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ABSTRACT

This paper analyzes the increased use, by local and transnational human rights NGO, of international legal instruments for the recognition and protection of human rights, a phenomenon the author calls “transnational legal activism”.

RESUMO

Este artigo analisa o crescente uso, por ONG locais e transnacionais de direitos humanos, dos instrumentos jurídicos internacionais para o reconhecimento e a proteção dos direitos humanos, um fenômeno que a autora denomina de “ativismo jurídico transnacional”.

RESUMEN

Este trabajo analiza el uso creciente que las ONG locales y transnacionales de derechos humanos hacen de instrumentos legales internacionales para reconocer y proteger los derechos humanos, fenómeno que la autora denomina “activismo legal transnacional”.

Original in English.

KEYWORDS

Transnational legal mobilization – Human rights and globalization – Inter-American Commission on Human Rights – Brazil – Memory – Violence against women – Racial discrimination.



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TRANSNATIONAL LEGAL ACTIVISM AND THE STATE: REFLECTIONS ON CASES AGAINST BRAZIL IN THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Cecília MacDowell Santos

Introduction¹

Since the early 1990s, as part of the process of globalization, we have witnessed the increasing transnationalization of legal institutions and of legal mobilization, two sides of a phenomenon legal scholars refer to as “global judicialization”² and “transnational litigation”.³ Global judicialization has emerged through the creation of international *ad hoc* or permanent courts and arbitral tribunals, as well as the increased resort to international judicial and quasi-judicial institutions to deal with disputes over both commercial and human rights issues. Transnational litigation involves disputes between States, between individuals and States, and between individuals across national borders. These changes of law in the context of globalization have raised debates on whether global judicialization is desirable or effective for enforcing the rule of law and for promoting local and global democracy. However, both advocates and critics of global judicialization have failed to critically examine the global politics of the rule of law in legitimizing the hegemonic neoliberal project of globalization, which has weakened the capacity of nation-States to enforce human rights norms.⁴ In addition, most studies of law and globalization have not paid sufficient attention to the role of human rights non-governmental organizations (NGOs), or to the central and often contradictory role of the State in the transnational legal battles over the recognition and protection of human rights.

The objective of this paper is to reflect on the relationship between transnational legal mobilization and the State through an analysis of the

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increased use, by local and transnational human rights NGOs, of international legal instruments for the recognition and protection of human rights.⁵ Drawing on cases against Brazil in the Inter-American Commission on Human Rights (hereafter, IACHR), the paper attempts to offer theoretical tools for reflecting on the strategies and limitations of what I call “transnational legal activism” vis-à-vis the responses given by the State. By transnational legal activism I mean a type of activism that focuses on legal action engaged with international courts or quasi-judicial institutions 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 human rights norms. The responses of the Brazilian State will be analyzed in light of the concept of a “heterogeneous State,” that is, a State that, due to contradictory national and international pressures, assumes different logics of development and rhythms, making it impossible to identify a coherent pattern of State action common to all State sectors or fields of action.⁶

Transnational legal activism can be viewed as an attempt not simply to remedy individual abuses, but also to re-politicize law and re-legalize human rights politics by invoking and bringing international courts and quasi-judicial systems of human rights to act upon the national and local juridical-political arenas. Yet the strategies of transnational legal activism are historically and politically situated. Therefore, they must be an object of empirical research. Since the State is a major actor in transnational legal battles over human rights issues, it is important to investigate both the practices of transnational legal advocates and how the State responds to them. This will help us to better understand not only how civil society actors engage in transnational legal mobilization, but also how the State relates to international human rights norms and how human rights discourses and practices develop in different sectors of the State and at different levels of State action.

Drawing on interviews and conversations with human rights activists in Brazil, as well as archival research, including legal documents and data collected from human rights NGOs and from the website of the Organization of American States, the paper will show that the practices of local and transnational human rights NGOs in the cases they brought against Brazil before the IACHR constitute an example of transnational legal activism. However, as the case-study will illustrate, their achievements, though important, have been very limited, both because of the precarious effectiveness of international human rights law and the internal contradictions and heterogeneity of the Brazilian State in the field of human rights. In addition to an overview of the cases against Brazil in the IACHR, I will present a closer examination of three cases concerning, respectively, the “memory battle” in the Araguaia Guerrilla case; the issue of domestic violence addressed in

the case of Maria da Penha; and the issue of racial discrimination addressed in the case of Simone Diniz. Each of these cases will show that the discourses and practices of the State regarding human rights issues are heterogeneous and contradictory at the national and local levels of administration. In what follows, I begin with a critical review of existing research on law, globalization and transnational legal mobilization. Secondly, I situate the case-study within the larger political context of democratization and the persistence of human rights violations in Brazil. This is followed by a discussion of transnational legal activism in the IACHR and the contradictory role of the Brazilian State regarding the politics of human rights.

Studies of law, globalization and transnational legal mobilization

Legal scholars have analyzed the internationalization of the judiciary from a dispute resolution perspective, debating whether global judicialization is inevitable and desirable for an effective and equitable enforcement of the rule of law.⁷ 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.⁸ Slaughter, 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”.⁹ According to Slaughter, 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, involving 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), the North American Free Trade Agreement (NAFTA) and the Law of the Sea Tribunal.

