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Abstract: The objective of this paper is to reflect on law and counter-hegemonic globalization through an analysis of the increasing use by human rights NGOs of international human rights law. Focusing on the case-study of Brazil and the Inter-American Human Rights System, the paper discusses whether transnational legal mobilization carried out by human rights NGOs contributes to a larger counter-hegemonic movement of globalization. By invoking international human rights systems to act upon the national juridical-political arena, human rights NGOs have the potential to re-politicize law and re-legalize politics. Although not directly challenging neoliberal globalization, the strategies of human rights NGOs can be viewed as an attempt to reconstruct human rights norms beyond an individualistic and liberal conception of transnational litigation and of human rights.

Introduction

In the current era of hegemonic, neoliberal globalization, we have been witnessing the global expansion of judicial power through the reform of domestic judicial systems in several countries, as well as the increasing internationalization of the judiciary and the transnationalization of dispute resolution, two sides of the same phenomenon scholars refer to as “global judicialization” (Ratner, 2003). Global judicialization has emerged through the

¹ An earlier version of this paper was presented at the Law and Society Association Annual Meeting, Baltimore, 6-9 July 2006. Sections of this paper also draw and expand on previous working papers on transnational legal activism presented, respectively, at the workshop “New Wars, Global Governance, and Law,” held in the International Institute for Sociology of Law in Oñati, Spain, 13-14 May 2004, and at the First European Socio-Legal Conference, held in the International Institute for Sociology of Law in Oñati, Spain, 6-8 July 2005. Research for this paper was funded by the Faculty Development Fund of the University of San Francisco. Thanks to Brianna Dwyer-O’Connor and Adriana Carvalho for their invaluable research assistance. Thanks also to Seth Racusen for his insightful feedback on the version presented at Baltimore.

creation of international ad hoc or permanent courts and arbitral tribunals, as well as the increased resort to international judicial and/or quasi-judicial institutions to deal with disputes over both commercial and human rights issues.² The changes of law in the context of globalization have raised questions about the prospects of the judiciary and global judicialization to enforce the rule of law, as well as to promote local and global democracy. This debate, however, does not critically examine the political aspects of law and the role of the rule of law in legitimating and regulating the hegemonic project of neoliberal globalization (Jenson and Sousa Santos, 2000). The rule of law and law enforcement do not necessarily promote the protection of human rights, especially the fulfillment of social, economic and cultural rights that require redistribution of material and symbolic resources. Given the negative effects of neoliberal globalization on a variety of excluded groups all over the world, such as rural workers, indigenous populations, women, sexual minorities, blacks, and the poor, it is important to ask whether and when the use of law can serve as an emancipatory tool for social struggles. What type of legal mobilization can be identified as part of a counter-hegemonic process of globalization? Can international human rights norms be used to promote legal and political changes at the local as well as national and global scales?

The objective of this paper is to reflect on law and counter-hegemonic globalization through an analysis of the increasing use by transnational human rights advocacy networks of international legal instruments for the protection of human rights. The paper discusses what I call “transnational legal activism” and the ways in which local and transnational non-governmental organizations (NGOs) use international judicial or quasi-judicial human rights systems. By “transnational legal activism” I mean a type of activism that focuses on legal action engaged with international courts or quasi-judicial organizations to strengthen the demands of social movements; to make domestic legal and political changes; to reframe or redefine rights; and/or to pressure states to enforce domestic and international laws. My hypothesis is that transnational legal activism re-politicizes law and re-legalizes politics by invoking and bringing international courts or quasi-judicial systems of human rights to act upon the national political arena. Transnational legal activism can be viewed as part of a larger counter-hegemonic movement of globalization and as a specific strategy to use supra-national institutions and the international human rights framework “from below” in

² See Sousa Santos (2002) for an illuminating discussion and analytical framework for understanding the changes of law in the context of globalization, as well as the social and political significance of the globalization of the rule of law and judicial reform.

order to advance counter-hegemonic globalization through transnational counter-hegemonic legal mobilization, that is, a counter-hegemonic movement of juridical-political globalization that challenges neoliberal globalization and its accompanying narrow models of liberal law and formal democracy.

Drawing on interviews and conversations with human rights activists and on data collected from human rights NGOs and from the website of the Organization of American States, I discuss this hypothesis by examining selected cases of human rights violations brought by social movements' organizations and human rights NGOs against Brazil before the Inter-American System of Human Rights, which includes the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

Global Judicialization and Transnational Litigation

Legal scholars have analyzed the internationalization of the judiciary mostly from a dispute resolution perspective, debating whether global judicialization is inevitable and desirable for an effective and equitable enforcement of the rule of law.³ On one side of the debate are those who favor the establishment of a global law of jurisdiction and judgments, both in civil and commercial matters as well as in criminal matters.⁴ Slaughter (2003), for example, is enthusiastic about the emergence of what she envisions as a “global community of courts” and “global jurisprudence,” which she sees as a consequence of the emerging fora of “transnational litigation.” According to Slaughter (2003: 192), international dispute resolution has been increasingly replaced with “transnational litigation,” a significant shift in the international legal system. Traditionally, international disputes involved states and were solved under the auspices of the international system. By contrast, “transnational litigation” encompasses domestic and international courts. It involves cases between states, between individuals and states, and between individuals across borders. Slaughter points out that transnational litigation typically refers to commercial disputes, as in cases brought to the World Trade Organization (WTO), North American Free Trade Agreement (NAFTA), and the Law of the Sea Tribunal.

³ See, for example, Kreindler (1998), Slaughter (2003), and Ratner (2003).

⁴ For a discussion of the possibilities for establishing a global law of jurisdiction and judgments in civil and commercial matters, see the collection of papers in Barceló III and Clermont (2002).

On the other side of the debate are those who do not view “global judicialization” as an inevitable development of international law and do not seem to be as enthusiastic about this trend. Observing that, in Europe and in Latin America, “the ability of individuals to seek a remedy against their government has advanced very rapidly at the international level,” Ratner (2003: 445) discusses the limits of “global judicialization” by focusing on the internationalization of criminal law and on the obstacles to the effectiveness of the International Criminal Court. A former member of the U.S. State Department Legal Adviser’s Office, Ratner (2003: 445) believes that “international law is applied mostly outside of courts and will continue to be so applied.” He argues that global judicialization is neither inevitable nor effective or desirable if it is going to divert resources from non-judicial methods of enforcing the law and solving disputes, such as diplomacy, negotiations, and sanctions. His view that “soft law” is more effective in addressing international disputes is also shaped by his experience working for the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE).

