

Year 5 • Number 9
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English Edition

• **Barbora Bukovská**

Perpetrating good: unintended consequences of international human rights advocacy

• **Jeremy Sarkin**

Prisons in Africa: an evaluation from a human rights perspective

• **Rebecca Saunders**

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

SIXTY YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

• **Paulo Sérgio Pinheiro**

Sixty years after the Universal Declaration: navigating the contradictions

• **Fernanda Doz Costa**

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

• **Eitan Felner**

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

• **Katherine Short**

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

• **Anthony Romero**

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



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CONTENTS

BARBORA BUKOVSKÁ	7	Perpetrating good: unintended consequences of international human rights advocacy
JEREMY SARKIN	23	Prisons in Africa: an evaluation from a human rights perspective
REBECCA SAUNDERS	51	Lost in translation: expressions of human suffering, the language of human rights, and the South African Truth and Reconciliation Commission
Sixty years of the Universal Declaration of Human Rights		
PAULO SÉRGIO PINHEIRO	71	Sixty years after the Universal Declaration: navigating the contradictions
FERNANDA DOZ COSTA	81	Poverty and human rights from rhetoric to legal obligations: a critical account of conceptual frameworks
EITAN FELNER	109	A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability
KATHERINE SHORT	147	From Commission to Council: has the United Nations succeeded in creating a credible human rights body?
ANTHONY ROMERO	173	Interview with Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU)

PRESENTATION



The ninth issue of the *Sur Journal* is dedicated to the commemoration of the sixty years of the Universal Declaration of Human Rights. The articles on this subject were chosen in collaboration with the International Service for Human Rights (ISHR). Two main issues were addressed in the selected articles: the indivisibility and the universality of human rights. These two issues were initially raised sixty years ago by the Universal Declaration of Human Rights as the pillars of international human rights law. In this ninth issue of the *Journal*, they are revisited under an especially critical light.

The issue of indivisibility is analyzed by both Eitan Felner and Fernanda Doz Costa. Felner adopts a pragmatic perspective: how can economic and social rights not only be recognized as human rights, but also be effectively implemented? The author proposes a methodological framework to assess whether or not a State has violated human rights obligations related to this set of rights. He also reveals some of the challenges in identifying violations of economic and social rights. Doz Costa approaches the issue from a conceptual perspective, discussing the possible connections between human rights and poverty.

Anthony Romero, Executive Director of the American Civil Liberties Union (ACLU), in an interview with Conectas Human Rights, sheds light on how important the human rights movement is for the protection of individuals in the currently most powerful country in the world, a country that has “seen a remarkable loss of human rights” in the last eight years. In Romero’s words: “[t]he existence of a global human rights movement is actually, for this very reason, vitally important. Even if one government of one country sets back human rights, there is a movement of leaders and human rights NGOs that can keep the pressure on and keep pushing for advances in human rights.”

Katherine Short’s paper analyzes to which extent the Human Rights Council has been successful in overcoming the over-politicized approach adopted by the former UN Commission on Human Rights. Short highlights, however, that the Council’s effectiveness has been partially “undermined by both its failure to implement mechanisms to prevent its own membership to include acknowledged human rights violators and its continuing inability to harness US support.”

This issue of the *Sur Journal* also includes an analysis of the UN human rights system from an internal perspective: the perspective of Paulo Sergio Pinheiro, former UN Special Rapporteur on the Situation of Human Rights in Myanmar (2001-2008), former UN Independent Expert for the Study on Violence against Children (2003-2006), and former UN Special

Rapporteur on the Situation of Human Rights in Burundi (1995-1999). Pinheiro is currently member of the Inter-American Commission on Human Rights.

This issue of the *Sur Journal* also includes three thought provoking articles by Barbora Bukovská, Jeremy Sarkin and Rebecca Saunders. Bukovská defends an idealistic view of human rights organizations, a view that is not content with mere normative achievements in the field. According to the author, as human rights should always result in concrete protection for victims of violations, Bukovská highlights the need to bridge the gap that frequently exists between international human rights organizations and the actual victims of violations.