On the other side of the debate are those who do not view global judicialization as an inevitable development of international law and seem to be less 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 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.¹⁰ A former member of the U.S. State Department Legal Adviser’s Office, Ratner 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 separate 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 and quasi-judicial systems.

Studies of transnational advocacy networks, transnational activism and counter-hegemonic globalization have contributed to our understanding of transnational human rights activism.¹¹ In their seminal work in this area, Keck and Sikkink define “networks” as “forms of organizations characterized by voluntary, reciprocal and horizontal patterns of communication and exchange. In spite of the differences between domestic and international realms, the network concept travels well because it stresses fluid and open relations among committed and knowledgeable actors working in specialized issue areas”.¹² The authors call these networks “advocacy networks because advocates plead the causes of others or defend a cause or proposition. [...] They 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’”.¹³ The concept of “transnational advocacy networks” is more useful than “transnational litigation” to uncover the power relations inherent in the struggles over the definition and protection of human rights. However, it does not specifically address *legal* practices and transnational *legal* mobilization.

Since the 1990s, cross-border legal interactions and the globalization of

the rule of law have emerged as a new field of socio-legal research.¹⁴ Two approaches can be identified in this field, ranging from an institutional and systemic to a more political and critical analysis of the relationship between law and globalization. This approach seeks to analyze the relations between legal and nonlegal institutions in order to uncover the characteristics of the developing global legal culture. It raises 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”.¹⁵ The importance of this approach lies in its attention to legal actors and legal cultures, as well as unequal power relations between these actors. But it 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 legal institutions, this approach also overlooks the contradictory processes of globalization and the dual role of the State as both promoter and violator of human rights.

The political and critical approach to law and globalization builds on socio-legal studies on law as an instrument of “social conflict”¹⁶ and a “social movement tactic”.¹⁷ Focusing on transnational legal mobilization and its relationship with social movements that advocate an alternative to neoliberal globalization, this emerging literature continues to question whether and under what conditions law can be used as an instrument of social emancipation.¹⁸ Although neoliberal globalization has diminished the power of the nation-States, this literature examines how transnational legal mobilization relates to both the State and international institutions. As Sousa Santos observes, “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”.¹⁹ However, the expansion of transnational corporations and the establishment of structural adjustment programs, all backed up by nation-States, have had disastrous effects on human rights. Even when States are not violators of human rights, they are too small and weak to counteract such violations. 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”.²⁰

According to Sousa Santos, transnational legal mobilization will be emancipatory and will constitute a “subaltern cosmopolitan politics and legality” if it includes four expansions of the conception of the politics of legality. First, there must be a combination of “political mobilization with legal mobilization”.²¹ Second, “the politics of legality needs to be conceptualized at three different scales – the local, the national, and the global”.²² 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 conceptions of individual rights are abandoned. Finally, the time frame of the legal struggles must be expanded to include the time frame of the social struggles by referring, for example, to capitalism, colonialism, authoritarian political regimes or other historical contexts.

The practices of human rights NGOs in cases against Brazil brought to the IACHR meet the conditions of what Sousa Santos describes as “subaltern cosmopolitan politics and legality”. However, I prefer to 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 expression “legal activism” also highlights social actors such as **activists**, and emphasizes a **movement** including a variety of legal, social and political struggles. Furthermore, not all forms of transnational legal activism directly challenge neoliberal globalization, which does not mean that this type of activism does not seek to promote social, legal and political changes. Just like the interests of those involved in human rights struggles, the strategies and goals of transnational human rights legal activism are diverse, linked to various social movements, ranging from class-based struggles to struggles against sexism, racism, political repression, imperialism and so on. Since the State is an important actor in transnational legal disputes, we need to further examine how the State responds to transnational legal activism in concrete cases and at all levels of State action—local, national and international. Before examining the strategies of NGOs in cases against Brazil in the IACHR and the responses of the Brazilian State, I shall situate them within the larger political context of democratization and the persistence of human rights violations in Brazil.

The paradox of democratization and the persistence of human rights violations

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 now have 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.²³

In Brazil, the military-authoritarian regime lasted over twenty years, from 1964 to 1985. Based on the doctrine of National Security and Development,²⁴ the military regime suspended direct elections for president, governors and senators; rendered the legislature ineffective; banned existing political parties; suspended constitutional rights; censored the press, the arts, and academia; and persecuted, imprisoned, tortured and killed whoever opposed the regime. During this period of political terror, sectors of civil society organized resistance and opposition movements.²⁵ Various social movements flourished throughout the 1970s.²⁶ 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). In 1979, during the presidency of General Figueiredo, amnesty of political prisoners was granted through the enactment of the *Lei da Anistia* (Amnesty Law, law no. 6,683/79). Activists in exile returned to the country. Elections for mayors and State assemblies were restored.²⁷

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. This has provoked numerous protests by family members of the disappeared and former political prisoners. Human rights NGOs and renowned jurists have also protested against the impunity granted by such an ample interpretation of the Amnesty Law and have demanded a revision of this law.²⁸ This is an important aspect in the battle over the memory of the dictatorship, which will be further examined in the next section in light of the case of the Araguaia Guerrilla that has been pending in the Brazilian federal courts since the early 1980s and in the IACHR since the mid-1990s.