While offering insights into the procedural aspects and obstacles to the globalization of the rule of law and judgments, legal scholars have approached the phenomenon of “global judicialization” and “transnational litigation” from a narrow, legalistic perspective. They have focused primarily on dispute resolution that deals with commercial disputes, adopting an individualistic and doctrinal perspective that overlooks the complex relations between different legal ideologies and power relations between diverse legal actors. When discussing human rights abuses, they have also approached the disputes from an individualistic perspective, as if the interests of the parties in question and the remedies sought by them concerned only legal matters and could be separated from politics and culture. Furthermore, legal scholars have often approached domestic and international courts and quasi-judicial institutions as either separated entities or as institutions merging into one developing “global community of courts.” Both perspectives overlook the role that NGOs and nation-states play as parties involved in domestic and international disputes as well as in the constitution of both domestic and international judicial or quasi-judicial systems.

Since the 1990s, cross-border legal interactions and the globalization of the rule of law and of the judiciary have emerged as a new field of socio-legal research.⁵ Two approaches can be identified, ranging from an institutional to a more political analysis of the relationship between law and globalization. Scholars who advocate an institutional and world-systemic approach to law and globalization have attempted to analyze the relations between legal and nonlegal institutions in order to uncover the most relevant characteristics of the developing global legal culture (Gessner, 1996a; 1996b). This approach seeks to answer questions about “use or avoidance of legal processes, as well as the legal cultures, the types of disputes, forms of decision-making, as well as the attitudes and strategies of legal actors” (Gessner, 1996b: 18). The importance of this type of research lies in its attention to legal actors and legal cultures, as well as unequal power relations between these actors. But it still focuses primarily on commercial disputes and international elites, and tends to overlook the relationship between the globalization of law and politics. By not examining the practices of social movement actors and their engagement with law and legal institutions, this approach also overlooks the contradictory processes of globalization and movements of resistance to neoliberal globalization.

Counter-Hegemonic Globalization, Law, and Transnational Legal Activism

Studies of counter-hegemonic globalization have attempted to document and analyze the experiences of resistance to the social exclusions resulting from the neoliberal institutions and ideologies of hegemonic globalization. These experiences of resistance have included a variety of networks, organizations and movements both fighting against the effects of neoliberal globalization and proposing an alternative vision of development. However, only a few studies of counter-hegemonic globalization focus on legal mobilization and the use of law as an instrument of social emancipation.

Sousa Santos (2002) offers an illuminating framework to discuss the relationship between law and counter-hegemonic globalization. According to Sousa Santos (2002), the hegemonic project of neoliberal globalization calls for representative democracy and the globalization of the rule of law. Participatory democracy and a variety of human rights advocacy networks offer resistance to the neoliberal model. Although neoliberal globalization

⁵ See, for example, the papers in the volume edited by Gessner (1996a), as well as the collection of papers published by the International Institute for the Sociology of Law in Oñati, edited by Feest (1999).

has diminished the power of the nation-states, Sousa Santos (2002: 283) observes that, “The nation-states will remain, in the foreseeable future, a major focus of human rights struggles, both as violators and as promoters-guarantors of human rights.” In addition, “the most serious violations of human rights have nowadays a distinctive global dimension” (Sousa Santos, 2002: 283). The expansion of transnational corporations and the establishment of structural adjustment programs, all backed up by nation-states, have had disastrous effects on civil and social rights. Sousa Santos (2002: 283) refers to this phenomenon as “localized globalism, that is to say, the locally specific and organized impact of global capital operations.” Even when states are not violators of human rights, they are too small and weak to counteract the violations of human rights in the contexts of “localized globalisms.” That is why “it is imperative to strengthen the extant forms of global advocacy and promotion and protection of human rights – as well to create new ones” (Sousa Santos, 2002: 283). This is not to deny the importance of nation-states as central actors in struggles for the protection of human rights. But given the double role of nation-states as both violators and protectors of human rights, domestic legal systems are not sufficient to guarantee the protection of human rights. Moreover, given the erosion of welfare states within the context of neoliberal globalization, global legal institutions have become crucial not only for the expansion of global capitalism, but also to foster the protection of human rights. Hence, despite its contradictions, international human rights law can be used as a juridical-political resource to emancipate oppressed groups.

Indeed, human rights NGOs, as will be illustrated by the Brazilian case, use the international system of human rights not simply to settle disputes between individuals or between individuals and states. Instead, they approach this arena of dispute resolution as a juridical-political resource to re-construct international human rights norms and to promote socio-legal, political, economic and cultural change. Both the international system of human rights and the state are at the center of their legal-political battles. Their claims target the state and they seek to promote social change both against and through the power of the state and of the international system of human rights.

Human rights NGOs are part of networks that Keck and Sikkink (1998) aptly describe as “transnational advocacy networks.” These networks “are organized to promote causes, principled ideas, and norms, and they often involve individuals advocating policy changes that cannot be easily linked to a rationalist understanding of their ‘interests’” (Keck and

Sikkink, 1998: 8-9). The concept of “transnational advocacy networks” is more accurate than “transnational litigation” to describe the engagement of human rights NGOs with the international system of human rights. However, since activists using the Inter-American System of Human Rights are mostly engaging in *legal* advocacy to promote policy as well as legal and political changes, I prefer to call their practices “transnational legal activism.” I define “transnational legal activism” as a type of transnational advocacy network that focuses on legal action engaged with international judicial and/or quasi-judicial institutions to make domestic legal, policy and political changes, to reframe or redefine human rights, and/or to pressure states to enforce domestic and international laws.

Transnational legal activism can serve as an example of what Sousa Santos (2002; 2005) calls as “subaltern cosmopolitan legality” if the conditions for such cosmopolitanism are present. These conditions include four expansions of the conception of law and of the politics of legality. First, concerning the breadth of legal actions, struggles, or disputes, there must be a combination of “political mobilization with legal mobilization, and the latter may involve legal as well as illegal and non-legal actions” (Sousa Santos, 2005: 30). Second, concerning the scale, “the politics of legality needs to be conceptualized at three different scales – the local, the national, and the global” (Sousa Santos, 2005: 30). Third, there must be an expansion of professional legal knowledge, of the nation-state law, and of the legal canon that privileges individual rights. This does not mean that individual rights are abandoned by subaltern cosmopolitan legality. Finally, the time frame of the legal struggle must be expanded to include the time frame of the social struggles which politicize the legal disputes by referring to social conflicts as a result of capitalism, colonialism, authoritarian political regimes, and so on.

The practices of human rights NGOs in cases against Brazil brought to the Inter-American System of Human Rights meet the conditions for the emergence of what Sousa Santos describes as subaltern cosmopolitan legality. But I use the term “transnational legal activism” to emphasize the *transnational* dimension of the alliances and networks formed by NGOs, social movement actors, and grassroots organizations engaged in human rights activism. The constituency of human rights NGOs is diverse and some have been constituted by activists coming from and working in different nation-states at the same time, such as the Center for Global Justice and the Social Network for Justice and Human Rights,

although the work of these NGOs focuses solely on human rights issues in Brazil. In addition, the term “transnational legal activism” emphasizes the increasing use of international law by activists. The word “activism” is also important for emphasizing the connection between legal mobilization and social movements.

