rights records separately from the Ministry of Foreign Affairs and produced its own report. Concerning the CESC report, the Spanish state presented its report to the CESC and is now waiting for the CESC review. In Portugal, the Human Rights Commission is linked with the Ministry of Foreign Affairs and holds the competency to coordinate the work of Ministries related to treaty-reporting systems. The composition of the Human Rights Commission encompasses all Ministries involved in the reporting process. The Portuguese NHRI, called "Provedor de Justiça", intervenes in the reporting process by sending information to governmental authority about human rights issues; participating in the Human Rights Commission meetings; and cooperating with the United Nations.

East Timor is a unique case because it is a recent state; its dependency was established in 2002, and it ratified the majority of human rights treaties in 2003. Because it lacks human and material resources, East Timor has only presented two reports to the UN, and has not yet presented any CESC reports. The OHCHR is helping the East Timor government speed up its reporting process.

Alternatively, with regard to follow-up related to implementation of recommendations made by the CESCER, not a single state had a special body devoted entirely to monitoring the CESCER's recommendations. Some states utilize one body to provide, among other things, follow-up to CESCER recommendations. For example, in Jordan, besides the Ministry of Foreign Affairs, there is a Human Rights Department that was established within the following Ministries: the Ministry of Interior, Ministry of Foreign Affairs, Ministry of Labor and Ministry of Justice. There is also a Human Rights Committee, which is composed by representatives of the Ministries above and whose responsibility is to follow-up on recommendations of international human rights bodies. Another specific case is Paraguay. In that country, there are inter-institutional bodies made up by all people charged with human rights issues in each Ministry and coordinated by one of them. In Spain, the NHRI holds the competency to follow-up on CESCER recommendations. In Portugal, the Human Rights Commission holds such competency and the Portuguese NHRI contributes to follow-up actions developed by governmental agents.

Concerning the last question, whether the state has law, rule or policy that defines the process of reporting, NHRIs have answered in the negative. Nonetheless, Paraguay's NHRI has mentioned the National Constitution, which includes a supranational legal order that ensures human rights validity. In Nigeria there is no particular law either, but the NHRI cited obligations inferred from UN treaties. Although the Spanish and Portuguese NHRIs answered that no specific law or rule on the process of reporting exists, both countries have special bodies which hold competencies to prepare human rights reports and monitor follow-up on recommendations. As a result, there are specific rules that state such competencies. As we can see, the majority of states do not have a specific law or rule on the process of reporting, but some of them have particular rules that are related to singular bodies in the human rights field.

Studies about state treaty-reporting processes are scarce, especially research on governmental bodies and rules concerning this issue. Therefore, in the context of new research areas, mapping data is extremely important because it permits the construction of a panorama about the theme. Given these points, one sees that, while some states have been attempting to comply with their human rights treaty obligations, the majority of states do not count on a specific agency or rule. Hence, there are examples, such as Spain and Portugal, where NHRIs have a distinctive role in reporting processes and follow-up recommendations. The Jordanian government has been making efforts to improve human rights influence within state bodies.

With this in mind, countries may be classified as: treaty-reporting system based on a specific agency, and treaty-reporting system based on general agencies, presuming that the first treaty-reporting system has a stronger link with human rights culture, and the second, a weaker link. The Brazilian model of treaty-reporting process may be framed as a treaty-reporting process based on general agencies. Consequently, the Brazilian government ought to take action towards this model, as Spain and Portugal have been doing.

3 Case study: the Brazilian State treaty-reporting system

We are not aware of any other research trying to provide a contextual description on the Brazilian treaty-reporting process, either the initial report or follow-up of recommendations. Thus, we designed a study to obtain this information. Given the research goals, three questions were defined: 1) is there a standard process for the treaty-reporting process; 2) is such process necessary to outline the treaty-reporting process and to measure; 3) has the Brazilian state been following up CESCER recommendations?

Three Brazilian governmental agents were recruited to act as participants in our study based on their expertise on human rights issues, on their concrete experience on treaty-reporting system and on their governmental background.⁶ The survey aimed solely at gathering information about the Brazilian treaty-reporting process. Because its goal was limited, we applied the following methodology: first, we identified the response contents connected with our questions; second, considering such contents, we identified four common issues among the three governmental agents: 1) the current treaty-reporting process; 2) the normative gap; 3) the specific body; 4) follow-up on the CESCER recommendations; after that, we analyzed these issues. We then organized the responses according to themes; and, finally, we propose a model for the reporting of the Brazilian State.

3.1 Governmental agents' considerations

1 Current treaty-reporting process

According to governmental agent 1, hereafter referred to as GA1, the Secretary of Human Rights holds competency to coordinate the process of human rights reporting and the Ministry of Foreign Affairs performs a secondary role in this process. As a rule, the Secretary of Human Rights convenes an array of meetings with all governmental agencies which have thematic involvement with the report. The Ministry of Foreign Affairs focuses on the procedural aspects of the treaty-reporting process and the Secretary of Human Rights on the substantive aspects. Nonetheless, although the Ministry of Foreign Affairs knows that the Brazilian state is obligated to present periodical reports, it does not have power to impose that duty on other agencies because there is not a Brazilian law or decree which establishes that duty. So, GA1 suggests that the Ministry of Foreign Affairs has developed an internal policy and political dialogue by showing to all agencies and bodies implicated that reporting is a state commitment and if they do not participate seriously Brazil could look bad on the international scene.

Furthermore, GA1 pointed out that, concerning the most recent CESCER report, the majority of bodies involved were unclear about what their task entailed and as a result there was a discrepancy between information provided by different bodies and agencies. Also, broadly speaking, bodies involved have seen the reporting process solely as an accountability process; without fully comprehending this misunderstanding, the agents could not broaden their perception of the reporting process.

With regard to governmental agent 2, hereafter referred to as GA2, the Secretary of Human Rights has been coordinating the reporting process with the cooperation of Ministry of Foreign Affairs. Since 2003, the Secretary of Human Rights has not had staff in charge of preparing reports and for this reason it has hired external consultants to accomplish this task. In the opinion of GA2, this solution has not worked because consultants have not had satisfactory knowledge of public policies and programs, nor have they had the authority to demand official information. Sometimes they have produced a report more similar to shadow reports. Despite recognizing human resources problems the Secretary of Human Rights has not yet solved this issue. Consequently, some Brazilian reports were delayed, as the CESCR has reported. In the past, according GA2, reports only reflected governmental policies and programs; they rarely presented outcomes, challenges and negative data. As for the process of elaborating bygone reports, he stressed that each reporting process demanded new efforts to make people conscious of human rights obligations because people have changed. Many Brazilian bodies and agencies are not aware of the importance of human rights culture; as a result, they consider that human rights do not have anything to do with their ordinary jobs. They treat human rights as an issue pertaining solely to the Secretary of Human Rights, they do not perceive it as a transversal theme. In addition, they consider international obligation as a state duty. Consequently, it is not their obligation.

Governmental agent 3, hereafter referred to as GA3, noted that, broadly speaking, bodies and agencies involved in reporting processes are incapable of identifying either relevant information or their role in the overall treaty-reporting system. Many times they sent inaccurate information because it was non-strategic or it was merely copied from existing documents. Also, they sometimes sent information on policies and programs without referring to their aims or outcomes. GA3 underscored the fact that the reporting process is time consuming and costly, mostly because it demands the participation of large sections of Brazilian Ministries. He highlighted the difficulties in the lead up to Legislative and Judiciary Power human rights culture as well as state-members and Municipalities. Moreover, GA3 underlined that the current reporting process does not have a methodology to gather information or make contact with the bodies and agencies involved. For this reason, the process becomes unprofessional and characterized by undesirable procedures.

2 Specific body which holds competency to coordinate treaty-reporting system

In order to address the necessity of creating a specific body which holds competency to coordinate the treaty-reporting process and follow-up on CESCR recommendations, GA1 suggested a permanent working group which could be established by an infra legal rule and should be composed of qualified professionals. GA1 opined that the reporting process requires adequate human and material resources and it demands time. It's difficult for governmental bodies and agencies to realize the positive impact of the reporting process on their own activities. Moreover, given their day-to-day tasks, they do not have enough time to prepare accurate information.

GA 2 asserted that a specific body is a prerequisite because it gathers all bodies

and agencies involved in a report process. Since information is indispensable for any report, a single body or working group is essential to spreading the idea that the reporting process is a state obligation; all agencies and bodies must be committed to providing accurate information. The most difficult aspect of the reporting process is obtaining accurate information from bodies and agencies. GA2 noted that in 2002 the Federal Executive Power created a Tutorship Commission on Human Rights, which holds competencies related to the Inter-American Human Rights System, but this Commission has never functioned (BRASIL, 2002).

GA3 affirmed that it is crucial to create a body with such competency. GA3 proposed an inter-ministerial committee composed of representatives from ministries and agencies members. Moreover, such a body must make uniform all reporting processes and responses to follow-up recommendations. It is necessary to institutionalize reporting process. However, creating a new body is not sufficient because past experiences show that political commitment is also essential. Government and public agents have to lead this sort of task within their work routine by formal rules and procedures.

3 Normative gap: weakness of current Brazilian treaty-reporting process

GA1 asserted that a normative gap makes the current Brazilian treaty-reporting process weak. The Ministry of Foreign Affairs and the Secretary of Human Rights do not have enough power to demand information from other agencies and bodies. Thus, it is necessary to adopt legislative measures; with them it is difficult to require information. Legislative measures involve institutionalization of the treaty-reporting process. It means that rules or law must regulate, as authoritative guidelines, social behavior in the state context. Also, GA1 pointed out that a manual could be developed by the Brazilian state in order to standardize governmental procedures related to the reporting process. Institutionalization will lead to better fulfillment of treaty obligations and allow bodies and agencies to profit from the reporting process. GA1 recognized that starting the process requires political capital, but this effort must be made because nowadays states' transparent behavior is not enough; mechanisms and tools are required to improve human rights protection.

GA2 observed that a law on internalizing human rights judicial decisions or recommendations is necessary, not only for UN recommendations, but also for the OAS and the Inter-American Court of Human Rights.⁷ The Secretary of Human Rights, aware of his responsibility, established in 2010 a working group to discuss a proposal for institutionalizing internal mechanisms for monitoring human rights, but this working group was not successful.⁸ If there are people engaged the result would likely be satisfactory, but without them the outcome has been inadequate. Such a lack of institutionalization reflects that this topic is not a priority within the Brazilian government, because it involves a political commitment and this implies a necessary allocation of financial resources, qualified staff and a permanent body.

GA3 stressed that, although one could consider human treaties as internal legal norms, a specific rule is necessary to translate it into concrete commands. Brazil has committed itself to present annual reports to the Human Rights Council as well as to create internal tools for the national monitoring of human

rights.⁹ Brazil adopted the Third National Human Rights Program in 2009, which establishes that the Federal Executive Power, through the Secretary of Human Rights, shall draft periodic reports to submit them to UN committees and shall institutionalize the flow of information by defined bodies and agencies responsible for drafting reports and following up recommendations. Given this policy, GA3 points out that, in fact, there are rules in Brazil, but that they are not capable of imposing order to states-members and Municipalities. GA3 affirmed that taking into account international commitments and internal achievements in the human rights field, the Brazilian government has been two-faced. On the one hand, it has been making strong international commitments, and on the other hand, it has been failing to adopt legal and administrative measures to fulfill its human rights obligations.

4 Follow-up to human rights body's recommendations

According to GA1, the Brazilian state does not have a formal and institutionalized mechanism to cope with human rights. Consequently, the Brazilian government has not been evaluating the CESCR's recommendations, let alone incorporating them in programs, policies and laws. GA1 emphasizes one exception: the Committee's recommendations were taken into consideration during the process of elaborating the Third National Human Rights Program. Despite this success, GA1 reminded that such a victory does not eliminate the necessity to constitute a specific body to tackle follow-up tasks. Such a body would hold the competency to evaluate the Committee's recommendations and to examine how they could be incorporated in programs, policies and rules.

GA2 pointed out that until the Third National Human Rights Program the Brazilian government had not systematized the Committee's recommendations. Their recommendations were merely inserted in the Third National Human Rights Program; as a result, GA2 affirmed that implementation control of human rights recommendations is linked with the implementation control of the Third National Human Rights Program.

3.2 Model proposal to Brazilian State treaty-reporting system

Given the experience of foreign agents and Brazilian government representatives we will propose a model for the Brazilian state treaty-reporting system. First of all, taking into account a treaty-reporting system based on specific agency and a treaty-reporting system based on general agencies classification, we notice that the first model has more capacity to strengthen human rights commitments and to improve state monitoring actions. Assuming that the treaty-reporting system based on specific agency is more adequate to spread human rights culture, we will ground our model on this conception.

It is possible to infer from governmental agents' considerations that the model should be founded on an Inter-Ministerial Human Rights Committee (IMHRC) made up of members representing the main agencies and bodies involved in the human rights reporting process, as well as from the National

Human Rights Institution (if it comes into existence). This is supported by GA3: “the solution would be to create an inter-ministerial committee” and by GA1: “I think that it must have a working group”. Likewise, GA2 emphasized that “an inter-ministerial group is necessary”. Such an IMHRC should hold the competency to, at a minimum: 1) coordinate the human rights treaty-reporting process; follow-up on CESCER recommendations and creating a methodology to develop this task; 2) require from Union, state-Members and Municipalities and non-state entities information and data connected with the human rights treaty-reporting process and follow-up recommendations; 3) gather and systematize information related to the human rights treaty-reporting process and follow-up recommendations; 4) manage a computerized system on data related to human rights 5) convene meetings; 6) elaborate human rights reports coordinated by its representatives; 7) follow up on recommendations made by UN and OAS human rights bodies; 8) present biannual reports on activities to the President of the Republic; 9) propose legislative, administrative and other measures to comply with human rights obligations. Furthermore, the IMHRC should be created by a law, not by a decree. As governmental agents have suggested, such a committee must have legislative and judiciary power as well as the power to compel state-members and municipalities. This is only possible with a law. GA2 supported this assertion: “it’s good to have an explicit law which shows that human rights obligations are also a federal state burden.” By the same token, the IMHRC should be coordinated by a representative of the Secretary of Human Rights because of the Secretary’s role in national human rights policy and his expertise in involving internal actors. Notably, GA2 suggested: “the group must be coordinated by the Secretary of Human Rights because such Ministry deals with victims and public policies beneficiaries more closely.”

The model for the Brazilian State treaty-reporting system should be based on legal duties; consequently, the law should require that all public and private entities have to cooperate with the IMHRC. In particular, the law should establish an Executive Secretary to provide administrative support and should require budget forecasting to support human and material resources. Although GA2 deals with the effectiveness of Inter-American condemnatory sentences as a correlative issue, we recognize that law on the IMHRC does not create the same challenges.

Based upon the governmental agents’ narrative, we affirm that the range of efforts attempting to establish a treaty-reporting system were not successful, including the working group created in 2010 by the Secretary of Human Rights, a Tutorship Commission on Human Rights in 2002 and a Follow-up and Monitoring Committee created in 2009 in the Third National Human Rights Program. The Third National Human Rights Program recognized NHRI importance and its Guideline 3 and Strategic Goal 2 handled mechanisms to monitor and evaluate human rights implementation. Specifically, Programmatic Actions (b) and (d) dealt with the treaty-reporting system. Under those circumstances, we should wonder if proposing the creation of an additional body would be just another legal measure disconnected with political set. Answering these questions assumes a large study on aspects of power relationships, involving those associated with social and

economic power (EVANS, 2001). Although we acknowledge this fact, we should take into account that proposing a model grounded only on legal foundations is superficial. All governmental agents have mentioned political elements: GA1 says: “proposal and being successful in implementing human rights body implies political capital... a political mobilization;” GA2 asserts: “State has a short-term vision, treaty-reporting system is not a priority;” GA3 affirms: “the Brazilian State has a constructive international discourse, but internally there is no implementation. There is a variability of political willingness.”

Evans developed three overlapping discourses on human rights with their own languages, concepts and normative aims: philosophical, legal and political (EVANS, 2001). Given the scope of this study, we will deal with legal and political perspectives. The legal discourse focuses on a large body of international law and at the core of this discourse is the Universal Declaration of Human Rights and the major covenants. “The legal discourse provides the most visible sign of human rights activity,” although the connection with legal instruments and efficacy is not necessarily clear (EVANS, 2001). Legal discourse creates the false impression that “the protection of human rights can be guaranteed provided we exercise diligence and reason when drafting and interpreting international law” (EVANS, 2001). On the one hand, “law is the means through which practical applications of the human rights aspiration are made real”; on the other hand, human rights involve the political communities in which they must operate (GEARTY, 2006). The political discourse attempts to contextualize the legal discourse (EVANS, 2001). Political discourse is concerned with the power relationships; social and economic features linked with the human rights sphere. Human rights instruments and their implementation flow out of politics in the first place because international law might exert influence on state practices, but the central dynamics would be the state’s preferences, in the context of external imperatives (GOODMAN; JINKS, 2003). For instance, issues of human rights may be subordinated to the imperatives of globalization, defined as the principles of free market capitalism and of economic progress. Consequently, the potential of human rights instruments is severely limited when its achievement depends on the capacity of the state to intervene in important areas of political economics (EVANS, 2001).

In sum, a model of the Brazilian State treaty-reporting system based on a bill on an Inter-Ministerial Human Rights Committee, merely a legislative measure, does not encompass a comprehensive approach on this issue. As showed above, it is essential to have a political commitment, which must be expressed in concrete actions, such as laws on IMHRC approval and budget forecasting, as well as skilled and qualified human resources. We stress, broadly speaking, that the Brazilian State has been adopting an ambiguous form of human rights political behavior. In the international arena, Brazil assumed in 2008 voluntary commitments, such as creating a national system of human rights indicators and elaborating annual reports on the situation of human rights, and yet, simultaneously, it does not have a National Human Rights Institution or an organized treaty-reporting system. Creating an IMHRC would be a welcome move because it would show a commitment to changing Brazil’s human rights behavior.

3.3 Monitoring right to health in Brazil based on its treaty-reporting system

3.3.1 Monitoring right to health: CESC parameters

We chose to analyze the right to health to illustrate the problem stated in this research study, namely the Brazilian state treaty-reporting system. Right to health was chosen because it imposes challenges related to implementation and monitoring of economic, social and cultural rights.¹⁰ Moreover, it is a fact that the right to health's content is imprecise, even though there were efforts made by CESC, through General Comment No.14 (2000), to demarcate the right to health (RIEDEL, 2009). Additionally, health is an essential and fundamental tool for people to enjoy other goods and human rights, including rights to food, housing, work, education, human dignity, life, non-discrimination, equality, privacy, access to information, the prohibition against torture, and the freedoms of association, assembly and movement (UNITED NATIONS, 2000).

Dealing with the right to health in Brazil is complicated because the Brazilian situation is a paradox. On the one hand, there is a significant jurisprudence concerning the right to health and the State's obligation to fulfill it—mostly related to treatments and new drugs. On the other hand, there are a number of unresolved issues due to the lack of an organized reporting system in the Ministry of Health. As a consequence of the lack of a specific Brazilian board to deal with human rights monitoring, we face serious problems in primary health care, inexcusable deficiencies in medical services and high rates of infant and maternal mortality (PAN AMERICAN HEALTH ORGANIZATION, 2011).

We are confident that with the improvement of the reporting system in Brazil, including the quality of reports and monitoring of the CESC Concluding Observations of Reports, Brazil can “conduct a comprehensive review of the measures it has taken to bring its national law and policy into line with the provisions of the treaties to which it is a party” (STEINER; ALSTON; GOODMAN, 2008).

Based upon CESC reports, we seek to analyze Brazilian reports, specifically the parts concerning the right to health and CESC recommendations. Such analysis takes into account General Comment No. 14, which highlights the implementation of the right to the highest attainable standard of health, and article 12 of the ICESCR, which “provides the most comprehensive article on the right to health in international human rights law” (UNITED NATIONS, 2000). Also, it considers the Revised General Guidelines regarding the form and contents of reports to be submitted by states parties under articles 16 and 17 of the ICESCR: 17/06/91 and The CESC Guidelines on Treaty-Specific documents to be submitted by States Parties under articles 16 and 17 of ICESCR, elaborated on 24 March 2009.¹¹

General Comment No. 14 is a cornerstone document, since it “is based on the Committee's experience in examining States parties' reports over many years” (UNITED NATIONS, 2000). Regarding the purposes of our study, we will focus

more on General Comment No. 14 than on the Revised General Guidelines and The CESCR Guidelines on Treaty-Specific documents, as it was adopted in 2009, after the Brazilian CESCR reports.

The CESCR provides reporting guidelines to advise States parties on the form and content of their reports so as to facilitate the preparation of reports and ensure that reports are comprehensive and presented in a uniform manner. Thus, reporting guidelines ultimately aim to standardize the subjects and style of reports and to guarantee that reports present an adequate level of information.

Considering CESCR Guidelines in the light of General Comment No. 14, we notice that some elements were highlighted by the CESCR, such as: 1) in general, a core obligation to adopt and implement a national public health strategy and plan of action; 2) providing information on the measures taken to ensure physical and economic accessibility; acceptability and quality; 3) providing information about the measures taken: core obligations concerning reproductive, maternal (pre-natal as well as post-natal) and child health care; sanitation, and an adequate supply of safe and potable water; immunization against the major infectious diseases occurring in the community; to provide essential drugs; 4) specific health issues: abuse of alcohol and tobacco, and the use of illicit drugs and other harmful substances; HIV/AIDS and other sexually transmitted diseases and mental health.

We stress that evaluating state reports concerning Article 12 of ICESCR should take into account CESCR Guidelines and General Comment No. 14, especially the aspects we have previously emphasized. In order to do so, we will begin with the Brazilian CESCR report concerning Article 12 and CESCR recommendations.

3.3.2 The Brazilian reports and the CESCR recommendations: a critical constructive view

We have analyzed the two Brazilian Reports submitted to the CESCR, one in 2001 and the other in 2007. Our analyses focused on Article 12 (the right to health) and were structured according to the report's contents and based on General Comment No. 14. We have taken into account the aspects highlighted above. Therefore, in methodological terms, we have followed the reports configuration and the aspects of General Comment No. 14 as it has been noted.

Brazil submitted its initial report under Articles 16 and 17 of the ICESCR in August 2001; as a consequence, the CESCR mentioned in its list of issues the late submission of the report and the absence of written replies.¹² The first draft of the report was prepared on the basis of work elaborated by the Applied Economic Research Institute (IPEA).

With regard to Article 12, the report is excessively long and prolix. According to the UN, initial treaty-specific documents should not exceed 60 pages.¹³ There are 46 pages only concerning Article 12, with a range of programs and policies, tables and too many details on medical concerns and specific diseases. First, we point out that the report does not follow any logical organization, as unrelated matters were

set in sequence, and the same topic was mentioned in disconnected paragraphs. For instance, paragraphs 558 and 614 mention the Brazilian Law on Health.¹⁴ Additionally, the report does not present disaggregated indicators and outcomes, and so, health facilities, goods and services are not evaluated according to the AAAQs.^{15 16}

The report begins with a general reference to central laws and operating standards. It does not deal with their content nor does it not mention national health strategies or national plans of action. The report is organized around diseases, so it starts with communicable diseases, from paragraph 578 to paragraph 593, and continues with a list of re-emerging communicable diseases, such as AIDS, Hantavirus, and Yellow Fever. Besides this, the report hints at the National Immunizations Program—which contains outcomes and some measures related to budget allocation—without contextualizing them in the national health strategies and plans of action or showing their efficacy in terms of the right to health.

To a large extent the report encompasses public policies descriptions, many of them lacking details, as the reference to the inter-municipal consortium formation process. Likewise, the report does not address the right to health facilities, goods and services. As a result, there is no data on provisions of equal and timely access to basic preventive, curative, rehabilitative health services and health education.