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, the strategy of social movements shifted from fighting the regime from the outside to participating in the 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 1985.²⁹ However, only recently did Congress pass a specific law determining the establishment of integrated services to combat domestic violence against women in the country, a much-awaited legal change that owes much to the case of Maria da Penha, discussed in the next section.

Diverse social movements also lobbied to influence the redrafting of the new Brazilian Constitution in 1988. As a consequence, Article 5 established a series of fundamental rights, stating 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 Constitution also declared that foreign relations are guided by the principle of the “prevalence of human rights” (Article 4, II).³⁰ In the early 1990s, new progressive infra-constitutional legislation was also enacted. For instance, Law no. 7,719/89 was created to punish crimes resulting from discrimination on the basis of race, color, ethnicity, religion or national origin.

The 1990s was a decade of ratification of several international and regional human rights norms.³¹ Former President Fernando Henrique Cardoso (Social Democratic Party or PSDB), elected for two terms (1995-1998 and 1999-2002), favored the recognition of international human rights norms. In 1995, Brazil ratified the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women, the so-called “Belém do Pará” Convention, adopted by the Organization of American States (OAS) in 1994. However, despite several communications sent by the IACHR the Cardoso administration ignored the case of Maria da Penha until the end of Cardoso’s second term. Furthermore, compared with other Latin American countries, Brazil took much longer to recognize the regional human rights norms established by the American Convention on Human Rights. While a number of OAS member States ratified the Convention in the 1980s, Brazil ratified it only in 1992. Brazil also ranks as one of the last OAS member States to accept the jurisdiction of the Inter-American Court of Human Rights. Only in 1998 did Brazil recognize the jurisdiction of this court.³²

Following the constitutional principle of the prevalence of human rights and to promote a culture of human rights, Cardoso launched in 1996 the *Programa Nacional de Direitos Humanos* (National Program of Human Rights, Decree no. 1,904/96), formally recognizing the human rights of “women, Blacks, homosexuals, Indigenous populations, the elderly, individuals with disabilities, refugees, individuals infected with HIV, children and adolescents, police officers, prisoners, the poor and the rich”.³³ In 1998, Cardoso created the *Secretaria Nacional de Direitos Humanos* (National Secretariat of Human Rights) to implement this program. For the first time in Brazilian history, the government recognized that Brazil was not a “racial democracy”. The National Program of Human Rights signaled the establishment of affirmative action programs in higher education, though these are not mandatory and have been an object of heated debate in the country.

Regarding the battle over the memory of the dictatorship, in the beginning of his first term, Cardoso signed Law no. 9,140/95, 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 created the Special Commission to examine claims presented by family victims, who ended up receiving some pecuniary compensation. However, family victims and their allies were critical of the procedures and the scope of this law. They claimed that the government, by refusing to revise the Amnesty Law and to declassify documents on the military massacre of the Araguaia Guerrilla members, was promoting a politics of forgetfulness and impunity.³⁴

President Luiz Ignácio Lula da Silva (Workers' Party or PT), also elected for two terms (2003-2006 and 2007-present), has not differed from his predecessor with respect to the battle over the memory of the dictatorship. However, the Lula administration has created some institutional support for the promotion of human rights. For instance, right after taking office in 2003, President Lula granted ministerial status to the *Secretaria Nacional de Direitos Humanos* (National Secretariat of Human Rights), renamed as *Secretaria Especial de Direitos Humanos* (Special Secretariat of Human Rights). He also created the *Secretaria Especial de Políticas para as Mulheres* (Special Secretariat of Public Policy for Women) and the *Secretaria Especial de Políticas de Promoção da Igualdade Racial* (Special Secretariat of Public Policy for the Promotion of Racial Equality), empowering both with ministerial status.

Despite these secretariats, the new progressive laws and the recognition of international human rights norms, 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, ethnicity, gender, sexual orientation, age and disability; impunity for the 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.³⁵ The new laws and programs to combat social exclusion, racism and sexism have hardly been enforced. This is the case because of the continuing concentration of power in the hands of the elite, corruption and other institutional problems of the justice system in Brazil. The neoliberal policies adopted by all parties in power since the end of the military dictatorship have further reduced the capacity of the State to implement human rights programs.