Sarkin examines the historical development of African prisons from colonial to modern times, raising two issues: first, he understands that African prisons current conditions are in great part a legacy of colonialism; second, he argues that overcrowding and violence are a widespread problem in prisons all over the world.

Finally, Saunders criticizes the system of transitional justice established in South Africa after Apartheid. In her own words, her article addresses "what is gained and lost when expressions of human suffering are translated into a standardized language of human rights." The author also questions the priority given to national over individual forms of healing.

These three articles invite discussion. We therefore invite readers to respond either with another article or with a three-to-five-page essay. Articles and essays will be subjected to the *Journal's* selection process, and hopefully will encourage further discussion on these key issues.

We would like to thank the following professors and partners for their contribution to the selection of the articles for this issue: Andre Degenszajn, Andrea Pochak, Fabián Sanchez, Flavia Piovesan, Habib Nassar, Inês Lafer, Juan Amaya Castro, Kwame Karikari, Lucia Nader, Magdalena Sepúlveda, Mustapha Al-Sayyed, Olga Espinosa, and Richard Pierre Claude. We would also like to inform that Profesor Upendra Baxi (Warwick University) has accepted our invitation to join the *Sur Journal* Editorial Board.

Finally, we would like to announce that the next edition of the *Sur Journal* will be a special issue on "People on the Move: Migrants and Refugees", to be published in collaboration with the Office of the UN High Commissioner for Refugees (**UNHCR**). The journal will also carry articles on other human rights topics.

The editors.



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ABSTRACT

Taking his work experience in the UN and in the Inter-American System of Human Rights into account, Pinheiro highlights some of the main achievements and challenges in the development of International Human Rights Law in the last 60 years.

Original in English.

KEYWORDS

Universal Declarations – Inter-American System of Human Rights – Human Rights Council – Special Rapporteurs – Universal Periodical Review



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SIXTY YEARS AFTER THE UNIVERSAL DECLARATION: NAVIGATING THE CONTRADICTIONS

Paulo Sérgio Pinheiro

For Paulo de Mesquita Neto, in memoriam.

Where are we now after 60 years after the Universal Declaration of Human Rights?¹ Do we have anything to commemorate? Celebrations of declarations and treaties are often exercises in frustration, which is inevitable when we compare the ideals enshrined therein with the appalling contemporary reality. If we consider the process of setting standards and establishing legally binding conventions, the obvious answer is that there has been progress. As my former colleague Absjorn Eide recognized, “the Universal Declaration, by inspiring and shaping the conception of common values, has contributed more than any other document to open up those possibilities”.² The establishment of the UN Commission on Human Rights (CHR) in 1946 and later the Human Rights Council (HRC) in 2006, the International Criminal Court, and the *ad hoc* international tribunals were extraordinary accomplishments. From the perspective of the democratic state and civil society, there were decisive changes. Some categories of victims – workers, women, children, gays, indigenous peoples, migrants, people with special needs and peoples of African descent – have seen their rights recognized, even if not yet fully protected.

But if we put ourselves in the shoes of the victims, there are 4 billion people excluded from the rule of law, ignorant of their rights, as the Commission on Legal Empowerment of the Poor has indicated, with many of the victims submitted to multiple human rights violations, and robbed of the chance to climb out of poverty. In fact, “only a minority of the world’s people can take advantage of legal norms and regulations. The majority of humanity is on the outside looking in, unable to count on the law’s protection”.³ Estimates of the *World Report on Violence against Children*⁴ suggest that 5.7 million children are forced into bonded labour, 1.8 million into prostitution and 1.2 million are victims of trafficking. While it is commonly thought that slavery ended

Notes to this text start on page 78.

decades ago, today there are more slaves than at any moment in history. Only 2.4% of the world's children are legally protected from corporal punishment. Out of the 11 million babies born every year in Latin America and the Caribbean, 2 million – mostly among the poor, Afro-Latinos, rural and indigenous – will never be registered. They are born but do not exist in legal or administrative terms.