With regard to special topics for broad application—such as non-discrimination and equal treatment, gender perspective, children and adolescents, elderly people, people with disabilities, and indigenous people—the report mentions the elderly, but it covers only the promulgation of Federal Law No. 8.842 in January 1994, which established the National Policy for the Elderly and the Brazil's National Health-Care Policy for the Elderly.

Regarding core obligations, we stress that the report does not cover: the right to access health facilities, goods and services on a non-discriminatory basis; to ensure access to the minimum essential food; to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to provide essential drugs; to ensure equal distribution of all health facilities, goods and services; and to adopt and implement a national public health strategy and plan of action. However, the report did allude to some examples of the effects of sanitation activities on health.

Also, the report enumerates again a list of diseases. Thus, we notice that the report focuses on diseases and general measures adopted to fight them. In the end, the report enumerates some mechanisms adopted to disseminate the right to health, for instance, the Health Channel.¹⁷ But it does not connect their content to a human rights framework or to the state's obligation to provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.

As for Brazil's initial report, concerning exclusively Article 12, we can say that:

- 1) a disease approach (BUSS; PELLEGRINI, 2007) was adopted; there is a list of diseases in the beginning and in the end. So, we can infer from such disease focus that health was understood as the absence of disease and the right to

health as a right to be healthy. This stands in contrast to the right to health as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health (UNITED NATIONS, 2000);

- 2) the report limits itself to listing or describing legal and administrative instruments, and it does not indicate how these measures have impacted the population's health;
- 3) the report does not acknowledge problems and challenges related to implementation of the right to health; Brazil does not make an effort to report any "factors and difficulties" that have affected the realization of the right to health, for example, corruption or bad management practices (ALSTON, 1997);
- 4) though required, the report does not mention vulnerable populations, for instance, indigenous people, people with disabilities, children and adolescents, minority groups such as the Quilombo communities, and it does not adopt a non-discrimination and equal treatment approach and gender perspective;
- 5) the report does not allude to national health strategies and it does not identify appropriate right to health indicators and benchmarks;
- 6) the report does not provide information on appropriate training for health personnel, including education on health and human rights.

Corroborating our analysis, the CESCR requests the State party to include, in its second periodic report, detailed and comprehensive information, including disaggregated and comparative statistical data, as well as information on measures taken to improve the functioning of services for children and young people. Also, the CESCR recommends that Brazil undertake urgent measures to ensure equal opportunity for Afro-Brazilians, indigenous peoples and minority groups such as Gypsies and the Quilombo communities, especially in the fields of employment, health and education. The Committee requests that Brazil undertake legislative and other measures to protect women from the effects of clandestine and unsafe abortion and to ensure that women do not resort to such harmful procedures. The CESCR requests Brazil to provide, in its next periodic report, detailed information based on comparative data about maternal mortality and abortion, and recommends that Brazil continue its prevention and care efforts in the field of health by providing sexual and reproductive health services to the population, with particular emphasis on those for women, young people and children.

Brazil submitted its second report under Articles 16 and 17 of the ICESCR in August 2007, but it should have been submitted by June 2006.¹⁸ The second Brazilian report on the implementation of the ICESCR was prepared by an Inter-sectorial Working Group coordinated by the Ministry of Foreign Affairs, the President's Office Special Secretariat for Human Rights, and the Applied Economic Research Institute.

Regarding Article 12, the report does not begin by mentioning general aspects on the right to health, as national health strategies and plans of action, but by covering the main causes of death, such as neoplasias and respiratory diseases. Next, the report covers mortality rate among children, then nutrition and maternal mortality. So, we realize that, unlike the initial one, the report does not have a logical structure, and the information does not flow logically from one section to the next.

The report mentions mortality rate among children and maternal mortality rate, but not disaggregated by sex, age, and population groups; it disaggregates only by region. The report acknowledges that child and maternal mortality are still serious health concerns. Nonetheless, it does not point out measures to counteract them.

In addition, the report covers the “measures adopted for the progressive implementation of the right to health”. It starts with the Federal Constitutional Article and theoretical concepts on equity in health and provision of integral care. The report does not state if there is a national or political strategy, plans or framework legislation. Next, the report talks about child mortality again, and also about health vigilance and the National Public Health Laboratory Systems. It does not show health results or impacts on the population or any information on the *de facto* situation with regard to the implementation of right to health. We believe that the main focus of the report was to show public investments and formal measures, in contrast to illustrating how these efforts have changed the population’s living conditions.

With an eye towards primary health care, the report identifies significant improvements in the implementation of the Family Health Strategy. Although the report presents data on availability and physical accessibility (though not disaggregated) it still focuses on *de jure* information, for instance, program goals and investments. As for all the programs and policies, there is no data on AAAQs – only general information on availability and not disaggregated.

In addition, the report provides *de jure* information on national policies. Concerning reproductive, maternal (pre as well as post-natal) and child health care, the report describes legal and administrative measures. Nonetheless, it does not provide information on the measures being taken to identify and fight against the high maternal mortality rate, especially those found in more remote regions where access to health facilities is very restricted, even though the CESCER requires this of Brazil in its list of issues.

With regard to vulnerable groups, the report talks about indigenous people in four lines. There is no information on AAAQs related to health facilities, goods and services. However, the report does provide information on adolescents and youth, the elderly and the imprisoned population, and it demonstrates that there are public policies and programs concerning such vulnerable groups. We can see that it is an improvement compared to the initial report.

When addressing mental health, abuse of alcohol and tobacco, and the use of illicit drugs and other harmful substances, the report refers to a range of public policies and programs. However, there is no information on availability, accessibility, acceptability and quality of health facilities, goods and services and statistical data.

Brazil's second report shows an improvement in relation to the initial report, especially if we take into account the following topics:

- 1) the second report is not disease-oriented, so it does not focus on diseases, but on general policies and programs;
- 2) the second report emphasizes more vulnerable populations; although it does not give satisfactory attention to indigenous people and Afro-Brazilians;
- 3) the second report exposes to a greater extent the obstacles that must be overcome to result in effective changes, such as reduction of the infant mortality rate and revision of the current legislation centered on the criminalization of drug use.

At the same time, the second report, unlike the first one, maintains the non-human rights framework pattern. In other words, the right to health is not understood as the right to enjoy a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health. Consequently, we summarize the key points:

- 1) AAAQs are ignored. For instance, there is no information on health services availability, population access, quality or acceptability;
- 2) broadly speaking, the report does not go beyond describing the legal formalities of the situation, and it does not provide statistical data, right to health indicators or benchmarks;
- 3) despite showing more challenges and difficulties, the second report does not sufficiently face structural problems, which necessary steps have not been taken and why is it important to implement the right to health (WISEBERG, 1997). For example, one of the most serious health problems in Brazil not mentioned in the reports is the lengthy lines the population has to face to get access to health services (OLIVEIRA et al., 2009);
- 4) although we notice a broader treatment for vulnerable populations, the report does not provide accurate information on indigenous people and Afro-Brazilians. For example, since 1999 there has been a Health Sub-System devoted specifically to indigenous people and an array of measures to address such communities;
- 5) the report does not mention any national health plan or strategy, or any legal framework; 6) the report does not provide disaggregated and comparative data;
- 7) there is no allusion to the right to a healthy workplace environment or the right to health facilities, goods and services;
- 8) the report does not deal with non-discrimination, equal treatment, or a gender perspective;
- 9) concerning core obligations, we realize that some of them are not mentioned

in the report, such as access to essential drugs; access to health facilities, goods and services on a non-discriminatory basis, education and access to information concerning the main health problems in the community, including methods of preventing and controlling such problems; and appropriate training for health personnel, including education on health and human rights.

Finally, considering that the document should include information on the steps taken to address issues raised by the CESCR in its concluding observations in the State party's previous report, there is no accurate information on:

- 1) measures to ensure equal opportunity for Afro-Brazilians, indigenous peoples and minority groups such as Gypsies and the Quilombo communities;
- 2) legislative and other measures to protect women from the effects of clandestine and unsafe abortion and to ensure that women do not resort to such harmful procedures;
- 3) measures to disseminate the present concluding observations widely at all levels of the society and, in particular, among state officials.

Taking into account these aspects, the CESCR, in its list of issues, has asked Brazil about the high rate of clandestine abortions and its causes, measures taken to guarantee effective access to health-care facilities, goods and services for the most vulnerable groups, including indigenous communities and persons of African descent, and educational preventive measures being taken to combat HIV/AIDS and to eliminate discrimination against persons with HIV/AIDS. Brazil responded to these questions in its replies submitted in March 2009 to the CESCR.

Similarly, we must remember that the CESCR identified some recommendations related to the second report, for example that the State party take all appropriate measures to address the discrepancy between life expectancy and poverty levels of the black and white population, through a more direct focus on health and poverty eradication programs for the former. In addition, the CESCR requested updated information and data on life expectancy, disaggregated by region and ethnic group. The CESCR recommended that Brazil intensify its efforts to control the spread of HIV/AIDS and the CESCR is concerned that the maternal mortality rates remain extremely high and that the risk of maternal death disproportionately affects vulnerable communities, particularly Afro-Brazilians, indigenous women and women from rural areas. Identically, the CESCR reiterates the recommendation made in its observations about Brazil's initial report – that the State party undertake legislative and other measures to protect women from the effects of clandestine and unsafe abortions. Furthermore, the CESCR recommends that Brazil take measures to ban the promotion of tobacco products and enact legislation to ensure that all enclosed public environments are completely free of tobacco.

In light of this study, we highlight another key aspect of CESCR recommendations. The Committee recommends that Brazil take into account the Committee's General Comment No. 14 (2000) on the Right to Health, particularly the following contents:

- 1) strengthen measures to reduce maternal mortality rates;
- 2) increase health-care funding for disadvantaged populations;
- 3) ensure that the people living in poverty have access to free primary health care;
- 4) establish community-based maternal health-care systems and referral systems for obstetric emergencies;
- 5) ensure the equitable availability of health-care facilities, particularly obstetric facilities, among the economically disadvantaged populations;
- 6) ensure that economically disadvantaged populations have equitable access;
- 7) provide, in its next periodic report, detailed and updated information, including disaggregated statistical data and indicators, in order to assess the level of progress achieved in that area.

In sum, we notice that, in both reports, Brazil has not incorporated a human rights perspective in writing its reports, especially in the parts referring to the right to health. Consequently, the Committee's General Comment No. 14 (2000) on the Right to Health was not considered as a parameter or guideline to produce reports. By using this General Comment as a parameter, Brazil could give emphasis in the reports, for example, to the use of human rights indicators—disaggregated in terms of vulnerable groups—to monitor the right's implementation as a core obligation. This would also serve as an instrument of accountability and participation in public healthcare.

Then, reports would present a narrative description and would emphasize formal and legal measures, as the adoption of a specific public policy or program and investment. In contrast, they do not demonstrate how effective these policies and programs are to the population, in particular to vulnerable groups and regions. Moreover, a key point reported is that the allocated resources are not enough; the report must address central problems in public health in Brazil, such as bad management practices, market concentration, corruption, and misuse of public funds. Therefore, we conclude that the Brazilian reports must be improved in the portions addressing the right to health. This requires a revision in the drafting process and it demands a change in public health professionals' conceptions of human rights.

4 Conclusions

The treaty-reporting process is a great opportunity to foster a favorable human rights environment and to bring about concrete changes in the ordinary practice of state bodies and agencies. Although the reporting system is not an enforceable mechanism its power to embarrass and constrain states cannot be denied. By acknowledging its importance to foster a cosmopolitan human rights culture and internal advances, we sought to demonstrate how important it is to establish a serious and committed

treaty-reporting system, with participation of all bodies and agencies involved in the reporting process, including the National Human Rights Institution, coordinated by a unique body – the Inter-Ministerial Human Rights Committee.

In other words, the creation of a treaty-reporting system based on a specific agency is crucial to improve the state's responses addressed to the UN Human Rights System. We highlighted that the reporting process is time consuming and costly. In addition, it demands material resources, engaged and qualified professionals, as well as specific budget allocations.

To ensure these cornerstone elements, it is crucial to have some political commitment, not only in a theoretical approach through speeches in favor of human rights, but also by practical actions, which must be reflected in law implementation. Legislative measures are a step in the right direction; however, they are not enough to face structural problems and to cause a break in the current power relationships. It is clear that creating efficient and serious mechanisms and cultural awareness is necessary to guarantee human rights.

Taking into account the Brazilian experience related to elaborating CESCR reports, specifically concerning the right to health, we concluded that there is a gap between CESCR requirements and the contents of Brazil's reports. We attribute this gap to the absence of a treaty-reporting system in Brazil, in other words, to the lack of a fully operating Inter-Ministerial Human Rights Committee, and to the distance among state bodies, especially those with public health professionals, and the absence of a human rights framework, in particular to General Comment No. 14 (2000).

Therefore, the Brazilian treaty-reporting process has deficiencies both procedurally and substantively. Concerning the former problem, Brazil should adopt a legislative measure to address the creation of an Inter-Ministerial Human Rights Committee, and the Ministry of Health should revive the Health and Human Rights Committee. With regard to substantive aspects, efforts must be made to elevate public agents' human rights qualifications and to introduce rights-based approaches (BERACOCHEA; WEINSTEIN; EVANS, 2011) in the Ministry of Health. Otherwise, the treaty-reporting process will be merely a formal and bureaucratic procedure, as the public health professionals will see it as a "paper process" only, without any practical effect. Under the current regime, despite Brazil being able to affirm in an international arena that the Country has been complying with its human rights commitments, we wonder how these commitments have been implemented.

We stressed that, in the public health field, Brazil has not been accomplishing its reporting commitments well enough. Consequently, effective measures must be adopted to prove that Brazil's human rights commitments are more than a political strategy attempting to occupy relevant international positions in a cosmopolitan arena. Similarly, Santos (2007) states that Brazil is a "heterogeneous State" that acts in a manner contradictory to the field of human rights. Brazil's "policies are ambiguous and contradictory", having State agents that work for the fulfillment of human rights obligations in some cases, while others totally ignore them and disregard the international commitments made by Brazil.

In the case studied here, Brazil's ambiguity is evident. Brazil formally commits itself to provide mechanisms for monitoring the relevant UN human rights treaties, such as the report system of the ICESCR, but the Country does not institutionalize the process of writing these reports, nor does it provide the necessary resources – material or human – to achieve this goal. Consequently, a serious political opportunity to change the population's living conditions, in particular the health standards of vulnerable groups, is placed at risk.

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NOTES

1. We use in this article the name "treaty-reporting system" as it was proposed by Donnelly in his book "International Human Rights" (DONNELLY, 1998).
2. We don't intend to deal with the role of nongovernmental organizations in the process of human rights monitoring, although we recognize their vital influence on human rights issues, mostly related to the fact that nongovernmental organizations produce "shadow reports" to present alongside the State's official reports. This choice is based on our aim to study the government role in the activity of monitoring human rights because there are few studies about that and our purpose is to contribute to Brazilian government in this field. We also note this choice is made because the system is designed around the relationship of the Nation State to individuals and groups of citizens.
3. "Article 6th Education, health, work, habitation, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute, are social rights, as set forth by this Constitution." (BRASIL, 1988).
4. National Human Rights Institutions are classified according to the Paris Principles.
5. This information was accessed on Jun. 2011 (UNITED NATIONS, 2009a).
6. Considering that confidentiality applies to information obtained directly from subjects, researchers have a legal and ethical obligation to keep personal records confidential. As a result we have referred to governmental agents as: governmental actor 1, governmental actor 2 and governmental agent 3.
7. There are a number of Bills on this topic, for instance Bill No. 4667/04 deals with legal effects flowing from International Human Rights Bodies.
8. The Rule passed in April 7, 2010 by the Secretary of Human Rights establishes this Working Group.
9. In accordance with the Report of the Working Group on the Universal Periodic Review Brazil (A/HRC/8/27, 22 May 2008 – Human Rights Council): "Brazil reinforced its commitment to create new tools for the internal monitoring of human rights. This would include a national system of human rights indicators and the elaboration of annual reports on the situation of human rights, taking into account, among other aspects, a follow-up of the UPR exercise." (UNITED NATIONS, 2008, p. 16).
10. "The very imprecision in problems of definition as well as measurement, monitoring, and enforcement have been roadblocks to applying useful economic, social and cultural rights." (SMITH, 2005).
11. The CESC Guidelines on Treaty-Specific documents to be submitted by States parties under articles 16 and 17 of ICESCR, elaborated on 24 March 2009, replaced the Revised General Guidelines (E/C.12/1991/1).
12. Brazil ratified the ICESCR in 2/24/1992 and its initial report, in accordance with article 17 of the Covenant and Council Resolution 1988/4, should be submitted within two years of the entry into force of the Covenant and thereafter periodic reports at five-year intervals. (UNITED NATIONS, 1993).
13. "Information which a State considers relevant to assisting the treaty bodies in understanding the situation in the country should be presented in a concise and structured way. Although it is understood that some States have complex constitutional arrangements which need to be reflected in their reports, reports should not be of excessive length. If possible, common core documents should not exceed 60-80 pages, initial treaty-specific documents should not exceed 60 pages, and subsequent periodic documents should be limited to 40 pages." (UNITED NATIONS, 2006).
14. The Law No. 10.683/03 (BRASIL, 2003) states the general competency of the Ministry of Health and Decree No. 7.797/2012 establishes the Ministry of Health structure (BRASIL, 2012).
15. Editor's note: According to General Comment N° 14 (UNITED NATIONS, 2000, para. 12) all health related facilities, goods and services must be available, accessible, acceptable, appropriate and of good quality (the so-called AAAQ framework).
16. Infant mortality rates were informed by region and Life expectancy at birth - expected life span by gender, region, and state.
17. Editor's note: Health Channel (*Canal Saúde*, in Portuguese) is a broadcast of the Public System of Health (SUS), hosted by Oswaldo Cruz Foundation (Fiocruz). See: <<http://www.canal.fiocruz.br/>>. Last accessed on: Dic. 2012.
18. In March 2009 Brazil sent to the CESC a reply to the CESC's list of issues (E/C.12/BRA/Q/2), but we have not analyzed it because it was the result of a CESC provocation and not was derived from spontaneous reporting activities.

RESUMO

Este artigo analisa o sistema de envio de relatórios aos comitês de monitoramento de tratados da ONU e particularmente o seu papel como monitor do cumprimento do direito à saúde. Executamos um estudo aprofundado sobre o sistema brasileiro, por meio de análises das competências legais dos agentes responsáveis pelo processo de envio de relatórios e da percepção dos agentes governamentais sobre o processo mencionado. Por fim, analisamos os dois relatórios brasileiros submetidos ao CDESC (2001 e 2007). Centramos nossa análise no Artigo 12 – direito à saúde – e a estruturamos de acordo com o conteúdo do relatório e com base no Comentário Geral nº 14. Concluímos que existe uma lacuna entre os requisitos do CDESC e o conteúdo dos relatórios. Salientamos que, no campo da saúde pública, o Brasil não vem cumprindo seus compromissos referentes aos relatórios de maneira suficiente. Consequentemente, medidas eficazes devem ser adotadas para provar que os compromissos de direitos humanos assumidos pelo Brasil são mais do que uma estratégia política para que o país ocupe posições internacionais relevantes em um auditório cosmopolita.

PALAVRAS-CHAVE

Sistema de apresentação de relatórios aos comitês de monitoramento de tratados – Direito à saúde – Instituições nacionais de direitos humanos

RESUMEN

El presente artículo analiza el sistema brasileño de presentación de informes sobre tratados, en particular su papel en la vigilancia del ejercicio del derecho a la salud. Llevamos a cabo un exhaustivo estudio sobre el sistema brasileño, analizando las competencias jurídicas de los órganos responsables del proceso de presentación de informes y la percepción que los funcionarios de gobierno tienen de dicho proceso. Por último, analizamos los dos informes presentados por Brasil ante el CDESC (2001 y 2007) submetidos al Comité de Derechos Económicos, Sociales y Culturales (CDESC). Nuestros análisis hacen foco en el artículo 12, sobre el derecho a la salud, y están estructurados de acuerdo con los contenidos del informe y sobre la base de la Observación General Nº 14. Concluimos que existe una brecha entre los requisitos del CDESC y el contenido de los informes. Señalamos que, en el ámbito de la salud pública, Brasil no ha dado suficiente cumplimiento a sus compromisos relativos a la presentación de informes. Por lo tanto, deben tomarse medidas efectivas para demostrar que los compromisos asumidos por Brasil respecto de los derechos humanos son algo más que una estrategia política tendiente a ocupar una posición de relevancia ante un auditorio internacional.

PALABRAS CLAVE

Sistema de presentación de informes sobre tratados – Derecho a la salud – Instituciones nacionales de derechos humanos



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ABSTRACT

Since the return to constitutional rule, Ghana has intensified efforts to promote human rights. However there are several challenges with the promotion of property rights, especially with regard to land ownership. This challenge, borne out of the tensions between the modern and the traditional state, is exacerbated by the plural legal systems in place as well as the challenges of rapid urbanisation and a high unemployment rate, particularly in the Greater Accra region. The liberal market system promoted by Ghana's return to constitutional rule led to increased investment in land and demands for greater security in land title. This led to efforts aimed at land reform. These notwithstanding, the inability of the state to enforce its rules and elicit compliance have meant that the land market remains a minefield. The consequence has been the emergence of private security service providers who employ illegal means of enforcement to protect land and landed property. Popularly known as land guards, these security providers are the nightmare of landowners in the Greater Accra region. Using primary and secondary sources, this paper examines the rationale behind the demand and supply of land guard services and the implications of such services on property rights in Ghana. We conclude that the weak law enforcement capabilities of the state and rampant corruption in the land management institutions facilitate conflicts in land markets and encourage people to resort to individual security mechanisms. We argue that as long as such illicit security measures are employed, the state's authority and monopoly over the use of force will remain irrelevant in the land sector.

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State subordination – Land guards – Human rights



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KILLING TO PROTECT? LAND GUARDS, STATE SUBORDINATION AND HUMAN RIGHTS IN GHANA

Linda Darkwa and Philip Attuquayefio

1 Introduction

Several indicators suggest that Ghana is on a path of growth and development. There have been suggestions that the country is the fastest growing economy in sub-Saharan Africa, and in 2011 the country was reputed to have attained a middle-income status. Situated in a sub-region where many of its neighbours have been victims of violent armed conflicts, Ghana is hailed as a beacon of peace. Undoubtedly, compared to its neighbours, Ghana deserves this praise. However, the dynamics that characterise its development have also facilitated a number of security challenges. Although some of the challenges are fairly new, most are old. A number of the security challenges confronting the state are a result of the modern state's inability to facilitate a re-engineering of the traditional state system to suit the needs of the country's present political, social, and economic landscapes without alienating the traditional structures—particularly because the state does not have the capacity to effectively enforce its authority throughout the country.

Ghana's return to constitutional rule in 1992 ushered in a period of optimism. On the one hand, the rights and freedoms of citizens have been guaranteed whilst on the other hand, the new political order has encouraged a liberal economic regime. This new political and economic dispensation has facilitated the development of strong institutions, which has in turn encouraged investment. During this same period, Ghana has experienced high volumes of rural-urban migration, a surge in the urban population, and a high demand for land for both residential as well as industrial development. The high demand for land has enhanced the commercialisation of lands, especially in Accra and its surrounding environs. The high value placed on land had implications for the former politics surrounding land ownership, acquisition, and transfers. The opportunity

Notes to this text start on page 159.

to make money off the sale or lease of lands facilitated a number of conflicts between families, communities, and individuals on ownership issues. These conflicts were exacerbated by the convoluted dynamics of land management that had been occasioned by the distortions of colonial rule and the consequent plural legal systems that emerged. Questions surrounding the definition of ownership and the rights and duties of lessors became much more prominent with the increase in land commodification following the return to constitutional rule in 1992. The challenge was compounded with the ineffective land administration processes, which were in place for land management.