Several domestic and international human rights non-governmental organizations (NGOs) have denounced this situation and have filed complaints in the Brazilian courts. But 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 call the “boomerang pattern”.³⁶ This pattern occurs when a given State blocks redress to organizations within it, prompting the activation of a transnational network. 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 government to enforce the progressive legislation, to create new laws and to devise public policy for the protection of human rights. Since the mid-1990s they have increasingly engaged in transnational legal activism, mobilizing to secure the support of intergovernmental organizations, such as the OAS and its Inter-American System of Human Rights.³⁷

Transnational legal activism in the IACHR and the Brazilian State

The IACHR and the expansion of transnational legal activism

The American Convention on Human Rights, adopted in 1969 and in force since 1978, established that its observance should be carried out by two organs: the Inter-American Commission on Human Rights (IACHR), created by the OAS in 1959, and the Inter-American Court of Human Rights, created by the Convention and in force since 1978.³⁸ Since individuals and NGOs are allowed to file complaints only in the IACHR, transnational legal activism has directly engaged with this organ.³⁹ The IACHR is composed of seven members elected by the OAS General Assembly. They are not judges and they represent all of the OAS member States. The IACHR has the mandate to receive petitions against member States regardless of whether they have ratified the Convention. Given that the IACHR and the Court have a complementary function vis-à-vis domestic judicial systems, admission by the IACHR of a complaint is subject to the complainant having exhausted domestic remedies. Although the IACHR can handle individual complaints and proceed with an *in loco* investigation, it is not a judicial organ and cannot deliver judicial and binding decisions.⁴⁰

Transnational legal activism in the IACHR has greatly expanded in the last decade. Although data on the complaints received and cases processed by the IACHR are not consistently presented in its annual reports, published since 1970, these reports indicate a significant increase in the number of complaints over the years.⁴¹ In 1969 and 1970, for example, the IACHR received 217 complaints, half of the number received in 1997 alone (435).⁴² This number

continued to increase over the past ten years, having tripled by 2006 (1325), with most complaints referring to Peru, Mexico and Argentina.⁴³

The number of complaints against Brazil in the IACHR has also increased since the 1990s. However, compared with other countries in the region, Brazilian human rights NGOs have been slower in turning to transnational legal activism over the past ten years. In the years of 1969 and 1970, for example, the IACHR received 40 complaints against Brazil, and the country ranked second in number of complaints in the region.⁴⁴ In 1999 and 2000, the number of complaints against Brazil decreased (35).⁴⁵ In 1999, the country came tenth in the ranking of complaints, and 46 cases against Brazil were pending in the IACHR.⁴⁶ From 2001 to 2006, there was a gradual increase in the number of complaints against Brazil. In 2006, this number almost doubled (66) compared to the combined figure for 1999 and 2000, and the country reached the seventh position within the region.⁴⁷ Since 1999, the IACHR has received 272 complaints against Brazil, with 72 cases being processed currently.⁴⁸

The increase in the number of complaints can be attributed to national and international political processes. Until the 1980s, military and other authoritarian governments had representatives at the IACHR, discrediting its stated goals of promoting democracy and respect for human rights. In addition to overlooking large-scale practices of torture, disappearances and extra-judicial execution, the Inter-American system of human rights also had to deal with a weak, inefficient and corrupt domestic judiciary.⁴⁹ The democratization process has helped to strengthen the OAS and its human rights system. The globalization of human rights law and the transnationalization of social movements have also contributed to the expansion of transnational legal activism. As a result of these processes, the IACHR has gained more credibility among human rights NGOs and has pressured member States of the OAS to recognize and enforce human rights norms.⁵⁰

Before the Convention was ratified by Brazil in 1992, the IACHR called the attention of the Brazilian State only twice, in 1972 and 1985. During the dictatorship, the IACHR clearly ignored the vast majority of complaints against Brazil. From 1969 to 1973, for example, the IACHR received at least 77 complaints against Brazil. Of those, 20 were accepted as “concrete cases”.⁵¹ All but one concerned practices of arbitrary detention, death threats, torture, disappearance and assassination perpetrated by agents of the State against political dissidents of the regime. When responding to the petitions sent by the IACHR, the Brazilian State denied the occurrence of the alleged violations. The IACHR considered that most of the cases were not admissible or should be archived.⁵² The only case in which the Brazilian State was found responsible involved the arbitrary detention, torture and assassination of the union leader Olavo Hansen in the precinct of the *Departamento de Ordem Política e Social*

(Department of Social and Political Order, known as DOPS), in São Paulo, in May 1970. The IACHR decided that the Brazilian State should impose sanctions on the perpetrators of the violation and should compensate the family victims. The Brazilian government claimed that Hansen had committed suicide and refused to follow the recommendations.⁵³

The second case concerned the violation of the human rights of the indigenous population of Yanomamis. It was initiated in 1980 and ended in 1985, within the context of democratization. The petitioners were representatives of anthropological associations and indigenous rights NGOs based in the United States. The IACHR recognized the “important measures taken by the Government of Brazil, particularly since 1983, to protect the security, health and integrity of the Yanomami Indians”.⁵⁴ At the same time, the IACHR recommended that the government continue to take these measures, proceed to demarcate the boundaries of the Yamomami Park and consult with the indigenous population to establish social programs in the park. This case shows that both the IACHR and the Brazilian government had begun to take human rights violations more seriously. Yet, since the 1980s, the State has not always responded to the communications sent by the IACHR and, though advocating the protection of human rights, has acted in contradictory ways.