In order to analyze how human rights NGOs and activists use international law, I believe we need to conduct more empirical work on the discursive struggles over the definition of human rights; the power relations among networks and within social movements; the strategies and tactics used by these actors; and the effectiveness of the international human rights system in terms of its impact on local-national governments and local-national judicial systems. In this paper, I focus primarily on the strategies used by human rights NGOs in the cases against Brazil in the Inter-American Human Rights System, offering a few examples based on preliminary results from field research still in progress. Before addressing these strategies, I will briefly present the political context of human rights violations and the politics of human rights in Brazil since the beginning of the redemocratization process in the mid-1980s.

The Paradox of Democratization and Continued Human Rights Violations in Brazil

During different periods from the 1960s until the mid-1980s, many countries in Latin America experienced military coups and were controlled by governments that promoted the systematic practice of kidnapping, torture, and murder of political dissidents. These regimes imposed authoritarian constitutions revoking fundamental political and civil rights. Since the mid-1980s, most countries in Latin America have been successful in ending military-authoritarian regimes, making important legal and political reforms towards democracy. Most countries in the region have now a democratic political regime along with progressive legislation granting new rights to often excluded groups, such as prisoners, rural workers, street children, indigenous populations, blacks, women, homosexuals, and transvestites. However, systematic practices of human rights violations against these social groups have persisted in Latin America (Méndez, O’Donnell, and Pinheiro 2000).

In Brazil, the military-authoritarian regime lasted over twenty years, from 1964 to 1985. Based on the doctrine of “National Security and Development” (Couto e Silva, 1981), the military regime suspended direct elections for president, governors and senators; made ineffective the

legislature; banned existing political parties, imposing a political system with only two parties; suspended constitutional rights; censored the press, the arts, and academia; as well as persecuted, imprisoned, tortured, and killed whoever opposed the regime. Within this period of political terror, sectors of civil society organized resistance and opposition movements.⁶

Various social movements flourished throughout the 1970s in response to increasing military repression, including the students' movement, the movement for amnesty, the workers' movement, the movement against scarcity, the women's movement, the black movement, and the environmental movement.⁷ Pressures from these movements and their international allies, as well as divisions among military leaders, instigated a decrease in repression in the late 1970s, leading to the *Abertura Política* (Political Opening). Censorship gradually decreased: Amnesty of political prisoners was granted through the enactment of the *Lei da Anistia* (Amnesty Law); activists in exile returned to the country; and elections for mayors and state assemblies were restored.⁸ To facilitate a smooth transition to civilian rule, the military and subsequent civilian regime broadened the interpretation of the Amnesty Law to also grant amnesty to the military officials and police officers who committed human rights abuses against political dissidents.

The 1980s brought a period of political, legal and institutional reform in order to restore democracy in the country. Elections for governors, national congress members, and the president were restored. During the transition from military to civilian rule, new hybrid institutions, such as state councils on the status of women, were created to help the government to design new public policies. The focus for social movements shifted from fighting the regime to participation in the re-democratization process from both inside and outside of the state. Thanks to pressures from the women's movement, the world's first women's police station run exclusively by female police officers was created in São Paulo in 1985 to deal with cases of violence against women.⁹

⁶ See Arquidiocese de São Paulo no Brasil (1981), Alves (1987), and Oliveira (1994).

⁷ See Durham (1984), Viola (1987), Sader (1995), Alvarez (1990), Teles (1993), and Keck (1992).

⁸ See Alves (1986).

⁹ Today, there are 125 women's police stations in the state of São Paulo, and Brazil has over 300 of these stations. See Santos (2005) for a sociological and feminist analysis of the emergence and operation of these police stations in São Paulo.

Diverse social movements also lobbied to influence the redrafting of the new democratic Brazilian Constitution in 1988. In addition to restoring fundamental political rights, this Constitution established new civil, social, and economic rights for children, adolescents, women, blacks, indigenous groups, and consumers. For instance, Article 5 of the 1988 Constitution established a series of fundamental rights, stating, among other things, that, “men and women are equal in rights and obligations”; “nobody will be subject to torture”; “property must fulfill its social function”; “the practice of racism is a crime”; “the state will promote the protection of consumers’ rights.” Article 6 established social rights to “education, health, work, leisure, security, social security, protection of maternity and childhood, assistance to the dispossessed.” The Constitution also declared that foreign relations are guided by the principle of the “prevalence of human rights” (Article 4, II).¹⁰

Since 1988, new progressive infra-constitutional legislation has been enacted to ensure the new civil, political, social, and economic rights declared in the 1988 Constitution. In 1989, for example, Congress passed Law 7719/89 to punish crimes resulting from discrimination on the basis of race, color, ethnicity, religion, or national origin. The following year, the Statute for the Protection of Children and Adolescents (Law 8069/90) was also enacted. The Code for the Protection of Consumer Rights (Law 8078/90) entered in effect in the same year.

In 1995, former president Fernando Henrique Cardoso signed Law 9140/95, known as *Lei dos Desaparecidos* (Law of the Disappeared), creating the *Comissão Especial de Reconhecimento dos Mortos e Desaparecidos Políticos* (Special Commission to Recognize those Killed or Disappeared for Political Reasons). This law determined the recognition that the Brazilian State was responsible for the killing of 136 persons who had disappeared for political reasons. It also created the above mentioned Special Commission to examine reports presented by family victims, who ended up receiving some pecuniary reparation.

Following the principle of the prevalence of human rights, in 1996 President Cardoso formulated the *Programa Nacional de Direitos Humanos* (National Program of Human Rights), further expanding the granting of civil, political, economic, and social rights to different groups, including “women, Blacks, homosexuals, Indigenous populations, elders,

¹⁰ See Piovesan (2006) for an illuminating doctrinal analysis of the debates among Brazilian jurists on the legal regime adopted by the 1988 Brazilian Constitution regarding the incorporation of international human rights norms into the Brazilian legal system.

individuals with disabilities, refugees, individuals infected with HIV, children and adolescents, police officers, prisoners, the poor, and the rich.”¹¹ In 1998, President Cardoso created the *Secretaria Nacional de Direitos Humanos* (National Secretariat of Human Rights) to implement the National Program of Human Rights.

Despite the end of the military regime and the enactment of a series of new progressive legislation since 1985, serious human rights violations have persisted in Brazil. Perpetrated by police, death squads and other interest groups, these violations include the systematic practice of torture; slave labor; discrimination on the basis of race, gender, sexual orientation, age, and disability; impunity of perpetrators of violence against women; summary executions; and violence against social movements struggling for agrarian reform and for indigenous rights, including the criminalization of these struggles.¹² The new progressive legislation and constitutional guarantees have hardly been enforced because of the continuing concentration of power in the hands of the elite, corruption, and other institutional problems of the justice system in Brazil and in the Latin American region.