The challenges confronting the land industry are not necessarily new phenomena. Writing in 1955, Pogucki suggests that the rising land values in Accra were a result of “rapid residential development and congestion in the commercial and industrial areas” (POGUCKI, 1955, p. 10-11). According to him, even in 1955, demand was exceeding supply and causing an increase in food prices because of the “retreat of cultivated areas as a result of the extension of town limits” brought about by the increase in population. He discusses issues of ownership and the rights and obligations imposed by customary law on those in charge of land administration in the traditional governance system, and areas of conflict. His work provides useful insights into the traditional structures for land management in the pre-independence period. Although Pogucki raises the definitional challenge of ownership in traditional land administration, his discussion is limited to the range of rights that a political head may exercise for a group on whose behalf he administers land. Thus, although the dispute over the right to exercise certain measures of authority contributes to the insecurity confronting landowners in Ghana today, it does not delve into the issues of multiple sale and criminality confronting contemporary land management.

Gough and Yankson (2000) admit that the primary challenges underlying the management of land markets in developing countries are the complex relationships between people and land, the different tenure systems that exist among the various societies within states, the exertion of state control over lands in the post independence period, and the plural legal system which pitches Western legal provisions against the customary laws of the diverse societies. Although these challenges are not new, contemporary issues such as rapid increases in urban populations have resulted in overcrowding conditions in many cities in the developing world.

Amanor (1999) explains that the unattractive nature of agriculture to youth as a result of its meagre pay offs combined with high levels of unemployment in rural communities facilitates rural-urban migration which undoubtedly increases the urban population. He argues that there is an “interrelationship between the penetration of international capital, the restructuring of the economy, the political economy of social and class formations, and local livelihood struggles for access to resources” (AMANOR, 1999, p. 23). Although his work focuses on agribusiness, he provides useful insight into the effects of land expropriation for the production of produce for the international market on the people living in those communities.

Focusing on land management in Accra, Gough and Yankson suggest that the overcrowding conditions in Accra have resulted in high costs of rent in the city and a subsequent conversion of agricultural lands to residential and commercial lands. According to them, the peri-urban areas which previously only had indigenous

settlements and were used for subsistence farming have been converted to residential areas (GOUGH; YANKSON, 2000, p. 2.489). This has led to an increase in the price of land and facilitated perceptions of alienation and inequality among the poor indigenous people and especially among the youth.

This perception often pits the youth in some communities against traditional rulers who they accuse of selling community lands for personal gain. However, Gough and Yankson explain that while some chiefs may exercise political and administrative authority over a parcel of land and the inhabitants, they may not be the allodial title holders, which means that they do not have the power to sell the lands. As a result, while the lands may be sold, the bulk of the revenue accruing from such sales may not get into the community where the land is cited. Their work reveals that some of the challenges that have arisen between the youth and some chiefs over perceptions of land alienation, lack of transparency, corruption, and inequity may actually be as a result of the youth's lack of knowledge regarding the actual ownership of those lands.

In his work *Customary Land Law in the Ghanaian Courts*, Woodman (1996) provides an exposition on the customary law provisions for modes of creation and transfer of land, and the persons who may hold interests in land. His work provides definitions for a number of concepts and entities in land administration. He also provides the parameters of the authority given by various groups in the traditional system (communities, families, clans, etc.) to persons charged with the administration of lands other than their personal properties. His work suggests that persons entrusted with the management of lands on behalf of groups cannot make unilateral decisions concerning the appropriation of the land without consulting the principal members of the group. Woodman touches on the conflict between some of the customary law provisions and the provisions of the modern state system. Woodman's work reveals the neatly laid out *de jure* provisions for the management of land in Ghana and the tensions present in the *de facto* application of the laws.

Despite a plethora of work on the land management problem in Ghana, we did not come across any works that addressed the phenomenon of "landguardism" and its effects on the security of Ghana. Although there are efforts at reforming land management in Ghana, "landguardism," the phenomenon of employing constituted groups of mainly young persons who engage in the use of illegitimate force to protect land and landed property in exchange for remuneration in cash or in kind, has been on the rise in Accra. This is arguably due to the challenge of multiple sale of lands; long legal processes for the resolution of land conflicts by the courts; lack of faith in the police and court systems as a result of perceived corruption and bias; and weak law enforcement, which facilitates the activities of gangs in the land industry (DARKWA, 2012). Although land guards seek to present themselves as private security operatives, they operate outside the framework for the provision of private security services and utilize violence and/or the threat of violence in the provision of security for land and landed properties. Their activities are illegal and a contravention of the existing laws on the provision of private security services.¹ The use of land guards for the resolution of land conflicts affects the enjoyment of property rights, as those without the resources to employ land guards often lose their lands to those with the capability to pay for such services.

2 Methodology

Using key informant interviews with three land guards,² a focus group discussion with five land guards,³ a retired police officer,⁴ a serving police officer,⁵ a building contractor who employs the services of land guards,⁶ and content analysis of newspaper articles, this paper seeks to provide insight into the nature of the activities of land guards and to demonstrate their negative impact on the enjoyment of property rights. It discusses perceived collusion between the state's security apparatus and criminal elements in the land industry. Finally, the paper explains the resilience of land guards through rational choice theory and concludes that until the Ghanaian state is able to reform the land sector effectively and elicit compliance for its laws as well as address the challenge of unemployment, the activities of land guards will continue. Only eight land guards were interviewed for the paper because it is difficult to get land guards to discuss their activities due to the illegal nature of their work. However, the responses obtained can be generalized for the phenomenon in the Greater Accra region because the interviews reached a point of data saturation at which point nothing substantively new was being discovered.

3 Land guards as organized criminal groups: Framing the issue

Land guards exist primarily to meet a demand for land protection services. As aforementioned, the phenomenon of land guards surged in the period following Ghana's return to constitutional rule in 1992; a period which saw the liberalization of markets and an increase in economic growth opportunities and credit access.⁷ These developments sparked an increase in the acquisition of property as potential investors sought out investment opportunities in real estate and ordinary citizens felt relatively secure to invest in land. Increased interest in land acquisition led to an appreciation of land value, especially in Accra, the capital of Ghana. It is noteworthy, however, that these processes unfolded within a transitional environment – from military dictatorship to democracy. Thus, a number of the institutions, processes, and norms necessary for resolving emerging challenges from land contestations were non-existent, inefficient, or inadequate.

To put the phenomenon of land guards into proper perspective, it is imperative to provide an overview of issues surrounding land ownership and acquisition in Ghana. About 80% of the total land area belongs variously to stools/skins,⁸ individuals, families, and clans. To a large extent, "private lands in most parts of the country are in communal ownership, held in trust for the community or group by a stool or skin as a symbol of traditional authority, or by a family" (GHANA. Ministry of Lands and Forestry, 1999, p. 2).⁹ However, the commodification of land has upturned the traditional values attached to land as an asset held in trust for communities and generations yet to come. In many instances, the increased economic value of land has led to a struggle over ownership and control. This struggle brings to the fore and probably amplifies an inherent challenge in the customary land tenure system – the ambiguity of boundaries (KOM, 2003). The challenge emerges from the fact that beyond establishing boundaries with trees, rivers, and other natural or man-made

elements, very little existed by way of reliable documentation. Consequently, conflicts over such boundaries frequently became exacerbated. The challenge of ambiguously demarcated land boundaries is not limited to communities but extends to family and clan lands. Thus, there are challenges of establishing ownership and control between communities as well as between clans and families within the same community.

The challenge of ownership and control creates another difficulty in terms of who has the *locus standi*, within a family or community context, to sell land. This is reflected in the Latin maxim *Nemo dat quod non habet* (that a person cannot give out that which s/he does not have). The challenge essentially lies in establishing who has title over a parcel of land – something many non-indigenous members of a community may not easily be able to verify. This inability to easily verify ownership of title has led to instances of multiple sales of the same parcel of land by several vendors laying claim to ownership of that land. Thus, to prevent other claimants from selling lands, a claimant may either go to court or resort to the use of force. In some instances, even when cases are in court, families may employ the use of force to prevent either side from appropriating parts of the land in contention (KOM, 2003, p. 16).

In a related vein, the lack of easily accessible and verifiable information on which individual within a family/clan or traditional area (community) has the right to sell land compounds the issue of multiple sale. Traditional authorities have designated structures assigned with specific functions for the smooth administration of their communities. Usually, there are designated families, title holders, or individuals mandated by custom to oversee all assets of the community; and who, in consultation with the chief and elders, may give out land to members of the community and allocate land to prospective buyers on behalf of the community. However, it is not always clear who has a right to sell community lands. Thus, some chiefs acting in this regard have been accused of acting outside of their mandates.¹⁰ Perhaps what is worse is the fact that, contrary to the constitutions of their communities, these individuals enrich themselves with the proceeds of the sales without any benefits to their communities.

Given these challenges, many buyers become victims of multiple sale and have to turn to courts of law to seek redress.¹¹ However, the long and costly processes of accessing justice in general and land litigation in particular often act as a deterrent to resorting to the formal processes of the judiciary. Even in instances when there has been recourse to the formal justice systems, it is still imperative to ward off contestations and prevent contenders from developing the land. This necessitates physical surveillance.

As a result of the above context, land ownership, transfer, sale, and acquisition in Ghana are fraught with several challenges, which necessitate surveillance and physical protection against encroachment. However, the Ghana Police Service does not provide surveillance services for individual private property. Generally, they only physically intervene after there have been complaints of trespassing, vandalism of property, unlawful occupation, or when there are clashes between opposing factions (DARKWA, 2010). The non-statutory private security providers do not usually undertake land protection services, probably as a result of the high risk involved. Consequently, parties in disputed land transactions have to guarantee the security of land through their own

means. This leads to chaos and anarchy, as the demolition and counter-demolition of structures are to establish ownership. The emergence of land guards is therefore in response to a need for the physical protection of private property interests. Although land guards' recourse to the use of excessive force, including deadly force with illicit small arms, is illegal, their services are highly sought after as they are considered the only viable choice for the protection of land (DARKWA, 2010).

As the country deepened its democratic processes, efforts have been made to develop and strengthen state institutions. As a result, some reforms have taken place in the land industry to provide better administration and management as well as guarantees for purchasers of property.¹² Systematic land titling and digitalisation of land titles have made it possible to verify land title within a shorter period prior to purchase.¹³ The question that begs an answer however is why the phenomenon of land guards continues to persist even after reform in the land sector. In fact, instead of becoming obsolete, information in the public domain suggests that land guards have become more brazen and vicious. The answer is three-fold. First, the incentives for being a land guard are sufficiently appealing and provide an impetus for the continued provision of land guard services despite the inherent associated risks.¹⁴ Secondly, despite reforms in the land sector, many of the challenges, such as multiple sales and forcible appropriation of land, persist, which lead to a continued high demand for the services of land guards. Thirdly, the multiple roles performed by land guards (facilitated by their reputation as ruthless people) keep them in business as they are employed for different purposes including the provision of personal security to politicians and, in extreme cases, serving as hired assassins.¹⁵ Thus, despite their obvious illegality, land guards remain active because (a) there is a demand for their services; (b) given their resources and opportunities available to them in the legal market, the envisaged utility of their illegal actions significantly exceeds engaging in the legal market; and because (c) of a perception that the risk of apprehension, arrest, and punishment is minimal.¹⁶

4 Profiling land guards

In order to appreciate the nature of interviewees for the study, it must be indicated that there are different categories of land guards. Although they all perform the same basic function of protecting land and landed properties, their motives are not always the same. As mentioned above, the vast majority of lands belong to stools, skins, and/or families. These lands are held in trust for the entire community and generations to be born. Therefore, there is often shared responsibility to protect the communal inheritance. Any perception of exploitation through sale of the communal lands may be met with hostility. In this instance, young people in a given community may rally together to prevent, or at least frustrate, the sale or the development of some lands. Their contention is usually with the traditional authorities that may sell the parcel of land. These kinds of land guards are formed sporadically to address a specific problem and usually exist only for the period of contention. They do not receive any remuneration, save being able to prevent the sale of their communal land. We refer to this category of land guards as "community guards."

The second category of land guards can be aptly referred to as “amateur land guards.” These are groups of young people within communities who come together to exploit landowners and developers. Once the land is procured, they impose a levy referred to as a “digging fee” prior to development. Failure to pay the “digging fee” could result in violent clashes between workers and these groups and, in some instances, vandalism. This category of persons is best described as extortionists, although they often allege that, as members of the community, they ward off encroachers from the land, thereby alluding to some semblance of protection. Although these persons usually operate within their own communities, some may also join other land guards elsewhere.

The third category of land guards includes those who work with the traditional authorities within the communities and who have sought refuge under the traditional *Asafo* institutions.¹⁷ They usually accompany those delegated by the traditional authorities to demarcate land and they also demand payment of “digging fees.” Two of the land guards interviewed positioned themselves within this category. Interestingly, neither of them belongs to the families for whom he claims to be working. It is therefore evident, as indicated in earlier paragraphs, that they could not be members of the *Asafo* group and only evoke that as a tool of legitimization.

The last category of land guards is young persons who work under identifiable hierarchies and provide protection services to the highest bidder. They may be contracted for a wide range of jobs including providing protection services for land and landed property, VIP protection, and the elimination of opponents and threats. They have a reputation of being ruthless and are usually feared. They do not necessarily belong to any community and work in different areas of the country.¹⁸ Although there are various categories, membership of such groups is fluid. This means that an individual may be a member of all the various categories.

Most land guards perform multiple functions and rely on their “networks” to perform in their various roles. To maximise time and profit, land guards may run shifts or rotate. For example, if five land guards are recruited by five different land/property owners to provide protection in a particular location, they (the land guards) agree to a shift system that allows them to rotate. This means that all the lands are guarded by one or two people at a time. This arrangement frees up their time and allows them to take up other assignments.

Land guards from the first category (community land guards) usually do not demand money from prospective buyers. They see themselves as the “defenders of their heritage” and their contention is usually with the traditional authority in place. However, those in the second category demand money because they believe that, as members of the community, it is their right to do so. Sometimes, after their extortion, they may offer protection services for which separate terms have to be negotiated. Members of the third category present themselves as the “warriors of the land” - *Asafo*. Portraying themselves as the legitimate protection unit of the traditional authority, the money they receive is perceived as a token in exchange for protection against potential encroachers. They, like the second category, may also negotiate separate contracts to provide additional “surveillance” services. The last category of land guards provides services for clients in conflict with other clients, clients in

conflict with communities, conflicts between families over ownership, and traditional authorities in conflict with one another over boundaries, demarcations, and control.

Most land guards live in low-income communities such as Nima, Ashiaman, Adjiringano, Amasaman Zongo, and Tudu.¹⁹ According to interviewees, most land guards fall within the ages of 17-40 years old, although there are older ones who serve as mobilizers, coordinators, and commanders. Most do not have the requisite qualifications for employment, yet a good number of them have finished basic secondary schools (junior high school).²⁰ Although they may belong to different organizations, they network extensively, relying on communication technology such as mobile phones to run their organizations. They work under pseudonyms, keep their identities secret, and often negotiate through a trusted middle person. They avoid face-to-face contact with their clients until they are certain of the clients' authenticity. Apart from taking advantage of a wider network platform, their recourse to modern communication technology is sometimes calculated to evade arrest. Irrespective of their motives, all land guards have certain common characteristics. They are mostly young, unemployed, and have very few rudimentary skills for legal employment, or no skills at all.

5 Land guards and human rights violations: Some case studies

Newspapers are awash with stories of land guards' activities resulting in injury, loss of investment, and, in some cases, death. A few examples are presented here as evidence of the negative impact of land guard activities on economic and social rights as well as the right to life. In November 1998, Richard Owusu Sekyere (popularly known as Kweku Ninja), a police officer at the Police Academy and Training School, and Jerry Wornoo (alias Taller), of the Striking Force Unit of the Ghana Police Service, were killed by land guards when the two allegedly attempted to erect pillars (which serve as boundaries and also indicate ownership) on plots of land they had acquired in Ablekuma, a suburb of Accra (AWORTWI-MENSAH, 2001).

In December 2005, there were reports that Godfrey Cobbinah, a senior administrator at the Internal Revenue Service (IRS), had been killed by land guards at Achiaman near Amasaman. As President of the Welfare Committee of the IRS, Cobbinah was inspecting land acquired by some members of the IRS when he was killed (LAND guards kill..., 2005). On 24th September 2010, it was reported that residents of Oyibi, a developing suburb in Accra, had been subjected to brutal attacks by land guards and threatened with eviction (LAND guards brutalise, 2010). On 1st August 2011, the Daily Graphic reported that land guards had terrorized a businessman in his house. The attack was linked to a fight by the businessman's company against encroachers on the company's land, which was acquired for commercial agriculture (AZU, 2011).

The above is a sample of the stories available in public sources. It must be noted, however, that many more incidents remain unreported and inaccurately reported.²¹ Although the stories are worrisome, the manner in which the atrocities are carried out is even more alarming. In all of the cases mentioned above, the crimes occurred in full view of witnesses, an indication of the land guards' fearlessness. Land guards

threaten, maim, and kill their victims in addition to demolishing property and preventing hired labourers from working. These activities undermine investment and development and are undoubtedly an affront to the right to life and freedom from fear, as well as a violation of the economic and social rights of victims.

6 Land guards as organized criminal groups: Establishing the Linkage

Land guards are more than ordinary criminal gangs. Rather, they are part of organized criminal groups. Providing a proper classification for them is imperative for understanding their seeming resilience and so as to design appropriate mechanisms for addressing the challenges they pose to human and state security. There is no consensus on a definition of organised crime (ALBANESE, 2000, p. 410; HAGAN, 1983, p. 52). However, Albini provides a useful definition for establishing the nexus between land guards and organised crime. He defines organized crime generically as “any criminal activity involving two or more individuals, specialized or non specialized, encompassing some form of social structure, with some form of leadership, utilizing certain modes of operation, in which the ultimate purpose of the organization is found in the enterprise of the particular group” (ALBINI, 1971, p. 37). This definition places organized crime on a continuum and allows for relative degrees of organization, specialization, and structure. In his Organized Crime Continuum Model, Frank Hagan suggests that for a criminal organization to qualify as organized, it ought to be highly organized, have a hierarchy, restricted membership, and an agreed code of secrecy. In addition, it must use violence and/or the threat of violence, provide illicit goods in public demand, and be profit-oriented. Finally, the group must have immunity through enforcement and may be corrupt (HAGAN, 1983, p. 54).

A profile of land guards obtained through interviews confirms different degrees of organization and structure. Most land guards (i) are part of extant structured groups,²² (ii) have identifiable leaders who utilize violence and the threat of violence to achieve their aims, and (iii) are mainly motivated by expected remuneration (in cash or in land). Some of these groups are backed by people of influence in their communities and/or at the national level. The membership of these organizations is generally fluid, allowing members to move in and out freely. There is, however, a core standing team around whom the other members coalesce. This latter group tends to occupy the highest positions and has restricted membership (ATTUQUAYEFIO, 2009).

7 The response of the Ghanaian State to the menace of land guards

Despite efforts to address the challenge of land guards, no holistic strategy has been developed to address the demand and supply sides of the activities of land guards. There is no single, comprehensive response to the menace of land guards in Ghana. However, there are various legal provisions contained in different instruments, which prohibit one or more of the activities of land guards. The right to protect private property, including land, is guaranteed, and Section 39 of the Criminal Code

(Amendment) Act, 2003 (Act 646) prescribes the situations under which force may be used to protect such property. It also stipulates the level of force that may be used. It provides *inter alia* that,

- (a) a person in actual possession of a house, land, or vessel, or goods, or his servant or any other person authorised by him, may use such force as is reasonably necessary for repelling a person who attempts forcibly and unlawfully to enter the house, land, or vessel, or to take possession of the goods;
- (b) a person in actual possession of a house, land, or vessel, or his servant or any other person authorised by him, may use such force as is reasonably necessary for removing a person who, being in or on the house, land, or vessel, and having been lawfully required to depart therefrom refuses to depart;

Although force may be employed, it is limited to what is reasonable. This means that landowners and their caretakers or security providers do not have the right to use unlimited force to prevent others from taking over their property. In effect, the use of excessive force that sometimes results in excessive loss, injury, or death contravenes the law. Secondly, although the use of force is permissible, it must be carried out within the ambit of the law. This means that the tools employed in exerting force must be legal. In effect, should there be the need to have recourse to the use of firearms, the possession and use of such must be within the confines of the law. Thus, the use of illicit weapons in securing land is illegal.

Despite the limitation to the use of force in the protection of property, land guards continued to employ illicit weapons in the commission of violent atrocities – in the name of protection. The continued mayhem caused by the land guards led to an explicit ban on their activities in 2004 by the Minister of Interior (LAND guards banned..., 2004). Despite the ban, the activities of land guards persisted, leading to the issuance of a second ban by the police service three years later (LAND guards banned, 2007). Subsequently, there have been several directives by politicians instructing the police to effectively deal with land guards. In addition to the above, the state has sought to address the source of the demand for land guard services – contention over land – by reforming the processes for verifying land titles, obtaining indentures, and title to land. These reforms notwithstanding, efforts must be made to minimize the benefits of the land guard industry so as to make it unattractive to young people as employment.

8 Explaining the resilience of land guards through the rational choice theory

The above-mentioned efforts notwithstanding, the challenges of land guards continue to persist. It is therefore necessary to proffer a rationale for their continued resilience in order to help develop appropriate responses. Using ideas borrowed from analyses of crime and deviance, the crime-as-work model, and rational choice theory, we provide an explanation of the resilience of land guards in Ghana.

At the backdrop of our analysis is the methodological individualism of rational choice theory that explains social phenomena from the perspective of individual

decision-making processes. Such processes are often characterised as social interactive events by which individuals act rationally in an attempt to achieve a beneficial balance between their rewards and costs. The process therefore involves a social exchange of some sort, one that involves costs and benefits for respective parties. Such costs and benefits may manifest in economic or extra-economic terms. Homans (1961), for instance, observes that as economic action involves an exchange of goods and services, social interaction includes the exchange of approval and certain other valued behaviours. In “Participation in illegitimate activities: a theoretical and empirical investigation”, Isaac Ehrlich also suggests that violation of the law occurs as a result of perceived incentives because:

[a]ny violation of the law can be conceived of as yielding a potential increase in the offender's pecuniary wealth, his psychic well-being, or both. In violating the law, one also risks a reduction in one's wealth and well-being, for conviction entails paying a penalty (a monetary fine, probation, the discounted value of time spent in prison and related psychic disadvantages, net of any direct benefits received), acquiring a criminal record (and thus reducing earning opportunities in legitimate activities), and other disadvantages.

(EHRlich, 1973, p. 523).

From a rational choice perspective, one of the motives for the activities of land guards is economic. The three land guards interviewed were convinced that their activities as land guards paid better than their trades – Yao, who has worked in a private security company, is a mason and an amateur boxer; Mohammed A is a driver; and Mohamed B a subsistence farmer. All three became land guards because the position offered them better rewards. Put differently, those who engage in crime perceive it as work that has the propensity to yield returns that exceed what they earn in the legitimate, competitive market (WILLIAMS; SICKLES, 2002, p. 479). All three work as full time land guards and belong to various networks that allow them to organize shifts, thereby enabling them to take up more than one assignment at a time, and in so doing maximize their opportunities to make more money. At least three of the land guards interviewed had economic motives. In one particular case, as a member of the royal house, the interviewee had witnessed some form of misappropriation by the elders of the Stool. Thus, in his opinion, the way to ensure that he gets what is rightfully his is to engage the buyers of the plots of land directly.