Types of cases and petitioners

According to Paulo Sérgio Pinheiro, over 70% of the cases pending in the IACHR concern the continued authoritarian practices by the States both past and present: they involve torture, arbitrary detention, disappearance and extra-judicial executions.⁵⁵ However, it is important to take into consideration the political context in which the cases have been reported. In cases against Brazil, for example, depending on the political context in question, one can find differences between the institutional and social positions of both perpetrators and victims. As noted above, under the dictatorship, almost all of the cases reported referred to political violence officially supported by the State and committed by agents of the State against political dissidents, regardless of their class, race or gender. Since the early 1980s most of the cases reported have concerned human rights violations not condoned by the State, though perpetrated by both agents of the State and death squads, paramilitary groups, landowners, business owners, or other members of the elite. Most of these cases concern class-and race-based violence against blacks, ethnic minorities, and the poor. Though a minority, there are also cases focusing specifically on violence against women, racial discrimination at the workplace, and the memory of political violence under the dictatorship.

It is estimated that human rights NGOs are responsible for 90% of the cases presented to the IACHR.⁵⁶ Since the 1980s, most of the cases against Brazil in the IACHR have been initiated by human rights NGOs. The majority of the petitions have been prepared and signed by international NGOs in partnership with local NGOs, victims or their families, social movement actors and/or grassroots non-governmental organizations. International human rights NGOs include, for example, the Center for Justice and International Law (CEJIL), Americas/Human Rights Watch and the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM). Although the members of the Center for Global Justice (renamed as Global Justice) come from and work in Brazil and the United States, this can be defined as a *national* organization. It is based solely in Brazil and advocates for the human rights of individuals and groups within and throughout Brazil. Since the late 1980s, the majority of the complaints in the IACHR have been initiated by CEJIL, followed by Global Justice and Americas/Human Rights Watch.

The local NGOs come from a variety of social movements and struggles. Local NGOs that actively participate in the human rights movement and that have engaged in transnational human rights legal activism include, among others, the *Gabinete de Assistência Jurídica Popular* [Cabinet for Popular Juridical Assistance] (GAJOP), the *Movimento Nacional de Direitos Humanos* [National Movement of Human Rights] (MNDH), 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 Killed or Disappeared for Political Reasons] (CFMDP/SP). The *União de Mulheres de São Paulo* (Women's Collective of São Paulo) is an example of a local grassroots feminist organization that has used the IACHR to advance the feminist struggle against gender-based violence. The *Geledés-Instituto da Mulher Negra* (Institute of Black women) and the *Instituto do Negro Padre Batista* (Institute of Blacks Father Batista) are examples of local NGOs connected to the black rights movement and the women's movement. With the exception of GAJOP, which has created a program specializing in the mobilization of international human rights law, most of the local NGOs have signed only one to three petitions, usually in partnership with larger international, national or local human rights NGOs.

Multiple strategies

NGOs use different strategies when approaching the OAS and the United Nations (UN). Transnational legal activism in the OAS is qualitative, whereas the approach of NGOs to the UN is quantitative. Since 1998, GAJOP, for

example, has sent ten complaints against Brazil to the IACHR. But the organization wrote 200 communications to the now extinct UN Commission on Human Rights.⁵⁷

These NGOs appeal to the IACHR not only to find solutions for individual cases but also to create precedents that will have an impact on Brazilian politics, law and society. The strategy is to make the case an example for social change. 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, the laws and the State, to prevent the continuation of human rights violations”.⁵⁸

But the NGOs are aware that legal mobilization in general, and the Inter-American System of Human Rights in particular, are limited resources for social change. As James Cavallaro, founder of the offices of Human Rights Watch and CEJIL in Brazil, founding member of Global Justice and currently a professor at the Law School of Harvard University, explains:

*Global Justice prepares a report on the situation of conflicts over land in Pará, Espírito Santo or any state where there is a crisis, on police brutality in São Paulo, or any theme. The report is prepared in Portuguese and translated into English. It is delivered to international organizations, newspapers, such as New York Times, etc. Thus, Global Justice also uses this informal space to press the Brazilian government to respond to our demands. The organization does this in conjunction with the use of the Inter-American system. The approach is holistic, because one petition alone is not going to transform the reality of Brazil. The starting point is strategic for any action in the Inter-American system. The system is useful only to some extent, because it is not going to solve the problem we're working on.*⁵⁹

In addition to using the IACHR as a political resource for social change, NGOs also approach it to reframe international human rights norms. 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 IACHR has been framed as a violation of civil rights. The IACHR has considered these complaints admissible. The only case referring to social rights (housing) was not admitted by the IACHR. Jayme Benvenuto explains that this complaint was framed as a social right to test the justiciability of social, economic and cultural rights. Like 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 reframe them.

But while most human rights violations are framed in terms of civil rights violations, the demands go beyond reparations for the victims. The petitioners normally demand that the Brazilian State take preventative measures and create new legislation or public policy on a specific issue. Despite the context of democratization, the Brazilian State has responded to these demands in contradictory ways, as the following cases illustrate.