Several domestic and international human rights non-governmental organizations (NGOs) have denounced this situation and have filed complaints in the Brazilian courts. Since the police and powerful interest groups are often involved in human rights violations, the local courts and the government have blocked redress to these organizations. This has occasioned what Keck and Sikkink (1998) call the “boomerang pattern.” This pattern refers to the activation of a transnational network when a given state blocks redress to organizations within it. Members of the network pressure their own states and, if relevant and necessary, a third-party organization, which in turn pressures the state that blocked redress to organizations.

Following the “boomerang pattern,” Brazilian NGOs have formed national and international human rights advocacy networks to pressure the Brazilian government to enforce the new laws and to design public policy regarding the protection of human rights. Since the late 1990s they have also mobilized their efforts to reach out the support of intergovernmental

¹¹ See Introduction to the *Programa Nacional de Direitos Humanos* (Secretaria Nacional dos Direitos Humanos, 1996).

¹² See, for example, Social Network for Justice and Human Rights (2001; 2002; 2003), Centro de Justiça Global and Núcleo de Estudos Negros (2003), and Sydow and Mendonça (2004). See, also, Americas Watch Committee (1991a; 1991b), Adorno (1995a; 1995b), AGENDE and CLADEM (2003), Caldeira and Holston (1995), Caldeira (1996), Méndez *et al.* (2000).

organizations, such as the Organization of American States (OAS) and its Inter-American System of Human Rights.¹³ In other words, they have increasingly focused their work on “transnational legal activism,” which I will illustrate with a few selected cases after the following overview of the Inter-American-System of Human Rights.

The Inter-American System of Human Rights: An Overview

The Organization of American States (OAS) was established in 1948. The American Convention on Human Rights was adopted in 1969 and entered into force in 1978. The Convention established that its observance should be carried out by two organs: The Inter-American Commission on Human Rights, created in 1959, and the Inter-American Court of Human Rights, created by the Convention and in force since 1978.¹⁴

The political context in which the Inter-American system was established marked its slow development and the disregard for its own purposes. On the one hand, the commitment to democracy and respect for human rights given in treaties by Latin American member states was neutralized by a fear of intervention by the United States. On the other hand, the fear of communism prompted the United States to support military dictatorships in the Latin American region. Until the 1980s, military and other authoritarian governments sat at the Inter-American system, discrediting the system’s goals of promoting democracy and respect for human rights. States of emergency and unresponsive or antagonistic governments were not uncommon. In addition to facing and overlooking large-scale practices of torture, disappearances and execution, the system had also to deal with a weak, inefficient and corrupt domestic judiciary (Steiner and Alston, 1996: 641).

In the 1980s, the democratization process that took place in most countries in Latin America helped to strengthen the Inter-American system’s commitment to democracy and respect for human rights in the continent. A number of OAS member states have ratified the American Convention on Human Rights and have recognized the jurisdiction of the Inter-American Court of Human Rights (see Graph 1 in the Appendix). Note that only in 1992, seven years after the transition from military to civilian rule, did Brazil ratify the

¹³ See Galvão (2002); Tojo and Lima (2004).

¹⁴ See Steiner and Alston (1996) for further information on the establishment of the OAS and of the Inter-American System of Human Rights.

Convention, ranking as the last member state among those who have so far ratified the Convention. Brazil has also been one of the last member states that have accepted the jurisdiction of the Inter-American Court. Only in 1998 did Brazil recognize the jurisdiction of the Inter-American Court.

The Inter-American Commission on Human Rights is composed of seven members elected by the OAS General Assembly. These members are not governmental officials and they represent all the OAS member states. The Commission has competence to receive petitions against member states of the OAS regardless of whether they have ratified the Convention. The Commission has a complementary function to domestic judicial systems. This means that admission by the Commission of a petition or communication is subject to the complainant having exhausted domestic remedies (Article 46 of the American Convention). Although the Commission can handle individual complaints and proceed to an *in loco* investigation, it is not a judicial organ and cannot deliver judicial and binding decisions.

A remarkable aspect of the Commission is the fact that “Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party” (Article 44 of the American Convention on Human Rights). Thus, contrary to the European Court of Human Rights, for example, which allows only the victims to lodge a petition with the Court, the Inter-American Commission on Human Rights gives more room for the politicization of the disputes by admitting petitions by human rights NGOs.

The Inter-American Court of Human Rights, however, is not accessible to either the victims or human rights organizations. The Court is the system’s judicial organ in charge of the interpretation and application of the Convention. But only state parties to the Convention and the Commission can submit a case to the Court. The jurisdiction of the Court has to be recognized by the state parties involved in the case. The Court’s decisions are binding as if delivered by a domestic court. The decisions are final and not subject to appeal. Since individuals and non-governmental organizations are allowed to send petitions or communications only to the Commission, transnational legal activism has engaged primarily with the Commission, as examined below.

Transnational Human Rights Activism and the Inter-American System: Selected Cases against Brazil

Transnational legal activism in the Inter-American System of Human Rights has expanded significantly in the last decade. As Graph 2 illustrates, the total number of complaints received by the Inter-American Commission on Human Rights during the last seven years has increased dramatically (see Appendix). Without considering the exceptional 3,763 petitions referring to the banking measures “Corralito” in Argentina, Graph 2 shows a gradual increase in the number of petitions sent to the Commission over the years. In 1997, for example, the Commission received 458 complaints. In 2003, this number more than doubled (1080) with most complaints referring to Peru, Mexico, and Argentina. In 2004, the number continued to increase, totaling 1329.

Although Brazil only ratified the American Convention on Human Rights in 1992 and recognized the jurisdiction of the Inter-American Court in 1998, the number of complaints against Brazil in the last five years has expanded in significant ways. In 2003, Brazil was the eightieth in number of complaints received by the Commission, as Graph 3 indicates. In 2004, less petitions were filed against Brazil (Graph 4), but Brazil continued to face many complaints compared to the majority of states in the region. Before the Convention was ratified by Brazil, the Commission called the attention of the Brazilian State only once, in 1985. The case involved the violation of the basic human rights to life, health and culture of the indigenous population of Yanomani.

After Brazil accepted the jurisdiction of the Court in 1998, national and transnational human rights NGOs began to increasingly resort to the Inter-American system to address violations of human rights in Brazil. Since 1999, the Commission has received 255 complaints against Brazil, as Graph 5 illustrates.

Types of Cases and Petitioners

Over 70% of the cases pending in the Commission concern the continuity of authoritarian practices by the State in the past and in the present: they involve torture, disappearance and extra-judicial executions (Pinheiro, 2001). The cases against Brazil range from violence perpetrated by both agents of the State and paramilitary groups. Most of the

cases concern violence against rural workers (including cases of slave labor), prisoners, indigenous populations, and street children. Though a minority, there are also cases involving violence against women and racial discrimination.