In retrospect, the 20th century was not just a period of war and conflict, holocaust, genocide, ethnic cleansing, apartheid, terrorism, and natural catastrophes - grey shadows that continue to threaten mankind. Amid those horrors, nevertheless there was unexpected progress in the struggle for human rights.

How could we imagine at the beginning of the 20th century that the supreme power of the Leviathan, the sacrosanct principle of sovereignty, could be eroded by international bodies and challenged by special rapporteurs, weakening the shield of sovereignty to protect national human rights violations? Even if this evolution has been outstanding, it has always been affected by the opposing dimension of the modern state, with its monopoly of legitimate physical violence. The state is both the major perpetrator of violations and the *defensor pacis*, the protector of the vulnerable. But the state is also one form of contradictory social relations; its actions and its morphology reflect this contradiction,⁵ very much present in the area of human rights protection.

We were under the illusion that these contradictions in a certain way had been solved at the World Conference on Human Rights held in Vienna in 1993 by the Declaration and Programme of Action, when democracy was enshrined as the regime most conducive to promoting human rights. But democracy, we have learned *à chaud* in Latin America, is not a panacea that automatically dissolves authoritarianism and prevents human rights violations.

Democracy more easily promotes human rights, but both in consolidated democracies as well as in the newer ones, it is not necessarily a guarantee against human rights violations. In the South, the political transitions from dictatorship to democracy have to a considerable extent preserved the status quo instead of guaranteeing real change. Democracies in South America and Eastern Europe are often a disguise for the oppression of the poor, corruption and collusion of politicians and State agents with organized crime. In the North, the US government has condoned the use of torture against terrorist suspects and prisoners.⁶ Democratic states in Europe have *sotto voce* collaborated with the rendition of prisoners to be tortured by third countries.⁷ Right now those governments are implementing directives on the repatriation of economic and illegal migrants these host countries have economically exploited for more than a century, confining families with children in detention centers (I sadly must say that I visited some of these centers) for a period of up to 18 months.⁸ Rich countries pay more than \$300 billion dollars a year in agricultural subsidies, six times the value of their aid to developing countries, not complying with the spirit of the WTO agreements and dumping cheap produce in poor countries.⁹ The struggle for human rights must confront these contradictions.

Having provided the context for the commemoration of the Universal Declaration, I will limit my remarks in the second part of this article to a brief

analysis of two institutions I have been involved with over the last thirteen years, one regional, the Inter-American Commission on Human Rights, IACHR, where I have sat since 2004, and the other, the UN Human Rights Council (HRC) and its predecessor, the Commission on Human Rights (CHR) that I have served on from 1995 to 2008. In my conclusion, I will dare to deal very briefly with the way forward.

We are celebrating the Universal Declaration, but we must include in the commemoration the *American Declaration on the Rights and Duties of Man*, approved three months before by the unanimous vote of the then-recently formed Organization of American States (OAS). Despite this precedence, for 11 years no effort was made to translate the American Declaration into practice. However, in 1959, perhaps motivated by the Cuban Revolution, the OAS decided to establish the IACHR following the model that the founding states of the CHR had rejected: the members are not the representatives of state members of the OAS, but seven independent expert-selected by the general assembly of the OAS, although in the first twenty years the “Commissioners” (a title with some Soviet flavour) behaved as delegates of their respective governments, protecting them from accusations. Fortunately, nowadays the Commissioners can no longer participate in any deliberations about their countries of origin.

The Commission is a quasi-judicial organ performing the role of public prosecutor of the Inter-American system. When countries fail to comply with the Commission’s recommendations, the case is referred to the Inter-American Court for Human Rights, a judicial body. In 2007, 115 cases were sent by the Commission to the Court. The binding sentences of the Court aim to vindicate the rights violated and to impose reparations and indemnities on the States that have recognised the jurisdiction of the Court, with which the governments usually comply.