*The Araguaia Guerrilla Case:
the right to memory versus the politics of forgetfulness*

Since the early 1990s, the only case about political rights violations under the period of the military dictatorship brought to the IACHR 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 the Federal District in Brasília. Because the court had not issued a decision on the merit of this case for thirteen years, CEJIL, the Americas/Human Rights Watch, the GTNM/RJ and the CFMDP/SP in 1995 sent a petition against the Brazilian State to the IACHR. At first, the Brazilian State denied its responsibility over this case and even denied the existence of the Araguaia guerrilla movement. It later recognized its responsibility but alleged that a new law enacted in 1995, the Law of the Disappeared, cited above, would provide pecuniary compensation to family members of those who had been killed or disappeared for political reasons. The petitioners argued that such compensation was not sufficient to reveal the circumstances of the death and disappearance of their family members. In March 2001, the IACHR declared the case admissible.

The strategy to use the IACHR had some impact on the case pending in the domestic federal court. In June 2003, federal judge Solange Salgado issued an unprecedented decision on the merit of the case, condemning the Brazilian State to take all necessary measures to find the bodies of the petitioners' family members who had disappeared during the massacre of the Araguaia Guerrilla movement; to provide the victims with a dignified burial, along with all the necessary information to issue their death certificate; and to provide the petitioners with all required information on the circumstances of the death and disappearance of the victims.

However, according to the attorneys working for the Special Secretariat

of Human Rights, the transnational legal mobilization over the Araguaia Guerrilla case has not impacted this organ, nor affected the government.⁶⁰ The Brazilian State filed an appeal to Justice Salgado's decision. The government has not declassified the documents on the Araguaia Guerrilla. Military officials insist that the documents have been destroyed. In November 2004, the Regional Federal Court (*Tribunal Regional Federal*) upheld Justice Salgado's decision and scheduled a hearing with the parties involved to implement that decision. The Brazilian State did not deny its responsibility but it did appeal again, claiming that Justice Salgado's decision should be executed under the jurisdiction of the original court where the lawsuit had been initiated. As of 26 June, 2007, the case was still pending in the Superior Court of Justice (*Superior Tribunal de Justiça or STJ*). On June 26, the *STJ*, while confirming Salgado's decision, has favored the state's appeal by ordering the original court to execute that decision.

In October of 2003, while the case was still pending in the Regional Federal Court, President Lula created an Inter-Ministerial Commission with the purpose of obtaining information on the remains of those who disappeared during the Araguaia Guerrilla massacre (see Decree no. 4,850/2003). It is worth noting that, contrary to the *Comissão Especial de Reconhecimento dos Mortos e Desaparecidos Políticos* (Special Commission to Recognize those Killed or Disappeared for Political Reasons), this Inter-Ministerial Commission only included representatives of the state. In March 2007, the commission issued its final report, stating, among other things, that Brazilian Army officials continue to claim that all documents relating to the Araguaia Guerrilla movement have been destroyed. The report also makes it clear that the commission worked under the condition, assured to military officials, that it would not use the information solicited from the Brazilian Army to revise the Amnesty Law. While the commission was indeed committed to finding the remains of those who were killed or disappeared for political reasons, it would not necessarily release the names of the perpetrators.⁶¹ Clearly, the federal government, while recognizing its responsibility for the historical past, has accepted the conditions imposed by the military to find the "truth" about the past. Furthermore, the battle over when and how the existing "secret" documents will be declassified continues, and the Araguaia Guerrilla case is still pending in the IACHR.

The GTNM/RJ and the CFMDP/SP have been very active in politicizing this legal battle outside of the courts. Since the early 1980s they have been mobilized for the right to have access to classified documents kept by the Brazilian Army. Among other things, they have used the media to denounce the impunity of military officials and police officers involved in the killing and

disappearance of political dissidents during the dictatorship; 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. The CFMDP/SP has also created a website to document its actions in search of information on those who disappeared.⁶²

It is important to note that legal mobilization and the use of the IACHR are not the major focus of their struggles over the right to memory and access to classified documents. Unlike human rights NGOs such as CEJIL, which specializes in human rights legal advocacy in the Inter-American System of Human Rights, the GTNM/RJ and the CFMDP/SP approach domestic and transnational legal mobilization as additional tools to strengthen their social and political struggles. As Criméia Schmidt de Almeida, founding member of the CFMDP/SP and 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 separate 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, can 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.⁶³

Both the Cardoso and the Lula governments have been unwilling to declassify the documents on the military operations in the Araguaia region. Both have enacted decrees that have indefinitely extended the time period for declassifying official documents considered “top secret”, which, according to these laws, can endanger the “national security” if they become public.⁶⁴ Both administrations have also opposed a revision of the Amnesty Law either. In sum, the case of the Araguaia Guerrilla clearly illustrates the heterogeneity and contradictory role of the Brazilian State regarding the politics of human rights at the federal level of State action. While international human rights norms have been recognized and a Special Secretariat of Human Rights has been created to implement national human rights programs, the federal government, regardless of the political party in power, has faced strong resistance on the part of military officials to follow the decision of a federal court and to guarantee the right to memory. Clearly, the federal government has promoted a politics of forgetfulness and impunity.