Human rights NGOs are responsible for 90% of the cases presented to the Commission and the Court (Hanashiro, 2001: 45). All of the cases against Brazil in the Commission have been initiated by human rights NGOs. The majority of the petitions have been prepared and signed by transnational and international NGOs in partnership with local NGOs, victims or their families, social movement actors, and/or grassroots non-governmental organizations. The local NGOs come from a variety of social movements and struggles, such as the human rights movement, the landless workers movement, the street children movement, the women's movement, the Black rights movement, and so on. Some participate in various social movements and human rights networks.

International human rights NGOs that have lodged petitions against Brazil in the Inter-American Commission on Human Rights include, for example, the Center for Justice and International Law (CEJIL), the Brazilian chapter of the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM-Brazil), and Human Rights Watch. The Center for Global Justice exemplifies a national human rights NGO, since it advocates for the human rights of individuals and social groups all over Brazil. Local NGOs that actively participate in the human rights movement and that have engaged in transnational human rights legal activism in partnership with international or national human rights NGOs include, among others, the Cabinet for Popular Juridical Assistance (GAJOP), the National Movement of Human Rights (MNDH), the Brazilian Commission on Peace and Justice, *Grupo Tortura Nunca Mais* [Torture Never Again Group] (GTNM/RJ), and the *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* [Committee of the Families of Those Who Died or Disappeared for Political Reasons] (CFMDP/SP). União de Mulheres de São Paulo is an example of a local grassroots feminist organization that has also used the Inter-American System of Human Rights to advance the feminist struggle against violence against women. THEMIS-Juridical Assistance and Gender Studies is a local feminist NGO that has also used the Inter-American System to advance the feminist struggle against gender-based violence. The Subcommittee on Blacks of the Human Rights Commission of the *Ordem dos Advogados do*

Brasil [Brazilian Bar Association] (OAB/SP) is an example of a local organization connected to various social movements, such as the Black rights movement and the human rights movement.

Multiple Strategies

When approaching the Inter-American system, the goal of these NGOs is to make the case an example for social change. Focusing on a variety of human rights violations, such as summary executions, institutional violence in hospitals and public shelters for children, police brutality in prisons and police stations, violence against women, racial discrimination, and so on, these NGOs seek the Inter-American system not only to find solutions for individual cases but also to create precedents that will have an impact in Brazilian politics, culture, and society. As Jayme Benvenuto, director of the International Human Rights Program of GAJOP, explains, “We work with the idea of creating examples. The case must be exemplary to make the country adopt a different position. We are not simply interested in a solution to the individual case. We are also interested in changing the police, changing laws, changing the state, to prevent the continuation of human rights violations.”¹⁵

NGOs use different strategies when approaching the Inter-American system and the United Nations system. Transnational legal activism in the Inter-American system is qualitative, whereas the approach of NGOs to the UN system is quantitative. Since 1998 GAJOP, for example, has initiated only eight cases against Brazil in the Inter-American Commission. But the organization has written 200 communications to the UN Committee on Human Rights in order to press the UN to send a representative to investigate human rights violations in Brazil.

Reconstructing Human Rights beyond Individual Rights

In addition to using the Inter-American system as a political resource for social change, NGOs also approach the Inter-American system to frame international norms and reconstruct human rights. The framing of the complaint as a violation of civil and political rights is more likely to be accepted by international judicial and quasi-judicial organs. For instance, all but one of the complaints initiated by GAJOP in the Inter-American system has been framed as a violation

¹⁵ Interview with Jayme Benvenuto, Recife, December 29, 2003.

of civil rights. The Inter-American Commission has considered these complaints admissible. The only case referring to social rights (housing) was not admitted by the Commission. Jayme Benvenuto explains that this complaint was framed as a social right to test the judiciality of social, economic and cultural rights in the Inter-American system. As other NGOs in Brazil, GAJOP is using international judicial and quasi-judicial organs not only to solve individual disputes over human rights but also to *re-frame* them.

But at the same time that human rights violations are framed in terms of civil rights violations, the demand goes beyond the reparation in favor of the victim. The petitioners normally demand that the Brazilian State take preventative measures and create new legislation or public policy on a specific issue. Moreover, there are cases that refer not only to class-based struggles but also gender-based violence and racial discrimination. In these situations, the framing of the cases goes beyond the individual versus collective debate on human rights by adding gender and race to the definition of human rights. In this sense, racism and sexism are also challenged by NGOs engaged in transnational legal activism. The political struggles over both individual and collective memory by family members of victims of political repression during the dictatorship have also been taken to the legal arena at the national and transnational scales. Due to their uniqueness, I mention three cases below that combine demands for the protection of individual and collective rights, and go beyond class-based struggles. While they illustrate aspects of what Sousa Santos depicts as “subaltern cosmopolitan politics and legality,” these cases are not directly challenging neoliberal globalization and do not politicize class-based violations of human rights.

The Araguaia Case: Fighting for both Individual and Collective Rights to Memory

The only case about political rights violations under the period of the military dictatorship brought to the Inter-American system concerns the massacre of members of the Araguaia guerrilla movement, which took place in the state of Pará from 1972 to 1975. In this case, the petitioners have used domestic and international law to reconstruct their memories, requesting access to classified documents and recovery of the bodies of those who were assassinated in the Araguaia region. This legal battle began in 1982, when family members of 22 of the disappeared persons brought proceedings in the Federal Court of Rio de Janeiro. In August 1995, the Inter-American Commission on Human Rights received a petition against

the Brazilian State from the Brazil section of the Center for Justice and International Law (CEJIL/Brazil), Human Rights Watch/Americas (HRWA), the Rio de Janeiro section of the *Grupo Tortura Nunca Mais* [Torture Never Again Group] (GTNM/RJ), and the *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* [Committee of the Families of Those Who Died or Disappeared for Political Reasons] (CFMDP/SP). In March 2001, the Commission declared the case admissible. In November 2004, the Regional Federal Court (Federal Court of Appeals) finally decided over this case, favoring the petitioners. But the battle over how the documents will be declassified continues, and the case is still pending in the Inter-American Commission.

The *Comissão de Familiares de Mortos e Desaparecidos Políticos de São Paulo* (CFMDP/SP) has been very active in mobilizing this case outside of the courts. It has politicized the struggle over access to classified documents kept by the Brazilian Army since the early 1980s. Among other things, the CFMDP/SP has used the media to denounce the impunity of those responsible for the killing and disappearance of political dissidents during the dictatorship; created a website to document its actions in search of information on those who disappeared; run campaigns for the right to memory; denounced the limitations of the governmental politics of reparation as a means to promote the erasure of history.¹⁶ Legal mobilization and the use of the Inter-American system are not the major focus of their struggles over memory and access to classified documents. They are tools to strengthen their social and political struggles. As Criméia Schmidt de Almeida, one of the founders of the CFMDP/SP and a survivor of the Araguaia guerrilla movement, points out, “The role of local justice and of the international institutions of justice would be important if they could enforce the law. I think that laws are important. But there are many tricks, we’ve won a case against the government and the government can procrastinate and never comply with the decision. My ideological perspective is Marxist and I don’t see the Judiciary as something separated from the State, and the State is at the service of the dominant class. The same can be said about the international organizations. On the other hand, the commissions on human rights, in principle, may defend human rights in favor of those who do not have access to state power. Hence, the laws are important. But they will only be enforced when we really achieve power.”¹⁷

¹⁶ See <http://www.desaparecidospoliticos.org.br>.