There are great similarities between the Inter-American and the European Human Rights systems, but the issues considered by them in their evolution were different: most cases in the Inter-American system concerned disappearances, massacres, summary executions in the 1970s and 1980s – characteristics of *the absence of the rule of law* that prevailed until the middle of the 1980s in almost the entire region. By contrast, in Europe the issues typically brought before the Court involved an improvement upon the *existing* rule of law. Since the creation of the Inter-American Commission, there have been successful modifications in the Inter-American human rights system that have broadened the guarantees for the population in the region. Nowadays among the 35 members of the OAS, 25 have ratified the American Convention on Human Rights, drafted in 1969, the basic document of the system, and 22 have recognized the jurisdiction of the Court. But even among those that have ratified the Convention and recognized the jurisdiction of the Court, many have been ambivalent and sometimes even hostile to them.

Only after the consolidation of authoritarian military regimes in the Southern Cone, did the IACHR begin to monitor human rights, under the pressure of reports of gross human rights violations presented to the Commission.¹⁰ This development was very similar to what happened at the CHR; only after the denunciations of torture by the Pinochet military dictatorship and of apartheid in South Africa did

the CHR begin to monitor human rights, at the end of the 1970s. The IACHR has also been inspired by the practice of the former CHR and has created posts for thematic and country rapporteurs who follow their country's cases under discussion by the Commission or who are devoted to specific themes, make visits and prepare reports.

The real challenge for the Commission *vis-à-vis* the new democracies across the South American continent is that most political guarantees have been restored, and still there is a persistent lack of respect in regard to civil, economic and social rights for the majority of the population. Thus, the governments responsible must engage in a dialogue due to the continuation of patent human rights violations in the cases admitted by the Commission.

I would like now to discuss how the contradictory dimensions of the modern state have been reflected in the CHR and later in the HRC. It is too early to compare the Commission on Human Rights (CHR) a body which has evolved during 60 years, with the HRC, which is in its second year and 8th regular session.

During the last decade of the CHR it was common to see some states accusing others of politicizing the Commission. But as my most dear friend Sergio Vieira de Mello observed critically in his last address to the 59th session, in April 2003, a few months before being killed in Baghdad: "most of the people in this room work for government or seek to affect the actions of government. That is politics. For some to accuse others of being political is a bit like fish criticizing each other for being wet. It has become a way to express disapproval without really saying what is on our mind". Considering that the HRC as well as the CHR are multilateral bodies constituted by representatives of States which continue to protect their interests, the political nature of the HRC is an essential element for its functioning. It would be naive to expect that this political behaviour of the member States would change only because the structure of the body has changed.

In fact, the Commission was *politicized* immediately after its creation in 1946 and particularly in the 1970s and 1980s, profoundly divided between the Western and Socialist blocs. Since those times a growing abyss between the developed and developing countries became evident. Observing the votes in the HRC, this division has remained and has sometimes been more pronounced than in the case of its predecessor, the UN Commission on Human Rights (CHR). There is a generalized and increasing suspicion from the countries of the South towards any initiative from the Western European and Others regional group (WEOG).

Another preferred target for criticism have been the special rapporteurs, the "jewel of the crown" of the CHR, as Kofi Annan rightly once said, a unique mechanism in the UN, able to monitor human rights and to have some impact on the lives of the victims. Of course they have operated in a very contradictory framework and on thin ice because at the same time they are obliged to make public what they see and to try to convince the governments to comply and establish some kind of cooperation with the CHR (and now with the HRC). In a certain sense this contradiction is analogous to the other contradiction between the "repressive" face of the state, which commits human rights violations, and its "benevolent" face,

which implements human rights policies: the rapporteurs are compelled to report *prima facie* and to try to establish a constructive dialogue with the “benevolent,” positive face. The work of the special rapporteurs is delicate and often thankless, to put it mildly, but it is essential and the system itself a great achievement which must be protected. The fight is ongoing and success is not assured.