*The Maria da Penha Case: engendering
human rights despite a heterogeneous State*

In 1998, CEJIL, CLADEM and Maria da Penha Maia Fernandes filed a complaint before the IACHR 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 Viveros 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”.⁶⁵

Despite sending several communications to the Brazilian State over a period of three years, the IACHR did not receive any response from the government under the presidency of Cardoso. In 2001, the IACHR 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”. The IACHR 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 IACHR 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 IACHR 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”.⁶⁶

As noted by the organizations CEJIL, CLADEM and AGENDE-Action in Gender Citizenship and Development, “the extreme relevance of this case surpasses the interest of the victim Maria da Penha, extending its importance to all Brazilian women”.⁶⁷ According to them,

This is because, besides of having declared the Brazilian State responsible for negligence, omission and tolerance regarding to the domestic violence against women, recommending the adoption of measures related to the individual case [paragraph 61, items 1, 2 and 3] – including establishing the payment of compensation to the victim – the Commission also recommended that the State the adoption of public policy measures to put an end to state tolerance and the discriminatory treatment of domestic violence against women in Brazil [paragraph 61, items 4 a, b, c, d and e].

This was the first case in which the Convention of Belém do Pará was applied by an international human rights body, in a decision in which a country was declared responsible in a matter of domestic violence.

The case of Maria da Penha, therefore, has become a symbolic case as it determines the systematic pattern of domestic violence against women and establishes State responsibility at international levels due to the ineffectiveness of judicial systems at a national level.⁶⁸

Despite the importance of the case, only in October 2002 did the government, through the *Secretaria de Estado dos Direitos da Mulher* (State Secretary of Women's Rights or SEDIM), created at the very end of Cardoso's second term, began to pay attention to the case of Maria da Penha.⁶⁹ The head of SEDIM, Solange Bentes, then pressured the *Superior Tribunal de Justiça* (Superior Tribunal of Justice) to conclude the appeal to trial against the aggressor. The case was concluded soon after, confirming the decision of the local Jury that had condemned Mr. Viveros to 10 years and 6 months in prison. The delivery of such decision, just a few months before the deadline for the prescription of the crime, was one among other IACHR recommendations on this case.

Similarly to Cardoso, President Lula ignored the case of Maria da Penha and the recommendations by the IACHR for over two years. 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. Thanks to pressures from the women's movement, the government began to partially comply with the IACHR's recommendations. Thanks to efforts by the women's movement and the *Secretaria Especial de Políticas para as Mulheres* (Special Secretariat of Public Policy for Women), the government proposed to National Congress a law on domestic violence against women—a proposal that had been demanded by the women's movement since the 1980s. The law was approved by Congress and signed by President Lula on 7 August 2006. As an act of symbolic reparation, the law was named "Law Maria da Penha" (Law no. 11,340/2006) and was signed in a public and solemn ceremony widely publicized by the Brazilian media.

Although the Brazilian State has partially complied with the recommendations concerning this case, it is important to note that the state of Ceará has refused to compensate the victim. It is also likely that the implementation of the Law Maria da Penha will face resistance from local administrations. Maria da Penha Fernandes feels honored by the name of the law, but she considers it "very important that those using corporatism negatively to procrastinate the case be held responsible".⁷⁰

*The Simone Diniz Case: racial discrimination
as a human rights violation versus the denial of racism*

In October 1997, CEJIL, the Subcommittee on Blacks of the Human Rights Commission of the Brazilian Bar Association in São Paulo (OAB/SP) and Simone André Diniz sent a petition to the IACHR, 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 Diniz. The *Instituto do Negro Padre Batista* was added as co-petitioner later.⁷¹ Several individuals and black rights organizations signed a statement in support of this initiative, connecting this legal mobilization to a larger social movement to end racism in Brazil.

In March 1997, Aparecida Gisele Mota da Silva placed a classified ad in the daily *Folha de São Paulo* expressing her interest in hiring a domestic employee. The ad explicitly indicated 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. When Diniz said that she is black, she was informed that she did not meet the requirements for the job.

Diniz immediately filed a complaint with the São Paulo Police Station for Investigation of Racial Crimes (*Delegacia de Crimes Raciais*). The police inquiry (10541/97-4) was initiated and sent to the office of the Public Ministry. But on 2 April 1997, the public attorney in charge of the case asked that the proceedings be archived, since he did not consider the acts committed by Aparecida da Silva to have constituted a crime of racism, as defined under Law no. 7716/89. The judge presiding over the case issued a decision on 7 April 1997, determining that the proceedings indeed be archived.

Using the IACHR 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 of this case in order to prevent future incidents of discrimination based on color or race".⁷² In October 2002, the IACHR declared the admissibility of the petition.

The Brazilian State did not deny the existence of racial discrimination in Brazil, but it denied its responsibility in the case of Simone Diniz, alleging that, as the domestic court had ruled, the actions committed by Aparecida da Silva did not constitute a crime of racism, and therefore did not constitute a human rights violation. At the same time, the Brazilian State offered to pursue a friendly settlement. But since the State did not make any proposal on how to

achieve an agreement, the petitioners asked the IACHR to decide on the merits of the case.