¹⁷ Interview with Criméia Alice Schmidt de Almeida, São Paulo, July 29, 2005.

The Maria da Penha Case: Engendering both Individual and Collective Human Rights

In 1998, the Center for Justice and International Law-CEJIL, and the Latin American and Caribbean Committee for the Defense of Women's Rights-CLADEM filed a complaint before the Commission alleging that the Brazilian State had "condoned, for years during their marital cohabitation, domestic violence perpetrated in the city of Fortaleza, Ceará State, by Marco Antônio Heredia Viveiros against his wife at the time, Maria da Penha Maia Fernandes, culminating in attempted murder and further aggression in May and June 1983. As a result of this aggression, Mrs. Maria da Penha has suffered from irreversible paraplegia and other ailments since 1983." The petitioners maintained that the Brazilian State "condoned this situation since, for more than 15 years, it failed to take the effective measures required to prosecute and punish the perpetrator, despite repeated complaints" (Case No. 12,051, Report No. 54/01, Inter-American Commission on Human Rights, Organization of American States).

For three years, despite sending several communications to the Brazilian State, the Commission had not received any response from the government under the presidency of Fernando Henrique Cardoso. In 2001, the Commission published a report of merit on this case, concluding that the Brazilian State had "violated the rights of Mrs. Maria da Penha Maia Fernandes to a fair trial and judicial protection, guaranteed in Articles 8 and 25 of the American Convention, in relation to the general obligation to respect and guarantee rights set forth in Article 1(1) of that instrument and Articles II and XVIII of the Declaration, as well as Article 7 of the Convention of Belém do Pará." The Commission also concluded that this violation formed "a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action." The Commission recommended that "the State conduct a serious, impartial, and exhaustive investigation in order to establish the criminal liability of the perpetrator for the attempted murder of Mrs. Fernandes and to determine whether there are any other events or actions of State agents that have prevented the rapid and effective prosecution of the perpetrator." The Commission also recommended "prompt and effective compensation for the victim, and the adoption of measures at the national level to eliminate tolerance by the State of domestic violence against women" (Case No. 12,051, Report No. 54/01, Inter-American Commission on Human Rights, Organization of American States).

During the first term of President Luiz Inácio Lula da Silva (2003-2006), the Brazilian government also ignored this case for over two years. Thanks to pressures from the women's movement, only at the end of 2004 the government began to slowly comply with the Commission's recommendations. For instance, the appeal to the trial of the aggressor of Mrs. Fernandes was finally concluded at the federal court and he was imprisoned 19 years after the crime – both negative measures. Reparation, another negative measure, was not provided, let alone the last recommendation, which requires a positive measure. In 2004, CEJIL, CLADEM, and AGENDE sent a petition to the Committee on the CEDAW-Convention on the Elimination of All Forms of Discrimination against Women, informing on the lack of compliance by Brazil of its international obligations related to the prevention and eradication of violence against women. The government finally reacted by proposing to National Congress a law on domestic violence against women, a proposal that had been demanded by feminist NGOs since the 1980s. The law was approved by Congress and signed by President Lula on August 7, 2006. As an act of “symbolic reparation,” the law was named “Law Maria da Penha” (Law 11,340/2006) and was signed in a public and solemn ceremony largely publicized by the Brazilian media.

The Case of Simone Diniz: Framing Racial Discrimination as Human Rights

Another unique case in point concerns a petition filed in October 1997 by the Center for Justice and International Law (CEJIL) and the Subcommittee on Blacks of the Human Rights Commission of the *Ordem dos Advogados do Brasil* (OAB/SP), alleging that the Brazilian State did not guarantee the right to justice and due process of law with respect to the domestic remedies to investigate the racial discrimination suffered by Simone André Diniz. The *Instituto do Negro Padre Batista* was added as co-petitioner later.

In 1997, a woman placed a classified ad in *Folha de São Paulo*, a large-circulation newspaper in the State of São Paulo, in which she expressed her interest in hiring a domestic employee, noting, among other things, her preference for a white person. Student and domestic worker Simone Diniz answered the ad by calling the phone number indicated, and introduced herself as a candidate for the job. The person answering Diniz's call asked about the color of her skin and when Diniz said that she is Black, Diniz was informed that she didn't meet the requirements for the job.

Using the Inter-American system as an instrument both to achieve individual compensation and to promote broader social change, the petitioners requested “that a recommendation be made to the State to proceed to investigate the facts, to make compensation to the victim, and to give publicity to the resolution in this case in order to prevent future incidents of discrimination based on color or race.”¹⁸ In October 2002, the Commission declared the admissibility of the petition, with respect to possible violations of Articles 1, 8, 24, and 25 of the American Convention.

Although not succeeding in judicializing social, economic and cultural rights in the Inter-American system, NGOs have been successful in using the system to pressure the Brazilian State to promote respect for political and civil rights. In addition to these three unique cases concerning political violence under the dictatorship, gender-based violence, and racial discrimination during the redemocratization period, the Commission has declared the admissibility of several cases relating to civil rights violations and has granted a number of precautionary measures in favor of the victims. In 2002, for example, the Commission granted six precautionary measures.¹⁹

Some Effects on the Brazilian State

Until 2004 the Brazilian State had accepted responsibility in sixteen individual cases of human rights violations, nine of which were decided in conjunction with the Commission. Two of these cases involved violations against rural workers in the south of Pará. The Brazilian State was also considered responsible for the illegal imprisonment, torture and death of an indigenous leader. Another case referred to the killing of 111 prisoners in the recently deactivated prison of São Paulo, Carandiru. In eleven of the other cases, Brazil was found responsible for the violations of human rights in cases of summary executions perpetrated by military police against children and adolescents. In all of these cases, the impunity of the responsible for the crimes was proven (Galvão, 2002: 215).

An important case that resulted in a friendly settlement agreement between the Brazilian State and the petitioners refers to slave labor. The agreement was signed in September of 2003. The Brazilian State was represented by the Special Secretariat for Human Rights of the

¹⁸ See Inter-American Commission on Human Rights, Report No. 37/02.

¹⁹ For an extended report on these cases, see Galvão (2002).