There is now some concern about the role of civil society organizations in the HRC. During the last and 8th session of the Council, there were repeated attempts by some countries to shut down NGOs, depending on their viewpoint. Their goal is no longer merely to challenge the principle of NGO participation or even to reduce their speaking time, but to muzzle them and to request the interruption of their speakers and the deletion of entire paragraphs from the records of the meetings.

The role of the HRC in strengthening dialogue and cooperation on human rights issues has also been reinforced, in particular “towards the prevention of human rights violations and to respond promptly to human rights emergencies,”¹¹ with the possibility of holding Special Sessions. Up to now, there have been seven Special Sessions: three dealt with Israel and the Palestinian Occupied Territories while the others dealt with Lebanon, Darfur, Myanmar and the right to food. It seems that the choice by the Human Rights Council to hold Special Sessions also includes criteria related to humanitarian international law, opening a more active role for the Council after natural disasters.

But the results of those Special Sessions were very meagre. For instance, the 5th Special Session on Myanmar was a quick response to the crackdown by the military junta against the formidable protests by monks and the general population. Despite a notable consensus on adopting the resolution, the government of Myanmar merely invited the special rapporteur to make a country visit but did not implement any of the HRC’s recommendations, with no consequence at all. I think that this apparent irrelevance will be a strong stimulus for other authoritarian countries not to fear special sessions or resolutions passed by the HRC.

Undeniably there was an upgrading in the main UN interstate forum dealing with human rights. The CHR was just a functional commission (as the Commission on the Status of Women) and a subsidiary body to the UN Economic and Social Council (ECOSOC) but its successor body, the HRC, has been elevated to the status of a subsidiary body of the UN General Assembly. The most innovative mechanism established by the HRC is, of course, the Universal Periodic Review (UPR) seen as the best tool for highlighting critical human rights problems in all member states. The UPR hopefully will push the HRC to look at the degree of cooperation with human rights mechanisms and of implementation of human rights norms and standards in a universal manner. This is a fairly long-term endeavour, so one must wait to see how it will turn out.

Up to this point, I have dealt with the past and the present. What has the Angel of History foreseen for us?

A [Paul] Klee painting named Angelus Novus shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his

mouth is open, his wings are spread. This is how one pictures the Angel of History. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The Angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the Angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.¹²

This thesis IX on history by Walter Benjamin can be a metaphor of the struggle for human rights, from the ruins of the past towards progress and perhaps with new catastrophes, even more destructive, in the future.

Of course my contact with the Angel of History is fairly limited and it would be too risky to make predictions about the events of the next 60 years. Let us be modest and think only about the next 10 years.

In the next decade, perhaps we will continue to navigate the contradictions, taking advantage of all of the “constructive ambiguities” in the institutionalisation of the HRC, to quote an expression of Ambassador Luis Alfonso de Alba,¹³ the first president of the HRC, to implement human rights. We must never lose sight of the four billion people excluded from the joys of our celebration. It is time that the principles of the Universal Declaration and the other great human rights instruments contributed to the creation of a global safety net of rights be applicable to all persons, everywhere and beyond any cultural “exceptionalism”.¹⁴ There are issues that must be urgently confronted all over the world such as lack of implementation of judicial decision, detention, migration, climate change, and organized transnational crime. The human rights systems in the UN or the regional bodies in the Northern and Southern Hemispheres will never be fully effective for those excluded if the countries cannot overcome the deficit in domestic legislation, the inefficiency of the judiciary, of the repressive apparatuses and the precarious implementation of rights at the national level. The obstacles to the protection of human rights will continue if the right of development and the elimination of extreme poverty and the right to food and to health, are not seriously tackled as crucial issues for the four billion in need but also for the developed world, which also contains a third world, continuously immobilized by fear, discrimination and racism. Social deprivation and economic exploitation must be considered serious violations of human rights, on a par with political oppression, torture and racial discrimination.¹⁵ Only the indivisibility of human rights can reinforce their universality.