Beyond the economic motives for land guards, fieldwork revealed another motivation from a social exchange perspective highlighted by rational choice theorists. This is the element of approval. Narrating conditions of such extra-economic assignments, the land guards noted the incidence of rightful landowners being robbed of their property by wealthier and/or more politically connected individuals. They suggested that in such situations, they merely step in to right the ills of society. They stress that while any offer of money is not rejected, the payoffs from such assignments tilt more towards approval as a result of fighting for the underprivileged. Such a situation parallels Scott's (2000) analogy that “stealing a car might be rewarding because of the pleasures derived from joyriding and the recognition accorded by fellow car thieves.”

In its simplest form, rational choice theory characterizes individuals as “rational actors who choose actions designed to maximize their own individual interests – the satisfaction of their needs and wants.” Individuals therefore undertake activities which promise rewards that outweigh the cost of such activities (INTERNATIONAL encyclopaedia of the social sciences, 2nd ed., p. 74). The individual, as a rational actor, is expected to make decisions based on an analysis of all available information at the time of the action. In effect, “a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities” (BECKER, 1968, p. 176). Here, the expected utility must be calculated as the expected benefit minus possible cost (where cost includes both financial elements such as fines, and non-financial elements like arrest and incarceration). This therefore means that the rational actor would desist from crime if the perceived cost of the illegal activity would outweigh its expected benefit. Conversely, it means that the rational actor would engage in crime if the expected benefits outweigh whatever cost may be incurred. It is therefore not surprising that despite the existence of the above challenges in the pre-1992 era, the challenge of land guards was almost non-existent. This, it can be assumed, was a result of the military presence in government.

Land guards made conscious decisions to assume the position because they believed it was to their advantage. In other words, having weighed their individual abilities and resources against the opportunities available in the legal and illegal markets, they were convinced that the opportunity in the illegal land guard market was superior. While the above explanation sheds light on the reasons why individuals may become land guards, it does not provide an explanation for the resilience of land guards in the face of the potential consequences.

The primary reason for the resilience of land guards in Ghana is attributable to weak law enforcement capabilities, corruption, and interference in the law enforcement processes. The resilience of land guards can therefore be explained through the rational choice theory (RCT). Land guards are rational actors. In the first place, given the challenges still present in Ghana’s land administration, opportunity exists for work in the provision of illegal security services. Secondly, land guards do not need specialized skills to conduct their operations and so there is no need for investment in education or training. Thirdly, enforcement of the law with regards to land guards is weak. Thus, land guards are not deterred by the possibility of arrest and detention. Yao and Mohammed A indicated that they had both been arrested several times but had never been arraigned before court because their “employers” stepped in. Similarly, Mohammed B, who was in police cells during the interview, expressed optimism that his “master” would be able to “kill the case.” Here, the perceived threat of punishment is almost insignificant as their prior experiences suggest that their crimes go mostly undetected and, when detected, the punishment tends to pale in comparison to the alleged offence.²³

A combination of factors therefore sustains the activities of land guards. These include the demand for their services, the opportunity for remuneration, and weak law enforcement structures that make detection, arrest, and punishment unlikely.

To avoid detection and arrest, land guards have sought to metamorphose into the legal security structures of the state by exploiting the legal gaps between the

traditional and modern state as well as the weaknesses in coordination within the law enforcement sector. Since the issuance of bans and increasingly aggressive efforts by the Ghana police to deal with the situation, land guards have sought to integrate their services into legitimate security service provisions. Land guards have resorted to three main ways of presenting themselves as legitimate security providers filling the lacuna in security service provision for private property.

Currently, some land guards present themselves as members of traditional *Asafo*²⁴ groups and as such, legitimate defenders of their communities and the communities' properties. This reference to *Asafo* groups adds an interesting dynamic to the discourse by attempting to evoke structures of the traditional state to legitimize activities that are antithetical to the modern Ghanaian state. The *Asafo* companies of the traditional state were made up of people from specific families within the community, with defined rules of membership and clear norms guiding recruitment, deployment, and the prosecution of war. However, there has been a corruption of this with persons outside the traditional *Asafo* families being co-opted (not always by the authorized persons designated traditionally to recruit) into the so-called modern *Asafo* groups used for the protection of land. There is thus an exploitation of traditional security structures to avoid arrest.

Other groups of land guards present themselves as members of watchdog committees. Due to the low numbers of police personnel as well as logistical limitations, some community members come together to provide community policing. However, members of watchdog committees must receive clearance from the Criminal Investigation Department (CID) to provide community policing. In a country with very little citizen data,²⁵ it is difficult to conduct background checks from a central location. Due to this challenge, it becomes imperative that the various units of law enforcement cooperate closely in exercises such as background checks so that law enforcement agencies closest to the communities may provide accurate information. However, this has not always been the case, and the central agency of the Criminal Investigative Department approves lists of watchdog committees without necessarily undertaking a background check of the applicants. Consequently, a number of land guards have obtained legal cover as members of watchdog committees.²⁶

Thirdly, land guards are presented as property caretakers whose resort to the use of force is expected to be in self-defence. Yao, one of the land guards interviewed produced a letter from the legal representatives of his client, appointing him as caretaker of a parcel of land. According to him, the appointment letter provided him with the right to be on the property and to question and ward off others who he deemed encroachers.

The security challenge posed by the activities of land guards is further exacerbated by their efforts to exploit the legal security structures to integrate their services into the legitimate economy of Ghana. While their methods of operation remain the same, land guards are rebranding their services as providers of security for private property, an area that is not covered by the police. The exploitation of legitimate structures of security to integrate their services into the legitimate economy of Ghana without compliance with the provisions stipulated in the law creates challenges by undermining the state's security structures.

9 Subordinating the State through land guard activities: A prognosis

There is no doubt that the activities of land guards undermine the state in several regards. As demonstrated above, land guards use illegitimate force to threaten, intimidate, and, in extreme instances, kill their victims. These activities not only challenge the state's monopoly over the use of force but also call into question the state's ability to provide and guarantee the protection to the people. Whilst land guards exist because of the insecurity of land title, their existence and the inability of the state security agencies to effectively address the threats they pose also create fear among citizens. In effect, land guards challenge the effectiveness of the state to protect its citizens and their property and thereby undermine the people's trust in the state. The success of their activities magnifies the challenges inherent in law enforcement within the country and thereby shifts trust from state agencies to themselves. In a way, while land guards may not have a deliberate agenda to supplant state law enforcement agencies, their success rates create a perception of effectiveness and thereby undermine the structures of law enforcement and official mechanisms for dispute settlement in the country.²⁷

Although subtle, there appears to be some level of collusion between some land guards and the state's law enforcement agencies. As indicated above, some land guards have sought to legitimize their activities by disguising themselves as members of traditional *Asafo* groups, watchdog committees, caretakers, and private security providers. Through such disguises, they have obtained refuge under the protective umbrella of these agencies and succeeded in avoiding detection and arrest even though they continue to operate illegally. To further legitimize their activities and prove that they are providing stopgap services, which the police cannot provide, there are attempts to differentiate between "just land guards" and "unjust land guards." All three land guards interviewed claimed only to accept assignments after they have verified the authenticity of their clients' claims. However, they asserted that other groups might accept assignments only for the money involved. The "just land guards" thus work in concert with the police to address the "unjust" land guards. According to Yao and Mohammed A, because they have caretakers, they often arrest land guards and hand them over to the police.²⁸ However, this categorization is really of no practical value as all land guards employ the same *modus operandi* in the execution of their duties – the use of illegitimate force. The classification therefore only serves to distinguish between those who collude with the police and those who do not.²⁹

Due to a lack of information, it is impossible to conclusively state that land guards corrupt law enforcement agencies. However, anecdotal evidence suggests that the employers of land guards often pay to free arrested land guards on bail and "kill" the case.³⁰ It was stated, however, that persons with political clout are able to call police stations to demand the bail of some land guards.³¹ As mentioned earlier, some land guards provide protection services for politicians during election campaigns with assurances of employment once

they win. Although the promise of employment is usually unfulfilled, land guards can still rely on their patrons when they get into trouble.³²

10 Addressing the challenge of land guards: Some options for consideration

Developing appropriate responses to the challenge of land guards requires addressing both the demand and supply sides. According to Skaperdas, organized crime exists “because of the existence of a power vacuum and the shortage or absence of ultimate enforcement” (SKAPERDAS, 2001, p. 108). This assertion is true for land guard services. Thus, responding to the menace of land guards requires a combination of effective laws, efficient and accessible mechanisms of law enforcement, and effective punishments that hopefully serve as deterrents.

In looking at the path forward, there is first the need to further popularize and simplify the processes of verifying land titles. Despite the reform in land administration, the processes are not well known by the ordinary Ghanaian citizen. Many people still believe that long delays associated with trying to obtain information at the Lands Commission still exist. Consequently, individuals continue to procure lands without verifying validity of title, and buyers still fall victim to multiple sales of land.

Furthermore, there is the need to intensify the cultivation of professionalism within the ranks of the Ghana police. Despite the efforts of the Ghana police service to address the challenge of land guards, they have not experienced much success because of the lack of coordination, effective research, and logistics. Their challenge with addressing land guards is not different from the challenges faced in addressing other crimes. The lack of networked systems means that there is the need for considerable coordination between the various units in the police service to be able to outwit criminals. Yet, there is very little coordination. The CID, for instance, provides clearance for watchdog committee members without consulting the police within the local communities and in the end provides clearance for land guards posing as members of watchdog committees.

In addition, it is also important to provide the police with surveillance technologies that enable them to track the activities of land guards in real time to be able to provide timely responses. According to the police officer interviewed, it is often difficult to locate land guards even when there is intelligence because they operate in the bush without easily accessible roads. Without appropriate vehicles, it is difficult to navigate through such roads, resulting in the land guards’ evasion of law enforcement agencies.

It is equally important to provide an effective intelligence-gathering system for law enforcement (QUANTSON, 2003, p. 45). A number of alleged armed robberies and murders are land-related and undertaken by land guards. Yet, the links are not always made. Interestingly, individual police officers have considerable information based on research conducted over a long period of time. However, this information is unavailable to the police service as an organization.³³

11 Conclusion

In this paper, we have discussed the nature of land guard activity and its implications on human rights. We also examined the rationale for the seeming resilience of land guards in the face of efforts to stop their activities. It has been noted that land guards are not mere criminals but rather members of organized criminal groups who utilize illegal means, including violence, to attain their goals. The profile of land guards suggests that they are mostly unemployed youth with little or no formal education and employable skills. It has been established that land guards are rational actors who take advantage of opportunities available in the illegal economy to earn incomes. The resilience of land guards in the face of the country's efforts to prevent their activities is explained through rational choice theory: given their resources and abilities, the expected benefits of being a land guard outweigh the benefits that would accrue if the same time and energy were expended on other activities.

In spite of Ghana's relative successes in advancing human rights, the activities of land guards undoubtedly inhibit progress in this regard. While it may not be generalized that the state is subordinate to the activities of land guards, the extent to which the activities of these land guards are conducted in the open creates the perception that the state, through its law enforcement agencies, is unable to deal with such issues. That land guards do not consider detection, arrest, and punishment as sufficient threats compounds the impression that the state is subordinate or, at least, tolerant of sub-state actors engaged in activities that negatively affect the human rights of the people living under the state. This belief is counterproductive to the protection of human rights within Ghana. If the gains in advancing human rights within the democratic system are to be sustained, the state must adopt a more proactive stand against the phenomenon of land guards in Ghana.

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NOTES

1. According to section 38 (2) of the Police Services Regulation Act 1970 (LI 1579) private security organisations are described as "Any organisation which undertakes private investigations as to facts or the character of any person, or which performs services of watching, guarding, patrolling or carriage for the purpose of providing protection against crime, but does not include the Police Service, the Prisons Service or the Armed Forces of Ghana.
2. The illegal nature of the land guard industry means that those who work in it are reluctant to admit that they work as land guards. As a result of the illicit nature of their work, most of them are unwilling to grant interviews. As a result, snowballing sampling was used to identify the three interviewed. Efforts to get others were however futile. Two of those interviewed, Yao and Mohammed A work primarily in Amasaman, a suburb of Accra with new estate developments. Mohammed B works in the relatively affluent area of East Legon. At the end of the interview, the interviewees confessed that the names they provided were pseudonyms.
3. The Focus Group Discussion was held in Sapeiman on August 26, 2012. However, due to the killing of a land guard seventeen days before the interview, none of the participants was willing to give out his name.
4. Paul Avuyi is a retired police officer who provided insights into the challenges confronting the Ghana police service in their efforts to address the menace of land guards. He was recommended by a serving police officer who was not willing to grant an interview.
5. The serving police officer serves in Amasaman, one of the developing suburbs of Accra. His area of operation has witnessed several incidents of land guard activities. However, as a serving police officer, he requested anonymity.
6. This estate developer employs the services of Yao and Mohammed A. He arranged the meeting for the interview but also requested anonymity.
7. Tsikata suggests that despite the challenges faced by the democratic dispensation, it "has had a positive impact on investment and growth". For more on this, see: TSIKATA, Kwaku G. Challenges of economic growth in a liberal economy. In: BOAFO-ARTHUR, Kwame (Ed.). 2007. *Ghana: one decade of the liberal state*. London: Zed Books. p. 49 –85.
8. In Ghana, chiefs in the southern parts occupy stools whilst their counterparts in the Northern parts occupy skins. During the enstoolment/enskinment of a new chief, the kingmakers in the Southern part of Ghana put the chief on the stool three times as part of the coronation. In the Northern parts of Ghana, the chief is placed on a skin thrice. Thus, the stool (in the South) and the skin (in the North) are the symbols of authority and legitimacy of Ghanaian traditional government.
9. In some places, land is held in trust for the people by the priest who tends to be both the secular and spiritual head. For instance, land among the *Konkombas* in Northern Ghana is held in trust by the *tendana*- the earth priest-, who is in charge of its appropriation.
10. In recent times, the Asantehene, one of the foremost paramount chiefs in Ghana has destooled a number of his sub-chiefs for acting out of their mandates with regard to the sale of land. Some of these chiefs are the Atwimahene destooled in November 2009 and the Abrafohene, destooled in October 2009. The office of the Asantehene keeps a record of such destoolment on <<http://www.manhyiaonline.org>>. Last accessed on: Nov. 2016.
11. The process of verifying land title has been somewhat simplified due to the computerization of the Lands Registry although the staff of the registry sometimes create artificial delays to enable them collect bribes.
12. In 1994, the government of Ghana started a process for the development of policy documents needed effective land management and administration in Ghana. In 1999, a National Land policy was adopted. It provides among others, the establishment of a Land Administration Project, which is expected to among several others, "improve the land registration and titles system in terms of security and reduction of turnaround time for service delivery". For more on the project see "Land Administration Project is on course". (Available at: <<http://www.ghanalap.gov.gh/index1.php?linkid=239&archiveid=46&page=1&adate=01%2F08%2F2007>>. Accessed on April 26, 2012; "Ghana: Land Administration Project 2". Available at: <<http://www.ghanalap.gov.gh/>>. Last accessed on: 26 Apr. 2012).
13. Currently, the verification of land title from the Lands Department takes approximately one week. The Charter of the Land Title Registry spells out the requirements for the registration of titles, conducting official searches, the registration of mortgages and conducting arbitration on disputed lands. The New Charter of the Land Title Registry is available at <http://www.scribd.com/doc/18943433/Land-Title-Registry-Ghana>. Last accessed on: 26 Apr. 2012.
14. According to the land guards, they are either paid in cash or with parcels of land. Payment may range from GHC20, 000 for ten people and above, depending on the size of the land. It appears that payment is calculated on the size of the land to be guarded.
15. Interview conducted with land guards, 25th March 2009. Although the two denied involvement in any hired killings, they gave instances where alleged armed robbers were in fact hired assassins.
16. Most land guards are young unemployed persons with very little or no education, little or no skills and instances where they have acquired some skills, these

are very basic and fetch little income in the legal market. All three interviewees suggested that they are land guards because of the lack of alternative opportunities.

17. This refers to the warriors of a particular community. They are usually constituted from the youth of the community and mostly serve as protectors of that particular community.

18. Although Yao and Mohammed indicated that they work with the chiefs of the Amasaman area, they also added that they act as caretakers of land for private individuals outside of the jurisdiction of the Amasaman chiefs and had undertaken "missions" in Aburi, Tarkwa and Aflao.

19. These are high-density areas in The Greater Accra region, South of Ghana noted as a fertile ground for breeding unemployed youth.

20. Yao indicated that he was a trained mason, an amateur boxer and had also worked with a private security company. He quit his job as a mason because he could not find work and started work with a private security company from which he quit again because of the low income he received. Mohammed A stated that he was a trained driver who became a land guard because of the unavailability of work. Mohammed B indicated that he was a returnee – having been deported from Germany. His efforts to return to Europe had failed and since he had neither formal education nor vocational training, he had not been able to find a job. In addition to guarding land, he stated that he had a subsistence farm and also kept some cattle.

21. The policeman from Amasaman stated that some of the land related killings have been wrongly classified as armed robbery related deaths.

22. Interviewees indicated that there was the "UN Group" which was the most feared; the Ashiaman Group and the Nima Group. The existence of the Ashiaman and Nima Groups is confirmed in GNA, "Police Arrest 23 Landguards" 07 October 2004 available at: <www.modernghana.com>. Last accessed on: Nov. 2012.

23. A fuller discussion on how risk perceptions can deter or encourage crime is discussed in Ross L. Matsueda, Derek A. Kreager, David Huizinga, "Deterring Delinquents: A Rational Choice model of Theft and Violence" in *American Sociological Review*, vol. 71, No.1 (Feb., 2006) pp. 95 - 122

24. The Asafo Groups are the traditional armies of the traditional state. In pre-modern Ghana, each community had its own Asafo Company referred to by different names. Their duty was to defend their communities from attacks. Today, they are to a large extent, merely symbolic relics of the old order.

25. Ghana began a national biometric data collection exercise in 2011 for the issuance of National identification Cards. Before then, there was no database with addresses and unique identifiers such as fingerprints for easy detection.

26. Interview by Policeman from Amasaman, Accra. Yao produced a copy of his clearance certificate to operate as a member of a Watch Dog Committee. The certificate was confirmed to be authentic by the police officer who accompanied the team to the interview.

27. According to the police officer interviewed, most people who recruit land guards alluded to the fact that their resort to land guards was as a result of their lack of trust in the police system. The estate developer who employs Yao and Mohammed A also confirmed that his resolve to use land guards stemmed out of the slow and unpredictable nature of law enforcement in Ghana.

28. Yao had a letter from the legal representatives of a client appointing him as caretaker over a parcel of land. Although he admitted that he performed the same functions as other land guards, he did not consider himself a land guard in the performance of his duties to that client because of his appointment letter.

29. The police officer from Amasaman confirmed that the police sometimes obtained and used intelligence information provided to them by land guards although he was hesitant to admit that there was collusion between law enforcement agencies and land guards.

30. Mohammed B was in cells at the East Legon police station when interviewed. When questioned on his fate, he assured the interviewers that he was confident that his employer would get him out. All three land guards indicated that they had been arrested several times but had never been prosecuted.

31. The police officer from Amasama stated that they often get "orders from above" to set some arrested land guards free. This according to him frustrated the efforts of the police especially as the same group of land guards continue to operate with impunity.

32. Mohammed A stated that he had provided bodyguard services for prominent persons in both the ruling and the opposition parties. However, he has not as yet been offered the appointment promised. However, he has the contact details of some of the politicians and relies on them to get him bail whenever he was arrested.

33. Although the policeman had a wealth of documented information, he indicated that his efforts to provide it to the police service were not welcome.

RESUMO

Desde o retorno do regime constitucional, Gana intensificou os esforços para a promoção dos direitos humanos. Entretanto, há muitos desafios em relação a defesa dos direitos de propriedade, especialmente quanto a posse da terra. Esse desafio, nascido das tensões entre o Estado moderno e o tradicional, é exacerbado pela pluralidade dos sistemas legais vigentes, bem como pelos desafios da rápida urbanização e do alto desemprego, especialmente na região da Grande Acra. O sistema liberal de mercado promovido pelo retorno de Gana ao regime constitucional levou a mais investimentos em terras e demanda por mais segurança nos títulos de propriedade. Isso levou a tentativas de realização de uma reforma agrária. Apesar delas, a incapacidade do Estado de fazer a lei ser respeitada significou que o mercado fundiário continua sendo um campo minado. A consequência foi o surgimento de provedores de serviços de segurança privada que empregam meios ilegais para proteger terras e propriedades fundiárias. Conhecidos popularmente como guardas da terra (landguards), esses provedores de segurança são o pesadelo dos proprietários de terras na região da Grande Acra. Usando fontes primárias e secundárias, o presente estudo examina a lógica por trás da demanda e da oferta dos serviços dos guardas da terra e as implicações de tais serviços para o direito a propriedade em Gana. O texto conclui que a fraca capacidade de policiamento do Estado e a corrupção generalizada nas instituições de administração fundiária facilitam os conflitos nos mercados fundiários e incentivam a busca por mecanismos individuais de segurança. Argumentamos que, enquanto tais medidas ilícitas de segurança forem utilizadas, a autoridade do Estado e o seu monopólio do uso da força continuarão irrelevantes no setor fundiário.

PALAVRAS-CHAVE

Subordinação do Estado – Guardas da terra – Direitos humanos

RESUMEN

Desde la restauración del Estado de derecho, Ghana ha intensificado los esfuerzos por promover los derechos humanos. Sin embargo, persisten varios desafíos respecto de la promoción de los derechos de propiedad, en especial en relación con la propiedad de la tierra. Este desafío, surgido de las tensiones entre el Estado moderno y el tradicional, se ve exacerbado por la pluralidad de sistemas jurídicos en vigencia así como también por los desafíos planteados por la rápida urbanización y el elevado índice de desempleo, especialmente en la región del Gran Acra. El sistema de libre mercado que se promueve en Ghana desde el retorno al Estado de derecho trajo aparejado un aumento de la inversión en tierras y una demanda de mayor seguridad respecto de su titularidad. Todo esto condujo a intentos por realizar una reforma del sistema de tenencia de la tierra. La incapacidad del Estado para imponer sus reglas y lograr su cumplimiento ha hecho del mercado de la tierra un campo minado. Como consecuencia, han surgido proveedores de servicios de seguridad privados que emplean medios ilegales para proteger la tierra y la propiedad inmueble. Comúnmente conocidos como guardias de la tierra, estos proveedores de servicios son una pesadilla para los propietarios de tierras en la región del Gran Acra. Con fuentes de datos primarias y secundarias, el presente artículo analiza los motivos de la demanda y oferta de estos servicios de seguridad y las implicancias que tienen para los derechos de propiedad en Ghana. Se concluye que la falta de poder del Estado para hacer cumplir la ley y la corrupción desenfrenada que afecta a las instituciones de administración de la tierra facilitan los conflictos en los mercados de la tierra y alientan el recurso a mecanismos de seguridad individuales. Se sostiene que en tanto tales medidas de seguridad ilícitas logren su propósito, la autoridad y monopolio del Estado sobre el uso de la fuerza seguirá careciendo de toda relevancia en el sector de la tierra.

PALABRAS CLAVE

Subordinación del Estado – Guardias de la tierra – Derechos humanos



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ABSTRACT

In this paper I analyze the extent to which international resolutions about women's roles in security really reflect women's interests concerning the matter.

Although international officials claim that the role of women is very important in preventing conflicts, reconstructing peace and rebuilding societies in post-conflict zones, in reality women only have a formal role, both as part of the army and as civilians in conflict zones. International laws see women as victims, not as important actors who are equal to their male counterparts in achieving these goals.