Presidency of the Republic, and the petitioners were represented by CEJIL-Brazil and the Pastoral Land Commission. The case refers to the Brazilian citizen José Pereira, who was injured in 1989 by gunshot wounds inflicted by gunmen trying to impede the flight of workers held in conditions akin to slavery at a farm in the state of Pará. The terms of the agreement established reparation for the damage caused to José Pereira for the violation he suffered. In addition, the Brazilian State recognized its international responsibility in relation to this violation, even though the perpetration of the violation was not attributed to state agents. Such responsibility was accepted by the Brazilian State because, as the petitioners alleged and the Commission understood, “the state organs were not capable of preventing the occurrence of the grave practice of slave labor, nor of punishing the individual actors involved in the violations alleged.” Furthermore, the agreement established that “the public recognition of the responsibility of the Brazilian State in relation to the violation of human rights” should “take place with the solemn act of creating the National Commission for the Eradication of Slave Labor – CONATRAE (created by Presidential Decree of July 31, 2003),” which would be inaugurated on September 18, 2003.²⁰

In cases initiated before 1998, however, the Brazilian State has not complied with its obligation and the victims have had to carry out new struggles to guarantee that the recommendations of the Commission be accepted by the Brazilian State. Thanks to the mobilization of human rights NGOs, President Lula created in 2002 a Commission for the Protection of Human Rights. This Commission was responsible for the implementation of the recommendations made by the Inter-American Commission of Human Rights and the decisions established by the Court. Most recently, however, the governmental politics of human rights has been undermined by the political crisis of the government due to scandals of corruption by the Workers’ Party and the ongoing economic restructuring that has reduced the government’s capacity to support human rights causes. In this context, the Special Secretariat for Human Rights lost the ministerial status that it had conquered during the beginning of the Lula administration. Furthermore, the national human rights programs remain to be implemented.

Conclusion

Globalization has promoted the expansion of transnational advocacy networks and activists have increasingly participated in these networks through transnational legal

²⁰ See Inter-American Commission on Human Rights, Report No. 95/03; see also Tojo and Lima (2004).

mobilization. In this paper, I have formulated the concept of transnational legal activism to reflect on the practices of NGOs engaged in human rights disputes brought to the Inter-American System of Human Rights, using Brazil as a case-study. The conceptions of transnational litigation and global judicialization are too narrow to capture the political aspects of the strategies and discourses of transnational legal activists. The framework of transnational advocacy networks is too broad to capture the specificity of transnational legal activism. Transnational legal activism can serve as an example of what Sousa Santos calls as subaltern cosmopolitan legality. But not all practices directly question the neoliberal model of globalization; not all human rights NGOs challenge and go beyond the legal canon of individual rights. There are different types of human rights NGOs and they relate differently to the law and to social movements. These differences must be further and empirically examined in light of the potentials and limitations of their practices in counter-hegemonic processes of globalization. An examination of the power relations among human rights NGOs and an analysis of their strategies, goals and discourses can help us to better understand the relationship between law, politics and civil society both at the domestic and transnational scales. This type of research can also illuminate the ways in which the discourse on human rights travels and is transformed through legal activist battles.

The case of Brazil and Latin America in general reveals that political democracy has not been sufficient to end violations of human rights. Although I have not examined the effectiveness of the decisions and measures recommended by the Inter-American system, NGOs have increasingly used this system to pressure member states to comply with the principles and norms established by the American Convention on Human Rights and other international human rights documents. The Inter-American system has not been designed to replace domestic judicial systems, but it offers some room for human rights NGOs to shape domestic politics, the politics of law, and public policies on human rights. On the other hand, since the petitions are presented against the Executive branch of the state, the judiciary and judges remain intact, having little contact with international human rights norms and principles. Transnational legal activism may help to change the course of a legal dispute pending in the domestic courts, but if the case is not pending, the local judicial system might remain untouched. The impact of transnational legal activism on the judiciary and on domestic politics is an important aspect of subaltern cosmopolitan politics and legality, deserving further investigation.

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Appendix

Graph 1: Ratification of the American Convention on Human Rights and Recognition of the Jurisdiction of the Inter-American Court of Human Rights, by country and year

American Convention on Human Rights (Pact of San José, Costa Rica)

Signed in San Jose, Costa Rica, on November 22, 1969

Date of entry into force: July 18, 1978

Inter-American Court of Human Rights

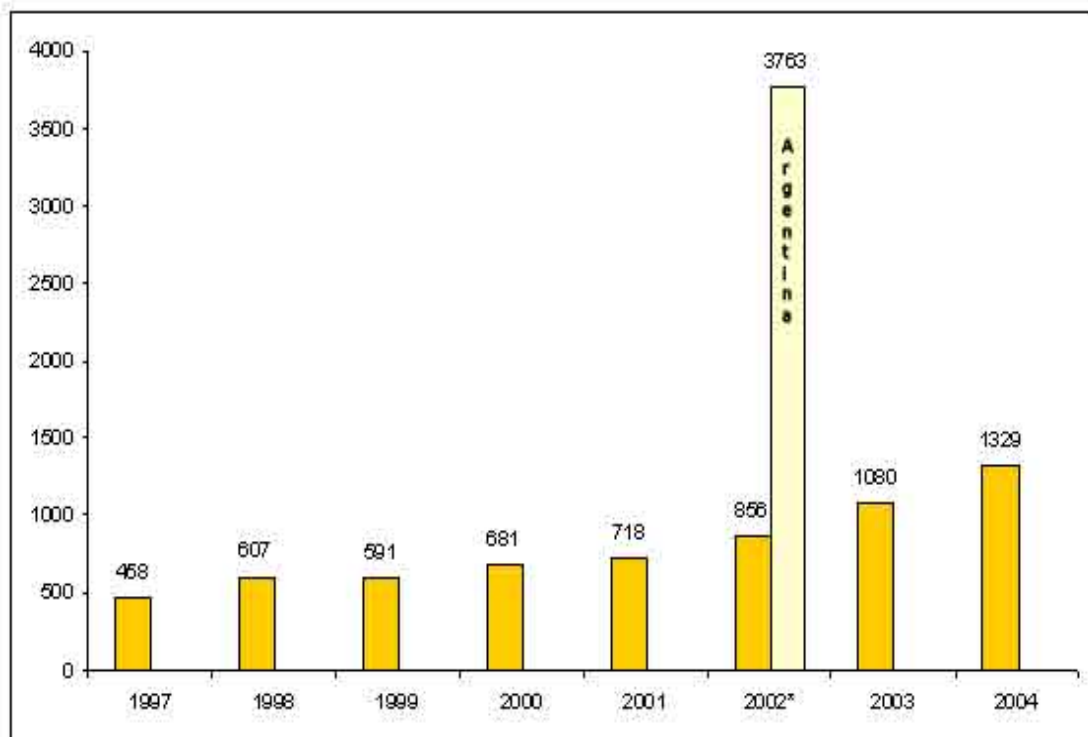
Created by the Convention

Date of entry into force: July 18, 1978

Signatory country	Year of ratification of the Convention	Year of acceptance of jurisdiction of the Court
Argentina	1984	1984
Barbados	1982	
Bolivia	1979	1993
Brazil	1992	1998
Colombia	1973	1985
Costa Rica	1970	1980
Dominica	1993	
Chile	1990	1990
Ecuador	1977	1984
El Salvador	1978	1995
United States		
Grenada	1978	
Guatemala	1978	1987
Haiti	1977	1998
Honduras	1977	1981
Jamaica	1978	
Mexico	1982	1998
Nicaragua	1979	1991
Panama	1978	1990
Paraguay	1989	1993
Peru	1978	1981
Dominican Republic	1978	1999
Suriname	1987	1987
Trinidad and Tobago		
Uruguay	1985	1985
Venezuela	1977	1981

Source: Lima Jr. *et al.* (2003).