Definitively, as Daw Aung Sang Suu Kyi once said,

It is not enough to call for freedom, democracy and human rights. There has to be a determination to persevere in the struggle, to make sacrifices in the name of enduring truths, to resist the influences of desire, ill will, ignorance and fear [...] It is man's vision of a world fit for rational, civilized humanity which leads him to dare to suffer to build societies free from want or fear.¹⁶

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NOTES

1. Another version of this text was presented at High-Level Panel on the 60th Anniversary of the Universal Declaration of Human Rights, "Where are we now? Development in the International Protection of Human Rights" 7 July 2008, Human Rights: Interpretation and Implementation, An Alumni Conference on the occasion of the 25th Anniversary of the Human Rights Centre, University of Essex.

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RESUMO

Pinheiro ressalta alguns dos pontos principais no desenvolvimento do Direito Internacional dos Direitos Humanos no últimos 60 anos, a partir de sua experiência de trabalho tanto no Sistema Interamericano quanto no Sistema das ONU de Direitos Humanos.

PALAVRAS-CHAVE

Declaração Universal - Sistema Interamericano de Direitos Humanos – Conselho de Direitos Humanos – Relatores Especiais - Revisão Periódica Universal

RESUMEN

A partir de su experiencia en el Sistema Interamericano y en el Sistema ONU de protección de los derechos humanos, Pinheiro destaca los aspectos principales del desarrollo del derecho internacional de los derechos humanos durante los últimos 60 años.

PALABRAS CLAVES

Declaración Universal – Sistema Interamericano de Derechos Humanos – Consejo de Derechos Humanos – Relatores Especiales – Revisión Periódica Universal

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SUR 1

EMILIO GARCÍA MÉNDEZ
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Human Rights: Reflections for
a New Agenda

FLAVIA PIOVESAN
Social, Economic and Cultural
Rights and Civil and Political
Rights

OSCAR VILHENA VIEIRA
and A. SCOTT DUPREE
Reflections on Civil Society and
Human Rights

JEREMY SARKIN
The Coming of Age of Claims
for Reparations for Human
Rights Abuses Committed in
the South

VINODH JAICHAND
Public Interest Litigation
Strategies for Advancing
Human Rights in Domestic
Systems of Law

PAUL CHEVIGNY
Repression in the United States
after the September 11 Attack

SERGIO VIEIRA DE MELLO
Only Member States Can Make
the UN WorkFive Questions for
the Human Rights Field

SUR 2

SALIL SHETTY
Millennium Declaration and
Development Goals:
Opportunities for Human
Rights

FATEH AZZAM
Reflections on Human Rights
Approaches to Implementing
the Millennium Development
Goals

RICHARD PIERRE CLAUDE
The Right to Education and
Human Rights Education
JOSÉ REINALDO DE
LIMA LOPES
The Right to Recognition for
Gays and Lesbians

E.S. NWAUCHE and
J.C. NWOBIKE
Implementing the Right to
Development

STEVEN FREELAND
Human Rights, the
Environment and Conflict:
Addressing Crimes against the
Environment

FIONA MACAULAY
Civil Society-State
Partnerships for the Promotion
of Citizen Security in Brazil

EDWIN REKOSH
Who Defines the Public
Interest?