In the first section, I will present the effects of militarization on women's lives. In the second, I will analyze, through a feminist lens, international resolutions and alternative security strategies.

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KEYWORDS

Women in military institutions – International resolutions – Gender – Defense and security.



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THE INEFFECTIVE RESPONSE OF INTERNATIONAL ORGANISATIONS CONCERNING THE MILITARIZATION OF WOMEN'S LIVES

Cristina Rădoi

1 The effects of militarization on women's lives

After the events of 9/11, the defense policies of most states have focused mainly on their militaries. After President George W. Bush's doctrine of preemptive war was adopted, the militarization of societies throughout the world increased. Thus, "the logic of military institutions permeated...language, popular culture, economic priorities, education systems, government policies, and national values and identities" (SUTTON;NOVKOV, 2008, p. 4).

Once the United States of America felt it had lost its supremacy, it began a long and painful process to regain its global military and economic dominance. Bush's preemptive war doctrine, very well expressed by the statement, "Either you are with us, or you are with the terrorists" (BUSH, 2001), created unbearable conditions for the civilian population, mainly women and children, and even for military personnel. The consequences of the preemptive war doctrine have affected people all over the world, from Americans and citizens of ally-states, whose public funds have been redirected toward financing military power [...] "they also jeopardize their own internal political processes in that their alignment with U.S. dominance is often at great cost to their citizens. [...] Allied governments support this war despite their own people's opposition to their nation's involvement" (KIRK, 2008, p. 38). Instead of using the funds for developing national projects, the Bush administration endangered civilians' lives in the conflict zone through unjustified imprisonment or atrocities in the name of democracy and human rights (SUTTON;NOVKOV, 2008, p. 9-11). Therefore, the atrocities of Guantánamo and of Abu Ghraib "reinforce the notion that some lives are more expendable and that some deaths are just inevitable" (LEE, 2008, p. 58-59).

Notes to this text start on page 184.

The United States claimed that it pursued the war on terror initially for its citizens' security, and when this cause became unconvincing, the reasoning shifted to America's duty to removing despotic regimes and rescuing Arabian women in the name of human rights. Therefore, a process of imprisonment started in the U.S. as well as in Iraq and Afghanistan, often without any real proof that those imprisoned were Al Qaeda members. The Bush administration also started attacks in Afghanistan without any proof that terrorists were still living there (SUTTON; NOVKOV, 2008, p. 39). The proportionality of the defense action, one of the principles of the "just war" (WALZER, 2004, p. 10) theory utilized by the United States, was not respected. Even if United States military action was a response to the 9/11 attacks, it led to atrocities and harassment against Afghans and Iraqis, and even against Muslims of other nationalities.

The brutalities and abuses inflicted by both male and female military personnel in Guantánamo and Abu Ghraib are yet more violations of human rights principles. The image of women as perpetrators of violence challenged the assumption of women's association with peace, and furthermore "race and nation 'trumped' gender [...]. White U.S. women were among the perpetrators (appropriating the masculinist role); Iraqi men were violated (forced into the feminized role)" (KIRK, 2008, p. 43). This association reinforces patriarchy by accepting the 'protector/protected' myth (ELSHATIN, 1995; TICKNER 2001).

The type of war imposed by Bush's doctrine relied on "a sexualized project of 'manning up'". In order to achieve their purpose of toppling the governments of Afghanistan and Iraq, the Bush Administration engaged in a project that subjected Afghani and Iraqi citizens to displacement, disability, abuses, torture and even death. This "manning up" project built a new type of citizenship. The duty of a "true" citizen was to value and support the war on terror and to embrace the national manhood (MANN, 2008, p. 180-181).

Feminist literature examining militarization and the characteristics of war shows that the construct of manhood has been built on the devaluation of femininity (ENLOE, 1990; STEANS, 1998; TICKNER, 2001). Militarism legitimizes masculinized men as the protectors, while feminized persons are labeled as weak, emotional and incapable (ENLOE, 2004, p. 154). In order to build manhood in war, soldiers are taught to repress all their supposedly feminine characteristics.

As we can see, the debated stereotypes of "just warriors and beautiful souls" or the myth of "*protector/protected*" (ELSHATIN, 1995; TICKNER, 2001) still prevail in society, embodied in the image of the salvation of Middle Eastern women holding their children from their enemies. This image has been used as an effective justification to manipulate public opinion regarding the necessity and importance of a "just cause" (SJOBERG, 2008, p. 4). In promoting democratic principles, Western states are using the protection of women and children as a justification for fighting a man's war on terror. The ways *a father protects his family*¹ and Western states attempt to protect the whole world are similar. Western states are an impersonation of the patriarchal father, which justifies their presumed warrant to ensure security (SCOTT, 2008, p. 112).

Yet the effects of war, including economic deprivation, displacement, poverty

or gender based violence, disproportionately affect women and children, and no conflict is gender neutral (SCHIRCH; SEWAK, 2005, p. 97). Statistics indicate that 80 to 90% of war victims are civilians, women and children. There are 22 million refugees in the world and 25 million people who have been relocated to camps due to the destruction of their homes (SHAW, 2003, p. 239-240).

Because conflicts are not gender neutral, feminists have pointed out how “militarism jeopardizes the environment and the health of individuals, posing a particular burden on women as caregivers” (SUTTON; NOV KOV, 2008, p. 17). In war-torn countries, conflicts have destroyed agriculture and forests, water and fuel supplies, basic infrastructure and the natural environment. Women have been the most affected, because they are the ones engaged in securing the survival of their families during and after the conflicts. These conflicts, as with all military missions, are consuming valuable resources that could be directed towards more worthy projects, like health or education, and also determine the extent of “environmental degradation and health problems even during peacetime” (SUTTON; NOV KOV, 2008, p. 17).

The policies of the U.S. military concerning the war on terror are, on the one hand, a strategy to secure its capitalist interests abroad and, on the other, a manipulative means for the Bush administration to gain support for all of the drastic measures imposed for the sake of war. These policies affect inequalities both in the U.S. and abroad, “creat[ing] unbearable conditions of social tension, violence, and crisis in many developing countries”(Frances Fox Piven apud SUTTON; NOV KOV, 2008, p. 17).

Human history has been dominated by war and this constant presence makes people believe that it has become unavoidable and even extremely necessary (FRANCIS, 2004, p. 5-9). Instead of allowing for war, even as a last resort, Francis holds that citizens must value moral precepts characteristic to humanity and choose not to support war. Thus, Francis proposes “a constructive approach of human relations,” which should be controlled by the positive values of humankind, such as respect for dignity and human needs. In her view, this constructive approach is the valid alternative for a world imbued with war and self-destruction (FRANCIS, 2004, p. 5-9).

Militarization is invading every activity of people's lives, starting with the media and continuing to the education system. Portrayed in television news as the brave acts of soldiers and the women bearing their children they save or in movies based on a hegemonic masculinity which, in the end, will save the world, militarization has become an internalized value (SUTTON; NOV KOV, 2008, p. 19). Media campaigns that present news according to an “Us vs. Other” dichotomy dehumanize the enemy and justify a militarized society. Intentionally providing only the number of victims from one side omits the human losses of the enemy, making it seem as though their losses do not even exist. The news media utilizes oppositional language like “our boys” against “the enemy”; American soldiers have human faces, but their opponents do not (FRANCIS, 2004, p. 15-19).

This type of argument is very seductive because it expresses the power relations between states and makes the presumably “just cause” seem valid. The dichotomy of “Us vs. Other” is specific to the pattern of power and domination,

and speaks about “winners and losers, about controllers and controlled” (FRANCIS, 2004, p. 59). Moreover, this type of duality is specific to gendered power relations because it imposes a gender hierarchy. The power relations between states, as well power relations between genders, rely on the pattern of trying to dominate “the other”. These types of power relations are specific to patriarchal societies.

The language of war permeates our lives and is internalized as normal and acceptable. The militarization of the English language also distracts American citizens from the realities of war (KIRK, 2008, p. 41). All technical expressions used to refer to war are neutral because they hide and minimize the real consequences of war and do not express the real damage that is implied (FRANCIS, 2004, p. 19). Therefore, expressions like “peacekeepers” represent, in fact, “rocket-launched intercontinental ballistic missiles;” patriots are “smaller surface-to-air missiles;” national security is supposedly a justification for fighting the war on terror (KIRK, 2008, p. 41). “A bloodless phrase such as ‘collateral damage’ refers to the destruction of homes and hospitals, and to civilian casualties, an unfortunate side effect of bombing so-called military targets” (KIRK, 2008, p. 41).

This type of language not only disguises atrocities committed against civilians, but also provides moral support for these actions, because “in killing ‘the enemy’ we are doing something good, not committing homicide” (FRANCIS, 2004, p. 15).

This type of dualistic thinking is specific to all hierarchical systems, such as militarism, colonialism, racism, jingoism or sexism, and it relies on opposing attributes: culture/nature, mind/body, male/female, self/other (PLUMWOOD, 1993). Among the ideologies mentioned above, “sexism is one of the oldest and is universal” (MIROIU, 2004, p. 50, 172). All branches of feminism agree that this kind of ideology relies on dualistic attributes, sustained by the superiority of one group over another and contributes to the dehumanization of “the other.” Inequalities and discrimination can be found at the intersections between class, nationality, race and sexuality, but gender is circumscribed to all of these. Therefore, discrimination against women can take multiple forms; “gender inequality remaining the last one of all inequalities” (PASTI, 2003).

The educational system is another mechanism that morally justifies war. It teaches people from an early age about heroic battles and the building and rebuilding of nations, but forgets also to teach about the hard experiences of people in war, the carnage of battle and the grand scale of human destruction. Art also portrays war: in paintings or sculptures placed in city centers where “men on horseback brandish swords triumphantly, honored, it seems, for their naked, violent power, rather than their humanity” (FRANCIS, 2004, p. 11).

We are socialized to accept and honor a statue memorializing a national hero disabled in war on a famous boulevard, but not a statue of a disabled pregnant woman. Thus, Marc Quinn’s sculpture, “Alison Lapper pregnant,” evoked significant debate in 2005 and 2006 regarding its placement alongside statues of male national heroes. It seems that society has internalized the habit of valuing only the kind of courage that is still represented by “the malestream” (KENNEDY-PIPE, 2007, p. 79).

2 Theoretical framework

This section of the paper outlines several theoretical approaches to security, like the traditional approach, the Critical Security Studies approach and the feminist approach.

Even if realism and its principles do not represent the main theoretical approach to international relations, all of the theories discussed in this section are based on its principles. Though theory determines practice in general, in international relations the opposite occurs (KEOHANE, 2005, p. 406). Thus, realist orthodoxy, with its principles concerning the international system, nation-state and maintenance of peace and security, is still persistent (GOLDMAN, 2005, p. 355). As is evident, theories evolved from state-centered approaches to others that similarly focus on institutional mechanisms while admitting the role of actors other than the State.

While traditional theories focus on state security obtained by defending state sovereignty against any kind of threat, there are some new theories, such as Critical Security Studies or Human Security, which focus on ensuring the security of the community or of the people through human emancipation or empowerment (SMITH, 2005, p. 41). These new theories add a moral dimension to the concept of security. Even though the theory of Critical Security Studies considers that a shift from state security to a broader definition of security, referring directly to society, must be made, it maintains the traditional framework, including “threats that locate danger, referents to be secured, agents charged with proving security and means by which threats are contained” (WIBBEN, 2008, p. 457).

Human Security, on the other hand, proposes a broader understanding of people's security by including economic, food, health, environmental, personal, community and political security (UNITED NATIONS DEVELOPMENT PROGRAMME, 1994, p. 24-25). Traditional theories, therefore, propose a negative definition of security concentrating on the lack of threats toward the state, while Human Security defines security positively, concentrating on the welfare and the empowerment of people (STEANS, 1998).

The feminist theory of international relations also criticizes the traditional perspective on security by contesting the notion of the state as an abstract entity and criticizing its advocates for intentionally omitting gender from their analysis (TICKNER, 2001, p. 22-27; ELSHTAIN, 1995; ENLOE, 1990). Feminist approaches offer a new take, developing a constructive pluralism by presenting the unheard voices of women in this area (COCKBURN, 2007).

In the attempt of proposing an alternative to traditional theory, Elshtain (political philosopher and Laura Spelman Rockefeller Professor of Social and Political Ethics at The University of Chicago), deconstructs war discourse, highlighting its construction of stereotypes for both men and women. According to Elshtain, men are seen as Just Warriors and women as Beautiful Souls (ELSHTAIN, 1995). Men are both subjects of war and its narrators, while women are told to remain in the private realm; therefore, their statute of person in need of protection becomes the reason for men's wars (SYLVESTER, 2004, p. 4). Feminists have argued that by using very technical language, these theories do not take into account human lives, and therefore

women's role should be to offer a moral perspective on war (ELSHTAIN, 1995, p. 75).

Elshtain was the first to point out that women's association with peace and men's association with war benefit neither. These stereotypes disadvantage both pacifistic men and warlike women by claiming that a woman's place is in the private realm as a non-combatant and a man's role is to be a warrior (ELSHTAIN, 1995, p. 4). Although Elshtain has criticized these traditional roles, she does not support women's admission into armies, arguing that they will only represent trophies and not achieve the real power as they believe they will (ELSHTAIN, 1995, p. xi).

For Cynthia Enloe (Research Professor in the International Development, Community, and Environment Department at Clark University in Worcester, Massachusetts), a gender lens is an important analytical instrument, which highlights gender relations as power relations that persist in every aspect of state policy. She emphasizes that though women's experiences are invisible, not having been taken into account for their good services offered to their communities, women play a very useful role in sustaining international relations through their unacknowledged work in tourism, diplomacy, agriculture, textiles, domestic services, or work on military bases (ENLOE, 1990, p. 1-5). Men's masculinity is constructed and maintained in correlation with women's sexual services. Therefore, the embedded patriarchy in international relations sexually objectifies women for the proper development of activities (ENLOE, 1990, p. 197). Even though women contribute to the development of international relations, they are seen as merely victims, whether in a conflict or in the armed forces (ENLOE, 2000, p. 235-244). Enloe considers that the concept of power in international relations must also include women's contributions to the field. Furthermore, she underlines the importance of a reconstructed concept that will eliminate power relations (ENLOE, 1990, p. 195).

J. Anne Tickner, a feminist Professor of International Relations at University of Southern California, adds a few important criticisms of traditional theories of international relations and security by considering that it is necessary to also value women's roles in maintaining peace and promoting security, not only the roles of soldiers and officials (TICKNER, 2001, p. 37, 127-130). She has argued in favor of institutional changes, including expanding women's access to the army and increasing their role in achieving sustainable global peace, insisting that women can offer a different perspective on war gleaned from their positions as mothers, wives and citizen-defenders² (TICKNER, 2001, p. 60). She has also criticised the concept of citizenship, suggesting that it is imbued with a hegemonic view of masculinity and correlated with a devalued femininity. The social construct of devalued femininity perpetuates the "protector/protected myth," which has allowed men to subjugate women because of their presumptive vulnerabilities (TICKNER, 2001, p. 25-28, 34-35).

Tickner holds that a feminist perspective that values the relational universe could contribute to the reconstruction of the concept of security. A relational universe imposes the necessity to cooperate with "the other" (state, organization, the proximate community). Therefore, that kind of universe is different from a dichotomous or a competitive kind. To this end, she argues that a security approach which relies on other states' insecurity is unsustainable. A feminist approach to security would not consider an abstract state but rather human beings as referents (TICKNER, 2001, p. 83).

3 Security strategies from the perspective of NATO and UE

As mentioned above, achieving security is seen as synonymous with achieving military security. States have monopolies on violence and can legitimately use it in an emergency. Given these conditions, states' sole objectives are to preserve their territory and sovereignty and to legitimately use violence to eliminate any threats to their national interests (CHENOY, 2005, p. 168). Citizens' security is perceived as equivalent to state security (STEANS, 1998, p. 104-107).

9/11 led to a change of perspective concerning the approach to security, even for U.S. allies. Bush's doctrine of preemptive war was an incentive to believe that the security of the whole world depended on the war on terror. In the name of freedom and security, the Bush administration invoked Article 5 of the Washington Treaty, which states that NATO allies must assist each other against attacks: "NATO will deter and defend against any threat of aggression, and against emerging security challenges where they threaten the fundamental security of individual Allies or the Alliance as a whole" (NATO, 2010, p. 7).

By obeying the American design of the war on terror, "allied governments trade national sovereignty for U.S. support and protection, real or imagined" (KIRK, 2008, p. 39). Citizens of allied states have been affected when large parts of their nations' budgets, ordinarily allocated to promoting equal access to education, health care, politics or economics, were redirected to defense. In this way, allied governments lost the support of their electorates. Being a member of the NATO Alliance implies providing a large budget for military expenditures, because member states must be in "a continuous process of [military] reform, modernization or transformation" (NATO, 2010, p. 9). Consequently, when states cut budgets, structural inequalities are reinforced and militarism imposes structural violence (CAPRIOLI, 2004, p. 412-413).

The duties that NATO assumes in order to achieve security for all its members are collective defence, crisis management and cooperative security (NATO, 2010). NATO fulfills these duties by using all political and military means necessary. NATO's Strategic Concept is still based on the principles of traditional approaches to international relations, which see the international system as anarchic and hostile, and therefore conclude that state sovereignty and security can be achieved only by gaining military power (CHENOY, 2005, p. 168; TICKNER, 2001).

Even assuming that crisis management and cooperative security could amount to real benefits for both allied and non-allied citizens, if the aims of NATO's operations continue to be the achievement of "an appropriate mix of nuclear and conventional capabilities," overall security will continue to be endangered. NATO will not encourage disarmament as long as NATO itself remains a nuclear alliance and as long as its core elements remain:

The maintenance of an appropriate mix of nuclear and conventional forces, the maintenance of the ability to sustain concurrent major joint operations and several smaller operations for collective defense and crisis response, [sic] developing and maintain robust, mobile and deployable conventional forces.

(NATO, 2010, p. 6-14).

There is a strong contradiction between the “supreme guarantee of the security which is represented by the strategic nuclear forces of the Alliance” on one hand and the assumed purpose of preventing conflicts and disarmament policies on the other (NATO, 2010, p. 14, 20, 23).

NATO collaborates with other actors like the UN and EU to maintain peace, stability and security in the world. Yet even if NATO were to declare that it had accepted the new measures adopted in the Lisbon Treaty concerning the European Security and Defense Policy (ESDP), over the years, there would have still been some tensions between NATO and the EU regarding EU capabilities (VAN HAM, 2000, p. 215).

The ESDP’s goals are to prevent conflict and to participate in the reconstruction of post-conflict areas by providing civilian and military capabilities in the following areas: police forces, the rule of law, civilian administration and civil protection capacities. The Lisbon Treaty marked a step further in achieving the ESDP by creating the position of High Representative of the Union for Foreign Affairs and Security Policy, adopting The Charter of Fundamental Rights of the European Union and ratifying the EU Charter of Fundamental Rights. Even though significant changes concerning EU defense have been made, power over military capabilities remains at the national level.

Just like NATO, the European Union considers terrorism and the proliferation of weapons of mass destruction to represent two of the biggest threats to global security. However, the EU also considers organized crime, state failure and regional conflicts equally important threats to which sufficient attention should be paid to avoid an explosion of conflicts. Therefore, one of the European Security Strategy (EES) core principles is achieving security by “spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights” (EUROPEAN UNION, 2003, p. 10).

Given the type of threats menacing global security, the European Union advocates constant action towards conflict and threat prevention. The EU admits that none of the threats mentioned above can be eradicated without concerted economic, political, judicial, military, police and humanitarian efforts (EUROPEAN UNION, 2003, p. 7-11). If “security is a precondition of development,” then it mandates a range of activities, from diplomacy, negotiation and trade to development and reconstruction (EUROPEAN UNION, 2003, p. 2). The European Union is trying to achieve the security of its citizens by developing programs that promote equal opportunities, justice and the protection of human rights.

If, prior to the election of President Obama, NATO relied on developing its ‘hard military capabilities’ and the EU, its ‘soft capabilities,’ afterwards, both adopted a shift to ‘smart power.’ While ‘hard power’ consists of constraining measures imposed by military, economic and financial powers and ‘soft power’ include measures such as diplomacy, negotiation and economic and social provisions for reconstruction, the concept of ‘smart power’ combines the characteristics of both to construct an ‘integrated strategy’ (CSIS Commission on Smart Power apud LECOUTRE, 2010, p. 4-5).

Contrasting the NATO Strategic Concept (NSC) and the European Security

Strategy, the ultimate goal for the former is state security while the goal of the latter is the security of the European Union's citizens. The EES considers all sorts of threats, explaining the interdependent processes among them and offering valid solutions for confronting them. The EES's focus on 'soft capabilities' addresses all sorts of problems that can affect citizens' security and argues that the exclusive use of a military approach is not sustainable.

The abstract qualities of 'hard' and 'soft', referring to the capabilities of these organizations' capabilities, are the embodiment of general patriarchal thinking which defines as valuable a masculinized approach to the military and a feminized approach to civilians. Neither strategy makes any explicit reference to gender, but instead assumes the gender neutral approach that has long been criticized by feminists for disguising a masculine perspective (HUDSON, 2005, p. 157; TICKNER, 2001). Even though none of the strategies refer directly to women, the NSC is a masculine and militarized approach to security, while the EES is less-militarized because of its citizen-centered nature, being a version that lies between a militarized perspective and a Human Security approach. A feminist perspective on security could create a sustainable partnership with the Human Security approach, extending the basic understanding of this concept toward the inclusion of specific concerns of women (HUDSON, 2005, p. 157).

Concerned with social cohesion, equal opportunities and gender equality, the European Union is an important partner for those fighting against gender-based violence. Its "feminine political culture," which is characterized by democracy, confidence and participation, could provide good support for integrating gender into mainstream security and for constructing a perspective that is more inclusive of women's interests in the field (Hubert apud LICHT, 2006, p. 210).

4 Feminist critiques to international resolutions regarding women, peace and security³

One of the most important moments in addressing women's security was the adoption of UN resolutions 1325, 1820, 1888, 1889 and 1960 (UNITED NATIONS, 2000, 2008, 2009a, 2009b, 2010). The adoption of the "Women, Peace and Security" resolution in October 2000 was the result of women's and feminist organizations' lobbying for peace and security (UNITED NATIONS, 2000). The UNSC 1325 resolution was the first that recognizes the active role of women in conflict prevention and the peace-building process. One of the resolution's greatest merits was its proposal of integrating a gender perspective in all documents related to conflict prevention, peace agreements or security maintenance.

The resolution stresses the need for women's active participation as equal participants "in all efforts for maintaining peace and security and in the decision process for prevention and conflict solutions" (UNITED NATIONS, 2000). The UN Security Council requested that all member-states both assure a greater participation of women at all decision-making levels in peacekeeping, peace-building, conflict prevention, post-conflict reconstruction and also financially support measures to facilitate the implementation of its objectives.

The United Nation Security Council Resolution (UNSCR) highly recommends that women occupy positions as representatives and envoys to “pursue good offices” in the name of the UN General Secretary and also recommends the expansion of women’s roles, “especially among military observers, civilian police [and] human rights and humanitarian personnel” (UNITED NATIONS, 2000, p. 1-2). The resolution mentions that the United Nation Security Council (UNSC) “*expresses* its willingness to incorporate a gender perspective into peacekeeping operations and *urges* the Secretary-General to ensure that, where appropriate, field operations include a gender component”⁴ (UNITED NATIONS, 2000, p. 2). In order to incorporate a gender perspective, the UNSC proposes the adoption of some measures, which should improve the status of women and girls in conflict situations. These include measures concerning the special needs of women and girls, measures to stimulate women’s participation in all the stages of peace implementation agreements and “measures that ensure the protection of and the respect for human rights of women and girls” (UNITED NATIONS, 2000, p. 3).