Graph 2: Total number of complaints received by the Inter-American Commission on Human Rights, by year, during the last seven years

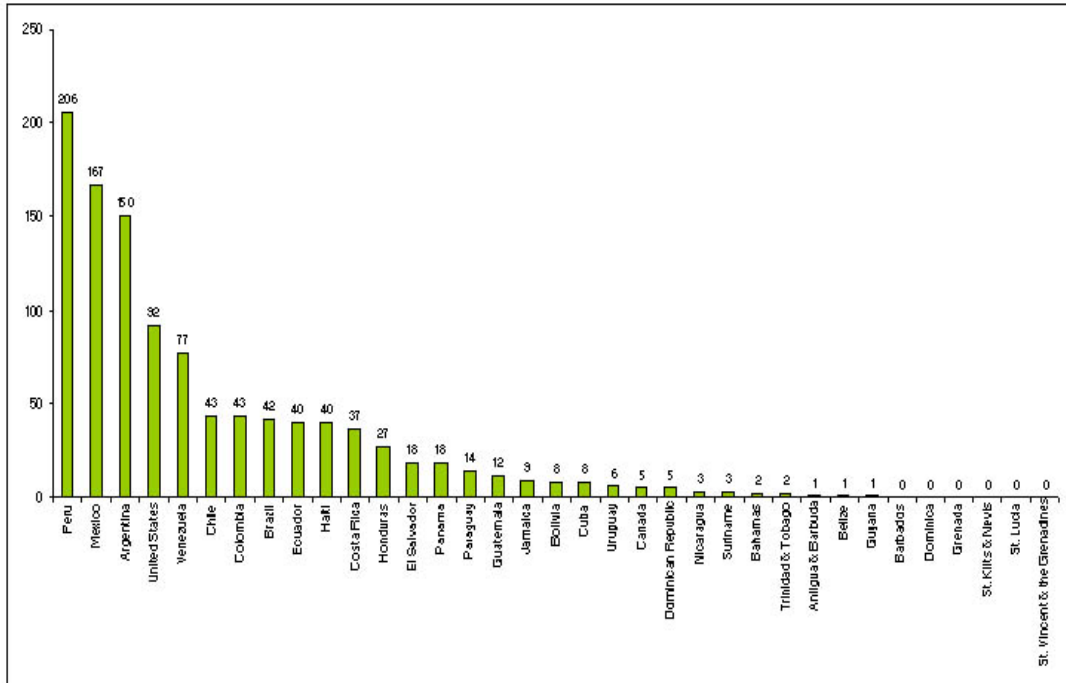


Source: Inter-American Commission on Human Rights, 2004 Annual Report.

* “Complaints” for the purposes of these statistics include all complaints, presented in writing, concerning an alleged violation by an OAS member state of the Convention, the Declaration and/or other pertinent instrument.

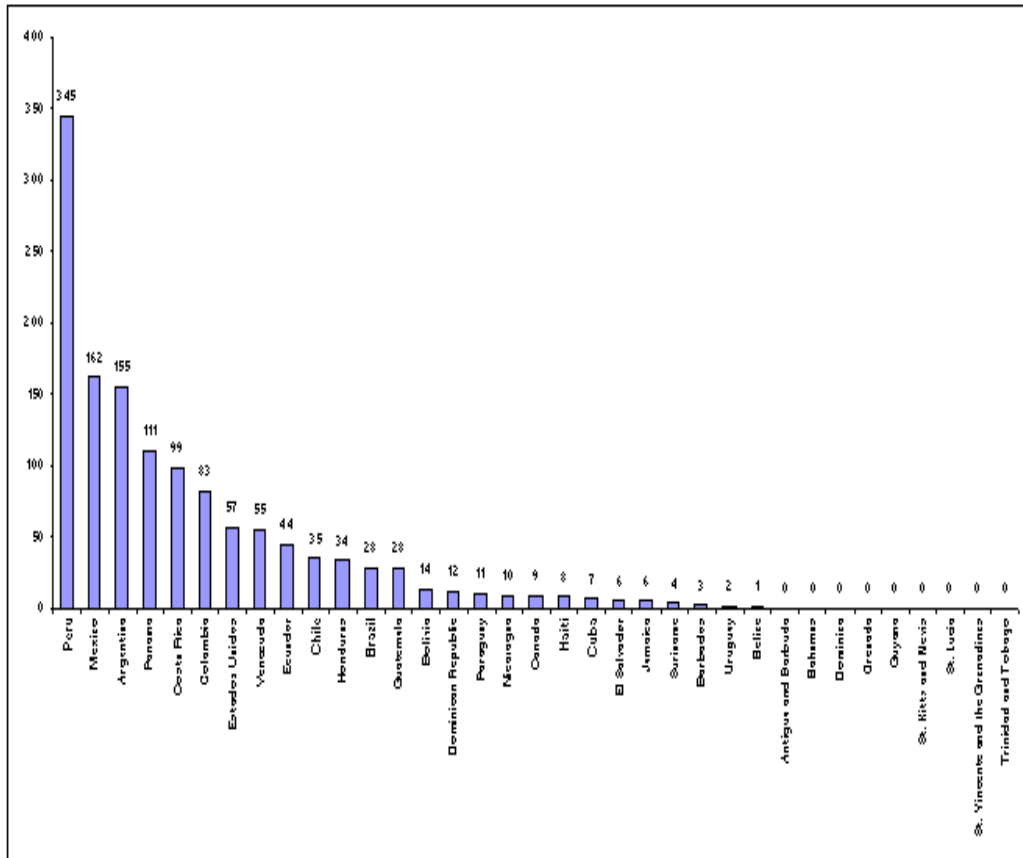
* Of this number, 3,763 petitions referred to the situation of the rights of persons affected by the banking measures “Corralito” in Argentina.

Graph 3: Total number of complaints received by the Inter-American Commission on Human Rights in the year 2003, by country



Source: Inter-American Commission on Human Rights, 2003 Annual Report.

Graph 4: Total number of complaints received by the Inter-American Commission on Human Rights in the year 2004, by country



Source: Inter-American Commission on Human Rights, 2004 Annual Report.

Graph 5: Total number of complaints against Brazil received by the Inter-American Commission on Human Rights, by year, from 1999 to 2004.

Year	Complaints
1999	46
2000	58
2001	51
2002	30
2003	42
2004	28

Source: Inter-American Commission on Human Rights, Annual Reports, 1999, 2000, 2001, 2002, 2003, and 2004.