VÍCTOR E. ABRAMOVICH
Courses of Action in Economic,
Social and Cultural Rights:
Instruments and Allies

SUR 3

CAROLINE DOMMEN
Trade and Human Rights:
Towards Coherence

CARLOS M. CORREA
TRIPS Agreement and Access
to Drugs in Developing
Countries

BERNARDO SORJ
Security, Human Security and
Latin America

ALBERTO BOVINO
Evidential Issues before the
Inter-American Court of
Human Rights

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Eddie Mabo and Namibia:
Land Reform and Pre-Colonial
Land Rights

NLERUM S. OKOGBULE
Access to Justice and Human
Rights Protection in Nigeria:
Problems and Prospects

MARÍA JOSÉ GUEMBE
Reopening of Trials for Crimes
Committed by the Argentine
Military Dictatorship

JOSÉ RICARDO CUNHA
Human Rights and
Justiciability: A Survey
Conducted in Rio de Janeiro

LOUISE ARBOUR
Plan of Action Submitted by
the United Nations High
Commissioner for Human
Rights

SUR 4

FERNANDE RAINE
The measurement challenge in
human rights

MARIO MELO
Recent advances in the
justiciability of indigenous
rights in the Inter American
System of Human Rights

ISABELA FIGUEROA
Indigenous peoples versus oil
companies: Constitutional
control within resistance

ROBERT ARCHER
The strengths of different
traditions: What can be gained
and what might be lost by
combining rights and
development?

J. PAUL MARTIN
Development and rights
revisited: Lessons from Africa

MICHELLE RATTON
SANCHEZ
Brief observations on the
mechanisms for NGO
participation in the WTO
JUSTICE C. NWOBIKE
Pharmaceutical corporations and
access to drugs in developing
countries: The way forward

CLÓVIS ROBERTO
ZIMMERMANN
Social programs from a human
rights perspective: The case of
the Lula administration's
family grant in Brazil

CHRISTOF HEYNS, DAVID PADILLA and LEO ZWAAK
A schematic comparison of regional human rights systems: An update

BOOK REVIEW

SUR 5

CARLOS VILLAN DURAN
Lights and shadows of the new United Nations Human Rights Council

PAULINA VEGA GONZÁLEZ
The role of victims in International Criminal Court proceedings: their rights and the first rulings of the Court

OSWALDO RUIZ CHIRIBOGA
The right to cultural identity of indigenous peoples and national minorities: a look from the Inter-American System

LYDIAH KEMUNTO BOSIRE
Overpromised, underdelivered: transitional justice in Sub-Saharan Africa

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Strengthening democratic policing and accountability in the Commonwealth Pacific

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Public security policies in Brazil: attempts to modernize and democratize versus the war on crime

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Toward an effective international legal order: from co-existence to concert?

BOOK REVIEW

SUR 6

UPENDRA BAXI
The Rule of Law in India

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Judicialization of politics in Colombia: cases, merits and risks

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Intermediary services for child witnesses testifying in South African criminal courts

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Brazilian copyright law and how it restricts the efficiency of the human right to education

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Eradicating systemic poverty: brief for a Global Resources Dividend

SUR 7

LUCIA NADER
The role of NGOs in the UN Human Rights Council

CECÍLIA MACDOWELL SANTOS
Transnational legal activism and the State: reflections on cases against Brazil in the Inter-American Commission on Human Rights

TRANSITIONAL JUSTICE

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Imagining locally-motivated accountability for mass atrocities: voices from Cambodia

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The pursuit of transitional justice and African traditional values: a clash of civilizations – The case of Uganda

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ELIZABETH SALMÓN G.
The long road in the fight against poverty and its promising encounter with human rights

INTERVIEW WITH JUAN MÉNDEZ
By Glenda Mezarobba

SUR 8

MARTÍN ABREGÚ
Human rights for all: from the struggle against authoritarianism to the construction of an all-inclusive democracy - A view from the Southern Cone and Andean region

AMITA DHANDA
Constructing a new human rights lexicon: Convention on the Rights of Persons with Disabilities

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Legal recognition of sexual rights – a comparative analysis with reproductive rights

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The virtue of following: the role of Inter-American litigation in campaigns for social justice

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The human right to medicines

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Medicines for the world: boosting innovation without obstructing free access

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

GABRIELA COSTA CHAVES, MARCELA FOGAÇA VIEIRA and RENATA REIS
Access to medicines and intellectual property in Brazil: reflections and strategies of civil society