In order to accomplish this objective, the UNSC recommends that states monitor both the impact of armed conflict on women and girls and the process of building peace in a conflict or post-conflict society. To the same end, the UNSC declares that it will collaborate with local and international feminist and women’s organizations (UNITED NATIONS, 2000, p. 3).

As for the adoption of this resolution, feminists agree that it is a good start for international law to incorporate feminist ideas in order to promote “gender equality and secure peace,” but criticize the superficial manner in which these ideas were transposed, that removes their valuable content (OTTO, 2009). International lawyer and feminist Diane Otto argues that “the institutional reception and management of feminist ideas works to divest them of their emancipatory content,” leading international institutions to transpose them as a “cooption” rather than use them through the potential of “governance feminism” (OTTO, 2009). If the “governance feminism” assumes that the implementation results of the legal or institutional power are intentional, the “cooption” of feminist ideas highlights taking over these ideas without any real interest in transposing them.

In demonstrating the positive outcomes of adopting of an international standard regarding women’s roles and conditions in peace-building, peace-keeping and security-maintenance, the development of gender-inclusive language recognizes women as autonomous and deserving of the enjoyment of human rights in these processes. Second, this type of resolution creates an institutional environment for the debate of feminist ideas and thus for new policy-making in this area. It also provides legitimacy for the development of new networks and organizations in the area of women’s rights (OTTO, 2009). The benefits of international organizations as actors in defining a constructive role for women in an area that traditionally emphasizes a male perspective cannot be denied. Any limitations to the positive outcomes they bring are attributable to the purpose for the adoption of these resolutions, namely, gaining legitimacy for UN actions while not empowering women. This can be demonstrated by the way in which women are portrayed in the text of the resolutions. They are associated with children, peace or victims and

are therefore seen as vulnerable. Although the gender mainstreaming perspective is used in the text in order to gain legitimacy, the link between the feminist perspective and the content of the resolutions is missing. This argument is bolstered by the fact that feminist critiques of UN militarism are not taken into account. These critiques stem from the feminist argument that a society with a high level of gender equality is more likely to be inclined to peaceful measures (CAPRIOLI; BOYER, 2001).

As stated above, feminists have also heavily criticized the form of the resolutions. Women as well as children are presented only as victims. The resolutions reflect a tendency to evaluate women's roles in the security process on the basis of a type of essentialism that associates women with peace and defines them as the primary victims of war in need of protection (CHARLESWORTH, 2008, p. 351). Feminists in international relations believe it is necessary for women to overcome their status as victims or pacifists in order to be truly empowered in the process of achieving gender equality in the institutions that are delegated to achieve and assure security (TICKNER 2001, CAPRIOLI; BOYER, 2001). Diane Otto observes:

Resolution 1325 goes on to invoke many other independent and self-sufficient representations of women as peace-keeping personnel, including 'military observers, civilian police, human rights and humanitarian workers' as participants in peace building as peace advocates and implementers of peace agreements as bearers of human right as refugees and ex-combatants as well as representing women as victims of armed conflict having special repatriation and resettlement needs needing protections as civilians during armed conflict and requiring 'special' measures to protect them from gendered violence.

(OTTO, 2009).

Elshtain's theoretical critique may apply to the resolutions as well; she points out the fact that the society is portraying men as Just Warriors and women as Beautiful Souls (ELSHTAIN, 1995) and that is not a good strategy for either of them. These stereotypes disadvantage both pacifist men and warrior women (ELSHTAIN, 1995, p. 4). They claim that women's place is in the private realm as non-combatants and that men's role is to be warriors (ELSHTAIN, 1995, p. xi). Men are both subjects of war but also its narrators while women should remain in the private realm although their status is the reason for men's wars (SYLVESTER, 2004, p. 4). Feminists have argued that by using a very technical discourse, these theories are not taking into account human lives and thus, women's role are limited to offering a moral perspective on war (ELSHTAIN, 1995, p. 75).

Otto underlines the use of gender in an institutional context. "The term is understood as a synonym for women's issues, which significantly limits its progressive possibilities because the contestability of conceptions of femininity and masculinity, as well as their relationality, is ignored" (OTTO, 2009).

The association of women with children causes them to be seen as mothers, and therefore pacifists who are vulnerable in conflict areas. The history of armed conflict contradicts this perception of women as pacifists; female suicide bombers and combatants are just two examples (SJOBERG; GENTRY, 2007). This association of women with children emphasizes their vulnerabilities as mothers in the context

of conflict, yet omits that these vulnerabilities originate more from an increase of gender inequality in a society in general (CARPENTER, 2006).

Nadine Puechguirbal observes:

Women are not more vulnerable per se in times of war; they are made more vulnerable because of pre-existing inequalities in so called peaceful societies. [. . .] As a result, women keep being associated with children in the private realm and by extension their needs are defined similarly according to the needs of girls and boys in conflict areas.

(PUECHGUIRBAL, 2010, p. 176).

Since they are perceived as birth-givers and caretakers in societies with gendered power hierarchies, women are not considered able to have a dynamic role in peace negotiations or conflict resolutions.

The association of women with victims comes from stereotypes regarding both men and women's roles. These stereotypes depict men as strong, powerful and authoritative and women as weak, vulnerable and passive. Because of these stereotypes, women are seen as victims of war and men as protectors/warriors/policymakers.

These critiques of male-dominated notions of security have helped to reformulate the concept of security in a way that allows for a more holistic response to peace and security, one that is inclusive, rather than exclusive, and one that empowers those who have previously been invisible in security discourse and practice.

(WILLETT, 2010, p. 146),⁵

These stereotyped assumptions about men and women's roles not only deny women's roles as active combatants but also that men can be victims of conflict (MOBEKK, 2010, p. 288-289). These types of assumptions highlight the type of essentialism that is specific to international organizations. This brings to light another major limitation of UN discourse relating to victims of armed conflict. The official discourse of the UN often puts together 'casualties' and 'women and children'. Puechguirbal argues that at a closer look, male, not female non-combatants are more often victims of armed conflict (2010, p. 176, 181). The association of women with victims is integrated into an argument that peaceful women are victims of conflict and therefore in need of protection from men who are more inclined to conflict than they.

As explained above, feminist critiques of the association of women with children, peace or victims cannot be taken separately. These associations are interconnected, mainly in order to emphasize the minimal role of women in the areas of conflict resolution and peace building. This emphasis occurs in societies with clear gender hierarchies where dichotomies like women and peace, women and victims and women and children prevail. These dichotomies devalue women's agency and, in doing so, construct stereotypes for men as well; for example, men and war, men and protectors and men and aggressors. One of the fundamental feminist critiques to the UN resolutions is that the latter stereotypes are built upon these dichotomies and therefore reinforce hierarchical gender power relations in society, and more particularly, in conflict areas.

Another important critique of the resolutions relates to the inappropriate manner in which they have been adopted. Specifically, when it comes to including a gender perspective in the resolutions, UN officials have not taken into account all feminist suggestions. Consequently, these resolutions refer to gender only with respect to women, not to men (CHARLESWORTH, 2008, p. 351). Gender represents a social construct that defines power relations. The dynamics of power relations between genders is obscured when it is equated solely with the feminine. Gender is a concept that supposes the existence of structural relations whereby norms and hierarchies are institutionalized relations of dominance and non-dominance (HOOGENSEN; STUVØY, 2006, p. 216; GROVES; RESURRECCION; DONEYS, 2009, p. 193-194). A feminist redefinition of security will foster a partnership between women and men such that both will benefit (HUDSON, 2005, p. 156).

Another feminist critique relates to the fact that despite women's important roles in conflict prevention and peace-building, they do not have the opportunity to visibly participate in initiatives. In order to assure sustainable peace, it is important that women are included, since they represent more than half the world's population, assure family continuance and have been the subject of continuous discrimination and inequality in gender relations, such that they are more likely to empathize with victims of conflict (WALLSTROM, 2010).

One of the limitations of the resolutions is that they do not constitute ratified treaties; instead they only comprise sets of guidelines without creating mechanisms to enforce them. Consequently, Willett observes:

There is a lack of resources to support gender advisers, in the field, to aid the training of peace-keepers in gender awareness, to monitor and verify the implementation of gender mainstreaming in all peace keeping operations, to train women as peace keepers, mediators, negotiators and senior diplomats, to prioritize women's needs in peace building and to empower local women's peace groups and their security priorities and initiatives.

(WILLETT, 2010, 143).

Hence, one can observe this lack of consistency between the resolutions purpose and their enforcement in practice. "Until the policies translate into meaningful practice, women's institutional inclusion is just a game of shadows" (OTTO, 2009).

Dissatisfied with the UNSC's lack of responsibility concerning the implementation of the resolutions, the feminist and women's organizations put pressure to adopt another resolution to solve the problem. Unfortunately, the adoption of UNSCR 1820 did not significantly remedy the lack of responsibility of the UNSC. What is more, this resolution's objectives are even narrower than the first's. The new resolution addresses the problem of sexual violence, which is used as a 'war tactic' against women during and after periods of armed conflict. This resolution fails to increase "women's potential to make valuable contributions to conflict resolution and peace-building," and treats them again as victims of war, as is manifest in the use of "women and children" language and the stereotypical assumption that women are in need of protection because of their exposure to sexual violence (OTTO, 2009).

Even if it “rejects the idea that sexual violence is a ‘natural’ expression of masculinity,” the UNSC treats the problem “as a ‘fixed reality’ in women’s life (OTTO, 2009). The UNSC judges that this sexual abuse can only be ‘fixed’ legally, failing to follow a plan to fight the core of this type of human rights violation. Proposing only measures that assume the necessity of stopping this kind of masculine activity evidences a belief that women are seen as “helpless in the face of sexual violence and that it is futile to fight back” (OTTO, 2009).

Thus, the feminist critique that the UN fails to incorporate gender equality as a political component remains. Resolution 1820 fails to recognize that women’s inequality is a factor that allows sexual violence to exist. “In the absence of a commitment to gender equality, and despite its nod to debunking myths, *Resolution 1820* is grounded in the old script of biological certainties, which accepts women’s inequality as natural and armed conflict as inevitable” (OTTO, 2009).

In the face of feminist critiques concerning the type of women’s agency allowed for in Resolution 1325, the UN failed to affirm that it had credibly fought sexual violence. A UN response should have proposed some empowerment measures for women and strategies to involve women who have had this type of experience in becoming agents for social change, encouraging them to participate in “training in self-defense and collective actions” (OTTO, 2009). “Such measures would tackle the causes of gendered violence by treating women as full and competent subjects of international law and policy, rather than reinforce the mythology that women are always victims who need to be rescued” (OTTO, 2009).

From 2008 to the present, the UN has adopted three more resolutions concerning the situation of women in armed conflict. If UNSCR 1820 sets a framework which addresses the problem of sexual violence, UNSCR 1880 represents a step further in addressing the necessity for gender balancing, recommending women’s roles as peacekeepers to solve the problem.

The resolution highlights the significance of female enrollment in peacekeeping activities. For example, female peacekeepers have proved to be very helpful in Muslim societies where they may perform certain tasks more appropriately. In order to carry out peacekeeping and peace-building operations, female officers are able to search female suspects without offending cultural norms. In conflict areas with Muslim populations, there have been examples of men who disguised themselves as Muslim women and even as female suicide bombers (MOBEKK, 2010, p. 281).

However, the significance of Resolution 1880 crumbles before the arguments it employs. The resolution reinforces the oldest myth, which presents women as inherently peaceful agents, vulnerable people or mothers. Telling examples are found in the assumptions that women and children will feel more comfortable in the presence of female peacekeepers in a conflict area, and even that the latter’s example will encourage them to enroll in their national police or armed forces (UNITED NATIONS, 2008, p. 2).

This type of essentialism “may lead to an assumption that when women are included in security forces [it is because] they are better equipped than men to deal with rape and violence against women” (MOBEKK, 2010, p. 286). All the

members of the armed forces or the police should receive training to deal with such situations; there is no guarantee that women will be more willing or able to perform these tasks. In order to expedite gender mainstreaming and gender balancing, it is important that women have access to all sorts of tasks, not only to those that keep with gender norms and devalues their work. The reassertion of the above-mentioned essentialism stresses that men are more fit to serve as protectors and policymakers, and that women's active roles in conflict resolution and peace-making continue to be idealized and undervalued (WILLETT, 2010, p. 143). Even if there are studies regarding female officers' use of force that portray them as less violent, possessing the ability to defuse "potentially violent situations" and as having a greater talent for implementing community policing, the essentialism of the resolution devalues their work, accomplishments and abilities (WILLETT, 2010, p. 143).

Feminists critique peacekeeping and peace building operations for their hegemonic and masculinized culture (WILLETT, 2010, p. 147). This is understandable, considering that these operations are conducted by UN member states' masculinized security forces. The masculinity of security forces is reinforced by the assumption that men are the protectors of women and children. The masculine norm in this type of operation is demonstrated through "a complex of behaviors and attitudes that privilege physical toughness [and] heterosexual macho bravura," constructed through "the denigration of women and femininity" (PUECHGUIRBAL, 2010, p. 174). Thus, the 'natural' bond between the protectors and the protected explains the mobilization of peacekeeping forces.

The 'natural' peacekeeper[s]/protectors not only have the collective physical resources to exercise definitive military power, but also assume they are most capable of thinking in strategic and rational ways. [. . .] For peacekeepers/protectors to exert this form of superiority, there must be a socially constructed 'protected'. More often than not, this is constituted in the form of defenseless women and children, the victims of conflict. In the binary structures of the liberal peace the feminization of the protected is a necessary corollary to the masculinized protector/peacekeeper.

(WILLETT, 2010, p. 147).

Unfortunately, there is no improvement in the content of the last resolution analyzed. The language of Resolution 1880 subscribes to the standard line of UN resolutions, imposing masculine language on UN peacekeeping documents and translating it into the power-relation structures of these operations. The myths of protector/protected, women's helplessness when confronting sexual violence, and female officers' inherent peacefulness perpetuate "a vision of gender roles that reinforces inequalities and prevents progress on gender mainstreaming" (PUECHGUIRBAL, 2010, p. 173).

Even if there were gender guidelines developed for military personnel in peacekeeping operations to facilitate the implementation of UN resolutions, the situation in the field demonstrates that the results expected in the resolutions were not attained. "The military disciplinary measures [and] the training [of] troops on the categorical prohibition of all forms of sexual violence against civilians"

(UNITED NATIONS, 2008, p. 4) did not eliminate or decrease the number of cases of peacekeeper misconduct against female colleagues or civilians. Currently,

Peacekeepers may become sexual predators on local women's vulnerabilities, they collude to make the insecurity of women in conflict situations and post-conflict societies invisible, they ignore the proactive voices of women's peace groups and in many scenarios they collude with warlords and military commanders to reinforce male privilege and power and enforce women's subordination in the aftermath of war.

(WILLETT, 2010, p. 147).

UNSCR 1889 addresses women's underrepresentation "at all stages of peace processes, particularly the very low numbers of women in formal roles in mediation processes" (UNITED NATIONS, 2009b, p. 2). One can observe a change of perspective concerning women's roles in armed conflict. The content of this resolution takes into account feminist critiques regarding the necessity of condemning the set of patriarchal myths on the condition of women, "stressing the need to focus not only on protection of women but also on their empowerment in peace building" (UNITED NATIONS, 2009b, p. 2). However, without setting an implementation plan for the above goals, this small progress remains superficial and the resolution's text remains empty. The promotion of gender equality policies in conflict areas is an objective which cannot be attained if the UN is still characterized by "a masculine norm ..." which dominates all decision-making spheres on "the behalf of other men and women" and is legitimized by a process of institutionalization (PUECHGUIRBAL, 2010, p. 182).

UNSCR 1960 emphasizes the need to continue the directives of Resolutions 1820 and 1888 regarding the eradication of sexual exploitation in conflict and post-conflict areas. This resolution does not bring any new issues to the international agenda (UNITED NATIONS, 2010).

It also stresses the need to include a greater number of female military personnel in peacekeeping operations and provide specialized training regarding sexual and gender-based violence and the appropriateness of measures taken toward these issues.

The UN resolutions do express the need to include a significant number of women in conflict areas who could provide their perspectives on the process of achieving peace and security. Feminists support the idea of "citizen defenders" with access to political and military decision-making, but they also stress that it is not enough for women to fill a certain percentage of military staff and end up imitating the established masculine behavior model (TICKNER, 2001). Thus, one of the most significant limitations of these resolutions from a feminist perspective is that women must improve their perceived status in order to have an important role in shaping the defense concept to their own values.

Since the adoption of the first resolution with respect to women's roles in conflict areas, the UN's position has not changed to include feminist critiques. With the later adoption of several resolutions on this subject, the UN's position has only stressed to a greater extent women's passive protected role as in conflict areas. UN officials did not act upon the feminist critiques to Resolution 1325 and subsequent resolutions only further stressed the association of women with children, peace or victims.

5 Feminist Human Security as an alternative to traditional securities strategies

If the traditional perspective on security is the expression of a masculinized, privileged point of view that breeds only “patriarchal structures,” the Human Security perspective expresses a wider agenda with a broader range of people’s concerns. For this reason, it is labeled a “feminized” approach that does not measure up to the imposed standard (HOOGENSEN; STUVØY, 2006, p. 210). Because the Human Security is a perspective focuses on “the everyday security of persons” (SUTTON; NOV KOV, 2008, p. 20) and feminism is concerned with the everyday experiences of women, there could be a solid partnership between these two approaches.

The UN proposed the Human Security approach especially in post-conflict societies (GROVES; RESURRECCION; DONEYS, 2009, p. 190). Within this approach, there are two directions of thinking that depend on the type of threat defined. The first direction focuses on violence as a source of insecurity or “freedom from fear,” while the second more expansively includes hunger, disease and natural disasters (SUTTON; NOV KOV, 2008, p. 20). The UN’s approach, “freedom from want,” focuses on an even broader agenda, which includes economic security, food security, health security, environmental security, personal security, community security and political security (UNITED NATIONS DEVELOPMENT PROGRAMME, 1994, p. 24-25).

The UN holds that human security is not an alternative to state security, but “rather reinforces it from the perspective of the individual” (GROVES; RESURRECCION; DONEYS, 2009, p. 192). Human security legitimizes institutions and governments by sustaining their objectives of achieving human development, human rights and the contributions of non-state actors (HUDSON, 2005, 165). The methods of human security focus on preventive diplomacy, conflict management and post conflict peace building, developing economic and state capacity, and human empowerment (SUTTON; NOV KOV, 2008, p. 20).

Even if this perspective does address problems that threaten a person’s security, feminists have argued that its scope must be expanded so as to include violence against women, gender inequality, and human rights for women so that women and men are seen as actors and not as victims (Woroniuk, apud GROVES; RESURRECCION; DONEYS, 2009, p. 191).

Gender analyses could enrich the Human Security perspective, considering that it was proposed by highly-ranked officials from international organizations and national governments who may not have properly addressed the experiences and problems for people from “below”. “Gender approaches deliver more credence and substance to a wider security concept, but also enable a theoretical conceptualization more reflective of security concerns that emanate from the ‘bottom up’” (HOOGENSEN; STUVØY, 2006, p. 209). The feminist perspective on human security could provide a freer framework for the security field.

The gender neutral term “human”, which in principle includes men as well as women, “is often the expression of the masculine” (HUDSON, 2005, p. 157).

Therefore, a gender analysis could make the voices of women heard. It is also a trap to consider traditional concepts of gender as universal because there are different groups of women with specific traits as well as different types of feminism (HUDSON, 2005, p. 157). Furthermore, a human security perspective cannot be valid if it is constructed only by “dominant state players” and imposed on those in a more disadvantaged position (HOOGENSEN; STUVØY, 2006, p. 219). A unilateral definition of the concept “perpetuates the distinction between ‘us’ and ‘them’: we, the secure, versus them, the insecure”: men versus women, white women versus black or Hispanic women (HOOGENSEN; STUVØY, 2006, p. 219). To avoid the construction of a unilateral definition, one can add “relational thinking” to gender analysis. This concept is useful for the human security perspective because it introduces subjectivity, sensibility and also clarifies its gender power dimensions (HUDSON, 2005, p. 169).

Human Security refers to a respect for human rights, sustaining the establishment of legitimate political authority, multilateral definitions, a bottom-up approach and focusing on conflict prevention (KALDOR; MARTIN; SELCHOW, 2007, p. 282-286). “Integrating gender into the concept of human security rather than applying human security to gender” will ensure that the concept offers a better understanding of the security of the people, women and men, who can achieve their objective in a safe and positive environment (HOOGENSEN; STUVØY, 2006, p. 219).

6 Conclusions

If international resolutions do not stimulate gender equality and women’s participation or promote women’s interests, there is a lack of real power bring about institutional change. For this reason, it is important that women are seen as real actors in achieving security and women’s access to the military is insufficient to achieving gender equality and sustainable peace. In order for women to be real “defender citizens” and to promote their values and interests in defense policy, it is necessary to also promote policies to change the perception of gender roles, help promote women into decision-making positions and create strong institutions to prevent and sanction prejudiced attitudes and discrimination.

Patriarchal society and institutions, which have imposed gender differentiated roles, are responsible for preventing women’s attainment of top level jobs in the security field, which have denied them the right to contribute to the construction of gender-balanced defense policy. Consequently, a feminist approach to human security best emphasizes the security concerns of women.

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NOTAS

1. I stand by this emphasis. The "father" represents the embodiments of patriarchy in a family through the social construct of the head of the household image.

2. The concept of citizen defenders was proposed by Judith Stiehm in her paper "Women and men's wars" (1989).

3. A previous version of this section of the paper was presented in the paper "On Romanian military

gender training and peace missions" (2011) - Cristina Rădoi and Ilona Voicu, presented at *Armed Forces and Society: New Domestic and International Challenges*, organised by International Political Science Association and R24 Committee, in 17-19 June 2011, Ankara, Turkey.

4. The emphasis is according to the original text of UNSCR 1325, 2000.

5. See also Mobekk (2010, p. 28).

RESUMO

Neste artigo analisarei em que medida as resoluções internacionais sobre o papel das mulheres na segurança realmente refletem seus interesses com respeito a tal questão.

Embora autoridades internacionais afirmem que o papel das mulheres é muito importante para a prevenção de conflitos, a restauração da paz e a reconstrução das sociedades em zonas pós-conflito, na realidade elas apenas desempenham um papel formal, tanto como parte do exército quanto como civis em zonas de conflito. As leis internacionais enxergam a mulher como vítimas e não como atores importantes em pé de igualdade com as suas contrapartes masculinas na conquista desses objetivos.

Na primeira parte, apresentarei os efeitos da militarização na vida das mulheres. Na segunda, analisarei, através de um olhar feminista, as resoluções internacionais e as estratégias de segurança alternativas.

PALAVRAS-CHAVE

Mulheres em instituições militares – Resoluções internacionais – Gênero – Defesa e segurança

RESUMEN

El presente trabajo analiza en qué medida las resoluciones internacionales sobre el rol de las mujeres en materia de seguridad, reflejan realmente los intereses de las mujeres.

A pesar de que los funcionarios internacionales afirman que el papel de las mujeres es muy importante en la prevención de conflictos, en el establecimiento de la paz y en la reconstrucción de la sociedad en las zonas donde hubo conflicto, las mujeres sólo tienen un rol formal, ya sea como parte de las fuerzas armadas o como civiles en las zonas de conflicto. El derecho internacional ve a las mujeres como víctimas, y no como actores importantes, iguales a las contrapartes masculinas en la consecución de dichos objetivos.

En la primera sección, se presentan los efectos de la militarización en la vida de las mujeres. En la segunda sección, se analizan las resoluciones internacionales y estrategias de seguridad alternativas, desde una perspectiva feminista.

PALABRAS CLAVE

Mujeres en instituciones militares – Resoluciones internacionales – Género – Defensa y seguridad



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ABSTRACT

This article analyzes the right of petition by individuals to the conventional committees that form part of the Global Human Rights Protection System established under the auspices of the UN. This article analyzes the right of petition by individuals to the conventional committees that form part of the Global Human Rights Protection System established under the auspices of the UN. The text describes the system that allows individuals to submit petitions with international organizations denouncing their States for human rights violations listed in the Universal Declaration and the International Covenant of Civil and Political Rights (ICCPR) or in the norms established in specific treaties such as the U.N. Convention Against Torture (UNCAT), the International Convention for the Elimination of all Forms of Racial Discrimination (ICERD), the Convention Against the Elimination of all Forms of Discrimination Against Women (CEDAW), and the International Convention on the Rights of Persons with Disabilities. According to the author, the recommendations made by UN bodies relating to allegations made directly through individual petitions are binding and must be complied with by the States in question.

Original in Portuguese. Translated by Barney Whiteoak

KEYWORDS

Right of petition – Human rights – Global System



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RIGHT OF PETITION BY INDIVIDUALS WITHIN THE GLOBAL HUMAN RIGHTS PROTECTION SYSTEM*

Carla Dantas

1 Introduction

This article is developed using the doctrinal currents of International Law as theoretical landmarks that assign the moral grounding for the development of rights, whose just and binding nature do not result exclusively from the discretion of states. This enables the emergence of an international order that is valid *erga omnes*, in which the protection of international rights is not guaranteed by a monopoly of states.¹

This doctrinal position involves the recognition of principles such as the prohibition of the use of force and war, the equality of states, the peaceful solution to disputes and humanitarian protection in times of war. It also includes the broadening of the international agenda, which now interferes in domestic legal systems (SOARES, 2004, p. 337), even determining the treatment that States must provide their own citizens.

Placed in historical perspective, the United Nations General Assembly (UNGA), carried out its mandate to promote human rights by adopting the Universal Declaration of Human Rights in 1948. This was an important landmark in the process of internationalizing human rights, since it proclaimed the rights contained in the Declaration to be a common standard of achievement for all nations (DALLARI, 2008, p. 55) and marked the start of the positivization and universalization of human rights, meaning that “more important than being proclaimed, they [the rights] must be guaranteed against all manner of violation” (AMARAL, 2002, p. 642). The UNGA’s subsequent adoption of international human rights treaties that established institutions to monitor the rights they contained led to the development of the global system of human rights protection.

*This paper was produced in the first session of the Program to Encourage Academic Production in Human Rights, which was held from February through May of 2013. The program, developed by Conectas Human Rights in partnership with the Carlos Chagas Foundation, is now in its second session. More information is available on: <http://www.conectas.org/en/sur-journal/see-the-list-of-candidates-selected-for-sur-journalundefineds-program-to-encourage-academic-production?pg=2>. Last accessed on: Dec. 2012.

Thus, international human rights obligations were imposed on states during the 20th century, giving rise to the possibility of holding states internationally responsible for non-compliance with these obligations (RAMOS, 2012, p. 29). Two prominent treaties were the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), together with its First Optional Protocol, which: a) recognized the need to create conditions whereby each individual can enjoy their rights; b) established obligations for states to guarantee effective instruments to defend the rights recognized by these treaties in their domestic legal systems;² and c) provided for international contentious and non-contentious instruments to promote and protect the rights, such as the good offices, the system of reports, the possibility of creating *ad hoc* conciliation commissions and the right of individuals to petition international bodies.

This article discusses the international human rights instruments established by the international treaties and approved under the auspices of the UN that recognize the right of individuals to petition the committees created by these international treaties, such as the Human Rights Committee (HRC), which is provided for in the ICCPR and its optional protocol.³

Just like the ICCPR, other international treaties adopted under the auspices of the UN allow for the possibility of addressing individual petitions to their respective committees. These are the following conventions:⁴

- (i) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which created the Committee on the Elimination of Racial Discrimination (CERD);
- (ii) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which created the Committee on the Elimination of Discrimination against Women (CEDAW);
- (iii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (CAT), which created the Committee against Torture (CAT); and
- (iv) Convention on the Rights of Persons with Disabilities (CRPD), which created the Committee on the Rights of Persons with Disabilities (CRPD).

During the 20th century, there was a significant increase in the number of international human rights norms, which projected individuals onto the international stage with powers to claim their rights, notably through the right to petition the aforementioned committees.

There is clearly a need today, as shall be demonstrated later, for a dynamic interaction between international law and domestic law in order to promote and protect human rights, which includes the efficient functioning of the regional and global human rights protection systems. On this point, Cançado Trindade has said that “international law and domestic law walk hand-in-hand and point in the same direction, coinciding behind the ultimate and basic common purpose of protecting the human being” (TRINDADE, 2001, p. 34).

2 The Global Human Rights Protection System

During the last century, there emerged an:

entire sector of International Law, with unbelievable normative force, that since the installation of the UN, in 1945, has grown increasingly more vigorous: the international protection of human rights, with normative engineering that is extremely well crafted and endowed with mechanisms to verify compliance”

(SOARES, 2004, p. 156).

In the context of the UN, this process of internationalization of human rights materialized with the establishment of the Global Human Rights Protection System, a term widely used in certain circles to refer to the international system for the protection of human rights that is universal and based on the principles established by the UN Charter. This system is intended to promote and protect the human rights guaranteed by the treaties adopted by the UNGA, such as those presented above.

The Global Human Rights Protection System is monitored primarily by the Human Rights Council, a subsidiary body of the UNGA and successor of the Commission on Human Rights in the task of promoting and protecting human rights.

The Global Human Rights Protection System can be categorized into two areas: *conventional*, established by international conventions and monitored, fundamentally, by the different committees created by them, which are known as “Treaty-Based Bodies”; and *extra-conventional*, formed by resolutions adopted by UN bodies and consisting of bodies created by the UN Charter or derived from them, which the UN calls “Charter-Based Bodies.”⁵

The conventional system operates through mechanisms to examine human rights violations documented by petitions from states or individuals that are addressed to the specialized committees, which, according to Carvalho Ramos, have a quasi-judicial nature (RAMOS, 2012, p. 75).

Each one of the conventional human rights protection committees that make up the Conventional Global Human Rights Protection System receives structural support from the UN Secretariat, more specifically the Office of the UN High Commissioner for Human Rights⁶ (OHCHR), a subsidiary body of the UN Secretariat that is responsible for promoting respect for and the full implementation of human rights.⁷

The UN Secretary General, via the OHCHR, is responsible for providing the conventional human rights monitoring committees with all the necessary staff and facilities for the effective performance of their functions.⁸ In the performance of this task, the UN Secretary General, via the OHCHR, helps these committees with their working methods, provides materials, office space and staff for the committees to perform their functions, and also conduct the initial screening of petitions submitted to the committees. This process consists of verifying whether all the formal requirements that are identified and analyzed in Chapter 3 below are observed. During the screening, the staff also prepares a summary of the content of each petition before submitting the cases for the consideration of the committees and keeping the register.

The committees examined in this article with the exception of CEDAW receive this support from the UN and report to the UNGA,⁹ via the Secretary General,¹⁰ and

officially participate in the UN specialized agencies.¹¹ Nevertheless, these committees are independent bodies and have a composition formed with the intent to preserve this independence, as presented below.

2.1 Function and composition of the committees

The conventional committees presented above have four common functions:

- (i) To receive, examine and issue opinions (concluding observations)¹² on the reports of state parties on the steps they have taken to apply the international treaties in their territories.¹³ In 2001, for example, the CAT issued an opinion on the Brazilian report, recommending that Brazil ensure that their law dealing with torture was interpreted in conformity with article 1 of the CAT, and that it improve conditions in its prison system, as well as regulate and institutionalize the right of victims to receive fair compensation for the cruel treatment suffered;
- (ii) To prepare general comments to assist State Parties to apply international treaties by defining their obligations. The HRC, for example, issued general comments in 2011 on the content and scope of the right to freedom of expression contained in article 19 of the ICCPR;
- (iii) To decide on allegations of non-compliance with the international treaties submitted by one state party against another; and
- (iv) To issue decisions (views)¹⁴ on the allegations of non-compliance with the international treaties contained in the individual petitions or communications presented to them, which is the subject matter of this study.

Conventional committees are composed of independent members with acknowledged competence in the field of human rights, which represent different geographic regions, and thereby form legally and culturally diversified committees. The members of the conventional committees are elected by secret ballot to the respective conventions from a list of experts nominated by State Parties and compiled upon the request of the UN Secretary General.¹⁵ To ensure that they act independently, the members of the committees serve in their personal capacity and not as representatives of their nationality or the state that nominated them. Moreover, members do they participate in the analysis of either the reports or the individual petitions relating to the state in question.

The committees conduct an extensive interpretation of the international treaties, which guarantees the greatest possible protection for the person and, therefore, prevents the exclusion or revocation of greater legal protection. This guarantees the application of the principle of the primacy of the most favorable norm and of maximum protection. In this context, the committees work with proven facts and although they are not required to follow the typical formalities of legal interpretations and arguments that are normally observed in contentious proceedings, they aim to have a real effect on the conduct of the State Parties being monitored. This working

rationale is consistent with the view of Alberto Amaral, who writes, the “interpretation of the treaties on human rights is subject to its own criteria (...) the interests of the parties gives way to considerations of public order” (AMARAL, 2002, p. 646).

Although they operate independent from each other, the committees are guided by the same principles of human rights protection and they share the same goals. As such, they are reviewed here together, with an attention to pointing out their operating differences when relevant.¹⁶

2.2 State Parties

In cases in which monitoring committees are instituted in the body of the main treaty, State Parties to these treaties accept and recognize the competence of the committees to analyze petitions by making a declaration at any time. Article 14.1 of the ICERD refers to this point. For committees whose competence to receive petitions from individuals is recognized by the optional protocols to the treaties, State Parties need to recognize this competence by ratifying the optional protocol in question, in accordance with article 1 of the optional protocols to the CEDAW and the ICCPR.

The international declaration accepting the competence of the committee or, depending on the case, the instrument of ratification of the optional protocol that recognizes the competence of the committee, are international acts that are internationally binding for State Parties, in accordance with the terms and conditions established in the declaration itself or international treaty.

According to domestic law in Brazil, for example, promulgation by the President of the Republic makes these acts legally valid and enforceable in Brazil. However, since this promulgation is an act of domestic law, it should not be confused with or determine the the international competence of committees to review petitions submitted by individuals under Brazilian jurisdiction. Under international law, this occurs by declaration by the UN Secretary-General or upon the ratification of the optional protocol in accordance with formal rules established by the treaty itself.

Currently, the ICERD has more than 150 States Parties. Brazil ratified the treaty in 1968 and promulgated in 1969 by Decree 65,810. However, it was not until 2002 that Brazil made its declaration to the UN Secretary-General recognizing the competence of the CERD to receive petitions from individuals under Brazilian jurisdiction under the terms of article XIV.1 of the ICERD. In 2003, this act was incorporated into Brazilian law by Decree 4,738.

The Convention against Torture, meanwhile, has 150 States Parties and the convention was ratified by Brazil in 1989 and promulgated in 1991 by Decree 40. To date, however, Brazil has not recognized the competence of the Convention against Torture to review petitions from individuals under Brazilian jurisdiction.

With more than 100 States Parties, the Optional Protocol to the CEDAW was ratified by Brazil in 2002, giving the CEDAW the competence to receive petitions from individuals under Brazilian jurisdiction. The protocol was promulgated in the same year by Decree 4,316.

The First Optional Protocol to the ICCPR, which in article 2 recognizes the

right of individuals to petition the HRC, has been ratified by more than 100 states. Brazil ratified the treaty in 2009, approving the text with a reservation to article 2 by Legislative Decree 311. However, it has not to date promulgated the treaty, nor has it made a declaration accepting the competence of the HRC to receive petitions from individuals under its jurisdiction.

Finally, the CRPD has 66 States Parties. Brazil ratified this convention and its optional protocol in 2008, recognizing the competence of the CAT to review petitions submitted by individuals under Brazilian jurisdiction. The CRPD and its protocol were promulgated on August 25, 2009 by Decree 6,949. It is interesting to note that the CRPD was the first international convention to be approved as a constitutional amendment under the terms of article 5, paragraph 3 of the Brazilian Constitution.¹⁷

Although Brazil has ratified and recognized the competence of certain conventional committees to review petitions submitted by individuals under its jurisdiction, no decision has been issued against Brazil within the framework of this conventional system of human rights protection to date.

3 Presentation of petitions to the OHCHR

The right to petition the committees is a conventional mechanism for the protection of human rights. This mechanism permits the direct and independent action of individuals on the international stage to the extent that it does not require the mediation of the State Party or any other entity.

The rules of procedure established in infra-conventional documents are intended to simplify and this process with the objective of providing broad access to this mechanism, thereby observing the principle of maximum protection.

Individual petitions¹⁸ must be submitted to the OHCHR,¹⁹ although the petitioner does not need to be represented by a lawyer, since familiarity with technical legal terms is not required.

As pointed out earlier, committees perform an effective and material analysis of each concrete case. Accordingly, the right of the individual and the violation by the state are extracted from the facts and the arguments presented by the petitioner. This is done regardless of whether the petitioner employs legal reasoning and vocabulary, removing the need to engage in technical debates or follow other legal and procedural formalities. Nevertheless, as shall be explored in this and subsequent chapters, the individual petition must contain a series of information and be accompanied by specific documents that substantiate its allegations.

First, individual petitions must be signed and identify the author with their personal data.²⁰ The committees may, *ex officio* or upon the justified request of the author, keep the identity of the victim confidential.²¹

The petition must also be written in one of the official languages of the UN, since it is the responsibility of the UN Secretary General, via the OHCHR, to conduct the preliminary review.

The petition, moreover, must present in detail, preferentially in chronological order, the facts that constitute the disrespect for the international convention in question and they must be accompanied by documents and information that confirm

the alleged events. In particular, this includes official documents such as judicial and administrative decisions on the matter and a copy of the domestic legislation applicable to the case.²²

Finally, the petitioner must demonstrate compliance with each of the admissibility requirements, which shall be presented in Chapter 5.

In the absence of one of the above items or any other information deemed important for the review of the petition by the committees or the OHCHR, which conducts the initial screening of the petitions, the petitioner will be contacted. Depending on the nature of the topic, the petitioner will be contacted by the committees themselves or by the UN Secretariat, in either case via the OHCHR, to request that they provide the information necessary to proceed with the petition.²³

In accordance with the principles of the primacy of human rights and of maximum protection, the fact that a petition is incomplete or unaccompanied by all the aforementioned documents and information does not, in itself, prevent the petition from being received. Petitions will only be rejected, and therefore not registered by the OHCHR or submitted to review by the committees, when their omissions preclude such a review. Nevertheless, in order to avoid delays and get through this first stage of the process, it is important for the petitioner to clarify the reason why they failed to submit any given document or information, as well as the reason why they may have failed to observe any of the admissibility requirements for the petition.

3.1 Standing to submit a petition and perpetrators of the alleged violations

Petitions may be submitted to the conventional committees not only by citizens of states that recognize the competence of the committees, but also by all persons residing within their territory and subject to their jurisdiction.²⁴

As expounded in General Comment No. 31 of the HRC, the right to petition the conventional committees is reserved for individual persons, although many of the rights recognized in the treaties under examination are also rights guaranteed to legal persons. The same document states that although this conventional human rights monitoring mechanism is reserved for individual persons, it does not prevent such individuals from submitting petitions in defense of legal persons whose rights have been violated according to the conventions.²⁵

Petitions submitted on behalf of a third party are admissible provided they are accompanied by proof that the victim is unable to act on their own behalf,²⁶ together with authorization from the victim for the third party to report the violation of their rights to the proper committee. In the name of the principle of maximum protection, such authorization may be dispensed with if the victim is a child, imprisoned, inaccessible or in a similar condition.²⁷

The perpetrator of the alleged human rights violation must always be a state party to the international convention that has been violated and that has accepted the competence of the committee to review the petitions, as described before. Nevertheless, the act or omission being reported may be one committed by either a public authority or a private individual. This is because the state is responsible for

not implementing measures to prevent acts or omissions that violate human rights or punish the violators of these rights (CONFORTI, 2005, p. 336). This is also view taken on article 2 of the ICCPR by the HRC in its General Comment No. 31. In this context, it is important to understand the extent of the international obligation of States Parties to the international conventions (being) examined here.

3.2 The extent of the international obligations

The essential condition for submitting a petition is an allegation of a violation of one or more rights set forth in the conventions. This includes the right to be provided, by the State Parties, with effective domestic remedies²⁸ aimed at respect, implementation and correction of violations of substantive rights set forth in the conventions, in accordance with article 2 of the ICCPR. This right reflects the general international obligation of the State Party to provide preventive and punitive remedies by monitoring the respect for the substantive rights of all persons as set forth in the convention.

State governments should first be instructed and prepared to prevent, investigate and punish any violation of the rights recognized in international treaties (SLAUGHTER, 1997, p. 185) and, second, if the violation is declared by a competent international organization, these governmental authorities should have previously established instruments and policies in place to immediately remedy the violated right or repair the damage caused by the internationally declared violation.

As shall be analyzed later, not only do the committees monitor disrespect of substantive rights, but they also track any omission or inefficiency by states in protecting or reestablishing such rights.²⁹ This is the very reason why the committees, in their decisions, declare the violation of substantive rights and establish a time limit for a state to present the measures it has taken to remedy the violation and thereby comply with its obligation.

State Parties should comply with this obligation in good faith and without invoking their domestic law as an impediment in accordance with the Vienna Convention on the Law of Treaties. This view is also shared by the *Escola Superior do Ministério Público da União* (Higher School of the Federal Public Prosecutor's Office) (PETERKE, 2010, p. 148).

4 Procedures

Each committee adopts its own rules of procedure, but since they are guided by the principles of maximum protection and the primacy of human rights, the committees are committed to pursuing a material solution for each issue. As such, depending on the complexity and urgency of the case, committees may bypass the rules of procedure presented below.

Once the OHCHR has identified all the essential information specified in section 3, the petition is registered. In other words, the OHCHR prepares a report with the content of the petition and submits it for the consideration of the proper committee, keeping track of the case registered with the UN Secretariat.³⁰

Invariably, the right of confrontation will be present in all stages of the human rights monitoring mechanism.³¹ The members of the committee receive this report, the petitioner is informed of the registration and the accused state is notified so it can present the considerations it deems relevant within a time **frame** that varies from four weeks to six months, depending on the committee and the nature of the case.

Once registered, the committee's examination of the petition occurs in two stages. The first consists of an examination of the admissibility of the petition and the second involves an examination of the merit. In general, these two stages of the mechanism are analyzed on the same occasion; for example, in the same plenary session of the committee,³² which as a rule is not public.³³ In exceptional circumstances, the admissibility of the petition and merit may occur in different plenary sessions given specific time limits set for the parties to submit comments at each stage. Additionally, should the state first submit considerations that are only related to the admissibility of the petition, the committees will, out of respect for the principle of confrontation, grant a new time limit³⁴ for the state to submit considerations on the merit.

The failure of the State to respond either on the admissibility or **on** the merit does not prevent the committees from analyzing the petition.

When the time expires for the accused state to submit considerations, the case is referred to the committee plenary session for analysis. A specific working group may be established ahead of the session to analyze the admissibility of a petition, and if the group unanimously declares the petition to be admissible, then the committee proceeds directly to its analysis of the merit of the petition in its plenary session.³⁵

The main admissibility requirements analyzed in the plenary sessions or by the working groups are the following:

- (i) the same case is not the subject of analysis by a similar international body;
- (ii) the exhaustion of all domestic remedies;
- (iii) the causal link; and
- (iv) the non-retroactivity of the reported act or omission.

It is worth pointing out that an analysis of the decisions already issued by the committees allows us to identify other important conditions that can prevent an examination of the merit of the petitions. These include, for example, any reservations compatible with the object and purpose of the international convention in question that are *legitimately* established in advance by the accused state according to certain *provisions*.³⁶

Given the possibility ruling out an analysis of the merit of the petitions, it is important that the petitions are not abusive: there have been cases declared inadmissible by the committees given the unsuitability and impropriety of petitioning the international body to address the issue.³⁷

As stated earlier, the conventional committees adapt to the complex needs of international human rights law and thereby contribute to the promotion of an extensive interpretation of protected human rights. These committees also

conduct material analyses of each admissibility requirement in order to prevent cases from not proceeding for an examination of the merit due to purely formal or superficial reasons and to ensure that the principles of the primacy of human rights and of maximum protection are respected. With the same objectives in mind, the committees do not examine the merit of petitions they consider abusive, since this would take up time that could be spent on the effective protection of the human rights that the committees were set up to provide.

In the event that a petition is found inadmissible, the possibility exists to request a review of the decision.³⁸ Once the petition has been admitted, the members of the committee examine the merit of the case.

As mentioned earlier, the standard procedure presented here can be modified to some extent. For example, the time limit for analysis and comments by the victim and the state in question may be shortened or issues may be raised that may require a response from the state. Nevertheless, given large number of petitions, it is common for time limits to be extended and for final decisions to take years,³⁹ which contributed to the development of procedure of urgent interim.⁴⁰

5 Admissibility requirements

5.1 Case examined by another international body

The petitions addressed by the conventional committees (except those addressed to the CERD) must involve cases that are not being analyzed simultaneously by another international body that is comparable to the committee in question; in other words, wherein one body could be substituted by the other.

With regard to the CAT, CRPD and CEDAW, this admissibility criterion has been widely applied and they have rejected petitions whose subject matter has, in the past, already been analyzed by another comparable international body.⁴¹ For the HRC, this admissibility criterion only temporarily prevents the analysis of a petition and is no longer applicable after the conclusion of the case by the other international body.⁴²

The differences established between the committees for assessing this admissibility requirement do not mean that the committees are dependent or subject to the decisions taken by other international bodies. All the committees independently analyze the performance and extent of human rights monitoring conducted by the other international bodies that are handling the case before deciding on the petition's admissibility.

In order for the conventional committee in question to assess the extent and compatibility of the work of another international body examining the same case, the petitioner must disclose which international bodies are analyzing or have analyzed their case. They must also detail the date on which the analysis by the other body began, and well as the progress made on the matter. Based on this information, the committee will study the work of the international body, analyze the extent and the subject of the case submitted and then decide whether this conflict should prevent it from proceeding with an analysis of the merit of the

petition. All of this is done while taking into account the principles of the primacy of human rights and of maximum protection.

In *Bandajevsky vs. Belarus*, the HRC decided that the procedure before the Executive Board's Committee on Conventions and Recommendations of UNESCO did not constitute a procedure of investigation that would make a petition inadmissible. This is due to the facts that the body is extra-conventional and that, in its procedure for analyzing individual petitions, no conclusion of violation or non-violation of the rights protected in the ICCPR was made, nor did it issue any binding decision on the merit. As such, this case also established the position of the HRC on the possibility of submitting cases that are simultaneously subject to analysis by the Human Rights Council referring to the Special Procedures or to Procedure 1503, which are extra-conventional mechanisms that make up the Global Human Rights Protection System.

Moreover, in *Dahanayake et al. vs. Sri Lanka*, the HRC decided that, since the case was not based on allegations of a violation of the ICCPR, the complaint lodged to the Asian Development Bank could not be an obstacle for the petitioners to present a communication to the HRC.

5.2 *Exhaustion of effective domestic remedies*

The exhaustion of domestic human rights monitoring and protection remedies deserves attention given its importance and its close relationship with the general international obligation assumed by State Parties when they ratify each of the international conventions. These obligation includes respecting and guaranteeing respect for the rights contained in the conventions, which requires making available domestic remedies capable of applying the rights protected under these international treaties to individuals in their jurisdictions, as described in section 3.2.

The State Party fails to comply with this general international obligation not only when it violates a human right protected by the treaty, but also when it is unable to guarantee, via effective domestic remedies, respect for this right or a solution to the violation. Therefore, the basis of this admissibility requirement rests on the argument that the State Party breaches a treaty. This, in turn, establishes the legitimacy of the individual to address the petition to the committees after using all of the available domestic remedies.

Domestic remedies that have been exhausted must be *effective* in order for the petition to be considered inadmissible. For domestic remedies that are complicated, difficult to access, restricted, prolonged,⁴³ outdated⁴⁴ or incapable of being solved ordinarily,⁴⁵ the human rights violation under examination is considered ineffective and cannot obstruct the admissibility of the petition, while the State shall be considered in material breach of its general obligation.

Note that this rule of admissibility requires the petitioner to inform the committee of all measures taken domestically to attempt to solve the problem, while the state must provide detailed information on the remedies that are available to the petitioner and provide evidence that there is a reasonable possibility that these remedies could be effective to resolve the case. Alternatively, the petitioner may clarify

to the committee the reason why all the domestic remedies were not exhausted, demonstrating which remedies are not effective and thereby dispensing with this rule of admissibility.

Countless cases have analyzed this admissibility requirement and the conventional committees have developed an interpretation of the concept of *effective* remedies, as described above. Take, for example, the *Vargas vs. Peru* case, in which the petitioner, who was accused of being a member of Shining Path and imprisoned by the Peruvian Anti-Terrorism Department (DINCOTE), alleged he had been tortured. The HRC, after conducting an analysis of previous complaints, identified the inefficiency of domestic remedies against torture and mistreatment in similar cases of people imprisoned for connections to Shining Path, finding the Peruvian courts would hear these cases in a non-transparent and negligent manner and disrespect the rules of due legal process. As a result of this assertion and the inertia of Peru to demonstrate the efficiency of the Peruvian remedies available to the petitioner, the petition was admitted and the HRC established a time limit of 90 days for Peru to take steps to make domestic remedies available to Vargas that would guarantee the respect for his right to be tried in accordance with the rules of due legal process and to be compensated for proven harm suffered as a result of the violation of his political rights.⁴⁶

In contrast, in the *Dahanayake et al. vs. Sri Lanka* case, the complaint was not admitted because the petitioner had access to effective domestic remedies to repair the damage caused by the compulsory acquisition of her property for the construction of a road.

The exhaustion of domestic remedies serves as a reference for the establishment of a reasonable time limit for presenting petitions to the committees. Petitions should not be presented after the exhaustion of domestic remedies, since as time passes, it becomes harder to gather evidence and restore the situation prior to the violation. The CAT frequently considers petitions inadmissible if presented long after the exhaustion of domestic remedies and it has even identified this as an additional admissibility requirement in accordance with procedural rule 113(f). Based on procedural rule 91(f), the CERD has established a time limit for presenting petitions of six months from the date of the final domestic decision that corresponds to the exhaustion of domestic remedies.

5.3 Causal link

Upon interpreting article 2 of the Optional Protocol to the ICCPR, the jurisprudence of the HRC developed the view that, even when all the admissibility requirements have been satisfied, petitions may still not be accepted if they do not establish a causal link between the act or omission by a State Party and the alleged violation of the ICCPR. A violation of the ICCPR should be considered a violation of the substantive rights recognized in the ICCPR that are inherent to the victim identified in the petition, who must have been personally and directly harmed as a result of the violation. The other conventional committees have adopted similar views in relation to their respective treaties.

This is another requirement for the admissibility of petitions and, although the committees do not analyze the merit of the case at this stage of the procedure, it is important to provide consistent and accurate information in order to clarify how the act or omission by the State resulted in a violation of the convention and personally and directly affected the victim.

In the *Aalbersberg et al. vs. the Netherlands* case, the petitioners claimed disrespect of the right to life guaranteed to them in the ICCPR based on the position of the Netherlands on nuclear weapons development in the country. In its response, the HRC clarified that the petitioners were not able to demonstrate personally and directly how the position of the Netherlands would threaten their lives or disrespect any of their rights established in the ICCPR. It was for this reason that the complaint was considered inadmissible.

Similarly, in the *Beydon et al. vs. France* case, the petitioners alleged that France had curtailed their right to participate in the running of domestic public affairs because they did not participate in the talks and the subsequent accession of France to the statute of the International Criminal Court. The HRC, however, determined the complaint to be inadmissible based on the lack of status of the victim, in light of the fact that the petitioners had the opportunity to participate and exert influence on this process through public debate and dialogue with their representatives. Because France is a democratic country, public dialogue depends solely and exclusively on the capacity of the petitioners to organize themselves.

Once again, as stated in the analysis of the other admissibility requirements presented above, the verification of this requirement is conducted in a material manner. It takes into consideration the content of the information and arguments presented to the committee and after an analysis of the facts. In the example of France, the fact that determined the inadmissibility was that it is a democratic country.

5.4 Analysis of events prior to recognition of the competence of the Committee

The final admissibility requirement that deserves consideration is the condition that individual petitions may only be addressed to the conventional committees if the alleged human rights violations occurred after the State Party recognized the competence of these committees to receive petitions.

As a general rule, the conventional committees do not examine allegations of events prior to the acceptance by the accused State of the competence of the committee to monitor the respect for the treaty in question. It is important to point out that this admissibility requirement is not applied automatically,⁴⁷ since a petition may be admitted if the alleged rights violation continues to produce effects after the recognition of the competence of the committee to analyze individual petitions. This is confirmed by the decisions on the admissibility of the *Blaga vs. Romania* and *Kouidis vs. Greece* cases, in which the HRC determined that the fact that a second or final instance judgment in the domestic courts was still pending demonstrates the undue continuity of the trial. These pending cases were in

violation of the right of due legal process established by the ICCPR and did not, therefore, constitute a barrier to admissibility.

Moreover, not only do the effects of the human rights violation in question need to be continuous, but the non-compliance with an international treaty must also be ongoing and be confirmed upon the admission of the petition. On this point, *Yurich vs. Chile* was deemed inadmissible by the HRC because, although the disappearance of the petitioner's daughter constitutes a violation with an ongoing effect, Chile, before ratifying the ICCPR and its optional protocol, had recognized and taken responsibility for the violation.

6 Examination of the merit

Once the admissibility requirements have been satisfied, the analysis of the merit begins.

The analysis of the merit takes into account the arguments presented by the petitioner that demonstrate the reasons why the petitioner believes the reported facts constitute a violation of the monitored international treaty. The committees also recommend that the petitioner indicates which article of the treaty has been violated.⁴⁸

Additionally, the conventional committees seek to maintain consistency in their decisions, an effort conducted with the structural support of the OHCHR. Thus, arguments of merit are strengthened when they are grounded in prior decisions or in general comments formulated by the committees on earlier decisions, which clarify the extent and correct interpretation of the articles of the international conventions. It is also important for the petition to be accompanied by the proper documents that prove the reported facts, as described in section 3.

Once the examination of the merit is complete, the committee releases its decision based on a majority vote of the members. Although efforts are made to achieve a unanimous result, dissident votes may be made separately.

The decisions that declare a treaty violation generally establish a time frame for the State Party in question to submit a response explaining what arrangements have been made to resolve the matter. Sometimes the decisions of the committees suggest measures that should be adopted by the States Parties.

The parties are, then, informed of the decision, which is also published on the website of the OHCHR. Subsequently, they appoint a special rapporteur to follow up on the implementation of the decision by the accused State.

Whenever a committee determines that certain human rights have been violated, the State Party is invited to clarify what measures it has taken to affect the decision or to cease or compensate for the violation.⁴⁹ The victim is, then, invited to comment on the observations presented by the State. This marks the beginning of the following up on the decision, during which time the special rapporteur for follow-up on cases⁵⁰ requests clarification on the execution of the decisions of the committees. The conclusions of the special rapporteur are included in the annual report of the committees, which is submitted to the UNGA⁵¹ as well as in press releases.⁵²

7 Conclusion

Under the UN Charter, states assume the commitment to act in conformity with the principles established therein. These include the promotion and respect for human rights that were recognized by the Universal Declaration of Human Rights of 1948 and other international treaties approved under the auspices of the UN, which comprise the body of norms of the Global Human Rights Protection System.

The Universal Declaration of Human Rights is the authoritative interpretation of “human rights” as referenced in the UN Charter (PIOVESAN, 2007, p. 137) and it thereby representing an international obligation for the UN Member States

Additionally, the Declaration of 1948 is an instrument that *codifies* the rights it contains and, therefore, it establishes customary international law that is binding on all states, regardless of how they voted when it was adopted by the UNGA.

Certain rights included in the Universal Declaration are also recognized by the international community as *jus cogens*, defined by the Vienna Convention on the Law of Treaties as a peremptory norm of general international law that is accepted and recognized by the international community. These are norms from which no derogation is permitted and which can be modified only by a subsequent norm with the same character.

The combination of these attributes alone would be sufficient to defend the binding nature of the Universal Declaration of 1948 and, consequently, its mandatory application and observance in all domestic legal systems.⁵³

Some of the norms in international human rights law addressed in this article have one or more of the aforementioned attributes of the Universal Declaration of Human Rights and, therefore, express international obligations of states. These obligations are variously made by codifying a customary right that was previously valid *erga omnes*, by representing a rule of *jus cogens* or through a norm whose protection constitutes one of the principles and purposes of the UN. Therefore, disrespect implies a violation of the UN Charter itself (AMARAL, 2002, p. 641). The other international human rights norms that make up the Global Human Rights Protection System but that do not share these attributes are still binding and therefore express international obligations. This means that they must be observed by State Parties in accordance with the rules codified in the Vienna Convention on the Law of Treaties and in particular, the customary rules codified in articles 26, 27 and 31.

In all the hypotheses described above, international human rights norms analyzed establish legitimate international obligations. Non-compliance with these obligations generates a responsibility for the state to repair any damage that may have been caused, (RAMOS, 2012, p. 29-30). In this context, the conventional mechanisms for the protection of human rights, which include the right of petition addressed in this article, “are truly collective mechanisms for determining the international responsibility of the States” (RAMOS, 2012, p. 84) which “can lead to the imposition of collective sanctions capable of obligating the offending State to finally observe international decisions” (RAMOS, 2012, p. 345).

Moreover, the absence of coercive mechanisms intended to force compliance with these decisions in the international legal system does not justify a denial

of their binding nature, since the well-known “inconsistency between the new responsibilities that legal norms delegate to the international community and the lack of mechanisms capable of ensuring their effectiveness” (AMARAL, 2002, p. 649) does not reduce the degree of protection afforded by the monitoring mechanisms.⁵⁴

Assuming, then, that international human rights norms represent international obligations for which states can be held responsible, the normative framework of the Global Human Rights Protection System establishes the general international obligation analyzed in sections 3.2 and 5.2, according to which the State Parties to the international conventions have the duty to take steps and develop *effective* domestic instruments to guarantee the application of the conventions, thereby preventing legislative omissions and government inertia from violating the rights they protect.

This general international obligation is *reaffirmed* in the decisions of the committees, since non-compliance has been demonstrated in a concrete case. This is because, as we have seen, the decisions of the committees generally do not establish a new international obligation, yet they sometimes suggest measures considered *effective* by the committees to solve the matter. That respect and reception of the decisions of the committees constitutes no more than mere compliance with previously established international obligations on States Parties. This is because, as a general primary obligation, State Parties must develop *effective* domestic instruments to guarantee respect for the international convention in its domestic law, which should make it unnecessary for individuals subject to their jurisdiction to appeal to the conventional committees.

Nevertheless, if an individual does need to use an international remedy, and if the complaint is justified, this constitutes clear non-compliance by the accused state of its general international obligation described above and means that the state can now be held responsible internationally. At this point, the state has the responsibility to comply with the decision issued by the committee (according to paragraph 15 of the General Comments No. 33 released by the HRC in 2008). To do so, it must incorporate its recommendations into its legislation in order to correct the violations or improve the existing implementation instruments that were incapable of correcting them.

In the first case, the state would be complying with its general international obligation because the treaty itself expressly determines the duty of State Parties to develop domestic instruments to guarantee its application. In the second case, the state would be in compliance, albeit after a delay, with its general international obligation because if the individual needed to appeal to the conventional committees for their rights to be respected, it is because all the domestic instruments were exhausted and proven to be ineffective. In this case, the State Party must create new instruments or improve existing ones to correct this additional breach and comply with its international obligation, which also involves incorporating the decision of the committee in that concrete case.

In this context, by declaring themselves subject to the monitoring of these committees, states must comply with their decisions, and, therefore, accept these decisions as binding. On this point, Carvalho Ramos points out, “if [the state]

expressly accepts this system [of petitions] it would be illogical to consider their final deliberations merely as advice or recommendations” (RAMOS, 2012, p. 342).

As the HRC explains in its General Comment No. 33, although they do not carry the legal weight of judicial decisions, the decisions of the committees do share some important characteristics of those issued by judicial bodies. The decisions of the committees are issued in a similar context to judicial decisions and are rendered by impartial and independent judges who make an authoritative interpretation of the international convention. Moreover, the decisions are issued by entities with recognized and accepted authority and they have a determinative character typical of judicial decisions. In this context, the HRC asserts that the decisions represent a ruling endowed with the authority conferred by the convention ratified by the State Parties and, therefore, they are binding to them.

However, some states have argued that the decisions issued by the committees are merely non-binding confirmations and interpretations of the international convention in question, while the only convention itself is an international obligation.⁵⁵ This view denies the binding nature of the committee’s decisions and is based on the lack of express provisions in the international treaties with regard to this matter.

The conventional committees have pronounced that the lack of specificity in the treaties in question concerning the binding nature of their decisions cannot be interpreted by State Parties as freedom to choose whether or not they accept these decisions, as pointed out in the General Comment No. 31 issued by the HRC. Such a view would represent a regression to a time before the internationalization of human rights when states were the only agents empowered to promote the protection of human rights and had a significant amount of discretion in doing so.

Due to this uncommitted position of some State Parties, the effectiveness of this human rights monitoring mechanism has come under threat and, consequently, the power of the individual to act on the international stage via individual petitions has diminished.

The annual reports of the committees that monitor the execution of the decisions in domestic legal systems demonstrate that the denial of the binding nature of these decisions has proven to be a significant obstacle in their implementation, to the extent that “the States [however] resist offering the international organizations the necessary instruments to address the new complexity that has emerged” (AMARAL, 2002, p. 649).

Consequently, this existing global monitoring mechanism has still not achieved the relevance that was intended to when it was conceived, as it depends fundamentally on the discretionary and even arbitrary cooperation of states. This situation contradicts the principles of international human rights law, as well as the primary motivation for the internationalization of human rights: not leaving the respect for rights that are so highly valued by international society to the discretion of States.

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NOTES

1. Articles 1(3), 13, 55, 56 and 62(2 and 3) of the UN Charter.
2. Article 2(3) of the ICCPR.
3. Article 1 of the Optional Protocol to the ICCPR.
4. The International Convention on Migrant Workers and the optional protocols to the ICESCR and to the Convention on the Rights of the Child endowed their respective monitoring committees with the competence to receive individual petitions, but these treaties are not yet in effect internationally. However, ECOSOC has the competence to monitor compliance with the ICESCR and some rights set forth in these conventions may be monitored separately by the mechanisms addressed here.
5. It is important to point out that the *conventional* human rights protection mechanisms have their material work limited by the convention, and are only applicable on the States Parties to the conventions. The *extra-conventional* mechanisms, meanwhile, are more susceptible to political influence, with the exception of those that have rules of independence intended to neutralize the interference of the governments of States being monitored.
6. The CEDAW also receives this structural support from the UN Division for the Advancement of Women.
7. The OHCHR is headed by the High Commissioner for Human Rights, elected in accordance with the rules established by Resolution 48/141 of the UNGA that are intended to preserve the independence and the rotational nature of the position.
8. Articles 36 of the ICCPR, 10.3 of the ICERD, 17.9 of the CEDAW, 25.2 of the CAT and 34.11 of the CRPD.
9. Resolutions 48/141 and 60/251 of the UNGA.
10. Articles 9.2 of the ICERD and 21.1 of the CEDAW, for example.
11. Article 38(a) of the CAT and 22 of the CEDAW, for example. See Report 49/537, resulting from the 5th meeting of persons chairing the committees.
12. The CERD and the CEDAW call them general recommendations.
13. Articles 9.1 of the ICERD, 35 and 36 of the CRPD and 18 of the CEDAW.
14. The CERD calls them opinions.
15. Articles 8 of the ICERD, 29 of the ICCPR, 17 of the CEDAW, 34 of the CRPD and 17 of the CAT.
16. On the harmonization of the work of the committees, see Report 49/537 resulting from the 5th meeting of persons chairing the committees and Report 65/190 resulting from the most recent meeting of the committees.

17. See MAGALHÃES, 2000, p. 65 and RAMOS, 2008, p. 455, for doctrines on the (supra) constitutional status of these treaties. For an analysis of the evolution of the jurisprudence of the Brazilian Supreme Court on the subject, see DANTAS, 2011.
18. For model petition forms, go to the website of the OHCHR.
19. Petitions Team, Office of the High Commissioner for Human Rights, United Nations Office at Geneva, via mail, to the address 1211 Geneva 10, Switzerland and, in urgent cases, via fax to the number + 41 (22) 9179022. Additionally, the petitioner may use the email address tb-petitions@ohchr.org, exclusively for informal contact.
20. Articles 96(a) of the HRC and 84.1(a) of the CERD, for example.
21. Rules of procedure 102.4 of the HRC, 74.4 of the CEDAW and 76.6 of the CRPD.
22. Article 2(e) of the optional protocol to the CRPD.
23. Rules of procedure 55.2 of the CRPD, 84.2 of the HRC and 58 of the CEDAW.
24. General Comments of the HRC No. 31, paragraph 10.
25. The CERD and the CEDAW also recognize as victims groups of people (articles 14.2 of the ICERD and 2 of the optional protocol to the CEDAW).
26. Rules of procedure 96(b) of the HRC, 68.2 and 68.3 of the CEDAW and 91(b) of the ICERD.
27. See the cases *Ruzmetov vs. Uzbekistan* and *Burgess vs. Australia*.
28. On the concept of effective remedies, see Chapter 5.2.
29. Of importance is the study of the role of the Judiciary (See CUNHA, 2005) and the National Human Rights Institutions (NHRI) devised by the Paris Principles established by Resolution 1992.154 of the Commission on Human Rights.
30. Rule of procedure 85 of the HRC, for example.
31. Rules of procedure 97.6 of the HRC and 69.9 of the CEDAW.
32. Rule of procedure 97.2 of the HRC and 70.3 of the CRPD. The CERD is the only committee that, as a rule, conducts these examinations in different stages.
33. Rules of procedure 88 of the HRC and 88 of the CERD, for example.
34. Rule of procedure 97.2 of the HRC, for example.
35. Rule of procedure 93 of the HRC, for example.
36. Emphasis is given to the use of the terms "legitimate" and "provisions", i.e., to the fact that some reservations, in contrast, cannot prevent the analysis of a petition by one of the committees, if they apply to non-derogable provisions of these treaties that do not constitute International Law provisions to which reservations are permitted. See *Kennedy vs. Trinidad and Tobago*.
37. Articles 14 of the ICERD, 2(b) of the CRPD, 3 of the ICCPR and 22.2 of the CAT and rules of procedure 71(d) of the CERD and 96(c) of the HRC.
38. Rules of procedure 98.2 of the HRC, 70.2 of the CEDAW and 93.2 of the CERD, for example.
39. The CAT, in its report, has stated that monitoring procedures are generally concluded in a time frame of between one and two years. The CERD, meanwhile, has stated that given the reduced number of cases before the committee, some cases are resolved in a time frame of less than one year.
40. In urgent cases, the committee may forward to the accused State a request for interim measures, in order to prevent irreversible harm to the victim while the petition is being analyzed by the committee. Despite their provisional characteristic, the interim measure requests are equivalent to decisions of merit.
41. Article 2(c) of the optional protocol to the CRPD and articles 22.4(a) of the CAT and 4.2(a) of the CEDAW.
42. Article 4.2(a) of the optional protocol to the ICCPR.
43. Article 5.2(b) of the optional protocol to the ICCPR and 7(a) of the CERD, rules of procedure of the CERD, 113(e) of the CAT.
44. See *Carranza vs. Peru*.
45. See *Chisanga vs. Zambia*.
46. See *K.N.L.H. vs. Peru*; *Blaga vs. Romania* and *Quispe vs. Peru*.
47. Article 2(e) of the optional protocol to the CRPD, for example.
48. Rule of procedure 84.1(d) of the CERD.
49. Rule of procedure 101.2 of the HRC, for example.
50. Rule of procedure 102.1 of the HRC.
51. Rules of procedure 101.4 of the HRC and 96 of the CERD, for example.
52. Rule of procedure 97 of the CERD, for example.
53. For an opposing view, see HEINTZE, 2010, p. 29.
54. In this context of the absence of secondary norms that can force the execution of the decisions of the committees, it is opportune to study the reasons why States fail to comply with the international treaties and obligations and, therefore, do not execute these decisions (CHAYES, A.; CHAYES, A. H., 1995, p. 3), seeking alternative non-coercive measures, or "non-forcible measures" (DUPUY, 1997, p. 23), to convince States to respect International Law. See also the study by the Human Rights Institute of Abo Academy University.
55. The International Law Association also views the decisions issued by the committees only as non-binding confirmation and interpretations of the international treaty in question, while only the treaty itself is an international obligation. Similarly, the Supreme Court of Ireland ruled in this way in the case of *Kavanagh vs. Governor of Mountjoy Prison*.

RESUMO

O artigo analisa o direito de petições individuais junto aos comitês convencionais que compõem o Sistema Global de Proteção dos Direitos Humanos mantido sob os auspícios da ONU. O texto descreve o sistema que permite a indivíduos entrarem com petições junto a organismos internacionais denunciando seus Estados por violações dos direitos humanos elencados na Declaração Universal ou no Pacto Internacional de Direitos Civis e Políticos (ICCPR) ou ainda das normas estabelecidas em tratados específicos tais como a Convenção contra a Tortura (CAT), a Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial (ICERD), a Convenção sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher (CEDAW) e a Convenção Internacional sobre os Direitos das Pessoas com Deficiência (CRPD). Segundo a autora, as recomendações feitas pelos órgãos da ONU relativas a denúncias feitas por meio direito de petição individual têm caráter vinculante e devem ser cumpridas pelos Estados em questão.

PALAVRAS-CHAVE

Direito de petição – Direitos humanos – Sistema Global

RESUMEN

El artículo analiza el derecho individual de petición ante los comités convencionales que forman parte del Sistema Global de Protección a los Derechos Humanos de la ONU. El texto describe el sistema que permite a los individuos entrar con peticiones junto a organismos internacionales denunciando a sus Estados por violaciones de los derechos humanos incluidos en la Declaración Universal o en el Pacto Internacional de Derechos Civiles y Políticos (ICCPR) o incluso por las normas establecidas en tratados específicos tales como la Convención Contra la Tortura (CAT), la Convención Internacional sobre la Eliminación de Todas las formas de Discriminación Racial (ICERD), la Convención sobre la Eliminación de Todas las Formas de Discriminación contra la Mujer (CEDAW) y la Convención sobre los Derechos de las Personas con Discapacidad (CRDP). Según la autora, las recomendaciones hechas por los órganos de la ONU relativas a denuncias hechas por medio del derecho de petición individual tienen un carácter vinculante y deben ser cumplidas por los Estados en cuestión.

PALABRAS CLAVE

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