In an unprecedented decision on a case of racial discrimination framed as a violation of human rights, the IACHR sent a report on the merits of the case to the parties in October 2004, concluding that “the State is responsible for the violation of the rights to equality before the law and judicial protection, and the right to a fair trial [...]”.⁷³ The IACHR recommended that the Brazilian State:

1. *Fully compensate the victim, Simone André Diniz, in both moral and material terms for human rights violations as determined in the report on the merits, and in particular;*
2. *Publicly acknowledge international responsibility for violating the human rights of Simone André Diniz;*
3. *Grant financial assistance to the victim so that she can begin or complete higher education;*
4. *Establish a monetary value to be paid to the victim as compensation for moral damages;*
5. *Make the legislative and administrative changes needed so that the anti-racism law is effective[...];*
6. *Conduct a complete, impartial and effective investigation of the facts, in order to establish and sanction responsibility with respect to the events associated with the racial discrimination experienced by Simone André Diniz;*
7. *Adopt and implement measures to educate court and police officials to avoid actions that involve discrimination in investigations, proceedings or in civil or criminal conviction for complaints of racial discrimination and racism;*
8. *Support a meeting with organizations representing the Brazilian press, with the participation of the petitioners, in order to draw up an agreement on avoiding the publicizing of complaints of racism, all in accordance with the Declaration of Principles on Freedom of Expression;*
9. *Organize government seminars with representatives of the judicial branch, the Public Ministry and local Public Safety Secretariats in order to strengthen protection against racial discrimination or racism;*
10. *Ask state governments to create offices specializing in the investigation of crimes of racism and racial discrimination;*
11. *Ask Public Ministries at the state level to create Public Prosecutor’s Offices at the state level specializing in combating racism and racial discrimination;*
12. *Promote awareness campaigns against racial discrimination and racism.*⁷⁴

This decision had an impact on the Brazilian government at both the federal and state levels. The local media widely publicized the case and the Brazilian

State became more attentive to the need to create more public policies to combat racial discrimination in the country. The state of São Paulo began to pay more attention to the 26 cases involving that state in the IACHR. In September 2005, then vice-governor and acting governor Cláudio Lembo (DEM) determined that the Public Attorney Office of the State of São Paulo (*Procuradoria Geral do Estado de São Paulo*) should accompany the cases involving that state in the IACHR (Decree no. 50,067, September 29, 2005). The governor appointed a public attorney, Mariângela Sarrubbo, to follow these cases and represent the state of São Paulo in the public hearings of the IACHR (Resolution PGE no. 21, 4 October 2005).

Nevertheless, the state of São Paulo refused to comply with the recommendations made by the IACHR regarding compensation to Diniz. In other words, recommendations 1, 2, 3, 4, and 6 have not been accepted by the state of São Paulo. According to public attorney Mariângela Sarrubbo:

The state considered that it had not violated human rights because it had created affirmative policies, as recommended by the Commission. The Police Academy, for example, created a new course on racial discrimination for police officers. A new legislation was proposed by Governor Geraldo Alkmin to the São Paulo state Assembly to establish an evaluating system in public sector recruitment examinations favoring afro-descendants. The case of Simone Diniz made the state more attentive to the problem of racial discrimination. This case had an enormous repercussion because the media made it visible. But this is a particular case that does not prove the inexistence of affirmative policies. This is an isolated case of a woman who supposedly discriminated against another woman. But there was no crime of racism. After the Commission made its recommendations, it had 30 days to send the case to the Court. But it didn't. I believe the Commission trusted that the measures taken by the state were satisfactory.⁷⁵

The IACHR did not send the case to the Court because the petitioners asked not to do so, based on the fact that the violation had occurred before the acceptance of the jurisdiction of the Court by the Brazilian State. The development of this case shows that the Brazilian State responded in contradictory ways. At the federal level, the Special Secretariat of Public Policy for the Promotion of Racial Equality and the Special Secretariat of Human Rights tried, though unsuccessfully, to find ways to comply with the recommendations made by the IACHR. At the local level, the state of São Paulo denied even the existence of the violation.

Until 2004 the Brazilian State had accepted responsibility in sixteen cases. Two involved violations against rural workers. Another concerned illegal imprisonment, torture and death of an indigenous leader. Another

referred to the killing of 111 prisoners in the now-defunct prison, Carandiru. In eleven of the other cases, Brazil was found responsible for human rights violations concerning summary executions perpetrated by military police against children and adolescents. In all of these cases, the impunity of those responsible for the crimes was proven.⁷⁶ An important case that resulted in a friendly settlement agreement referred to slave labor. Signing the agreement in 2003, the Brazilian State recognized its responsibility even though the perpetration of the violation was not attributed to State agents. As the petitioners stated, such responsibility was due because “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”.⁷⁷

In most cases, however, the Brazilian State has not fully complied with its obligation and the victims have had to carry out new struggles to guarantee that the recommendations of the IACHR be implemented by the Brazilian State.⁷⁸ Even in cases where the Brazilian State has agreed to comply with its obligation to compensate the victims, one of the major problems facing the federal government is the resistance by local governments and local courts to enforce international human rights norms, despite the fact that these norms have been ratified 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 IACHR and the decisions established by the Court. However, the governmental politics of human rights has been undermined by a political crisis hounding the government and the ongoing economic restructuring that has reduced the government’s capacity to implement human rights programs.

Conclusion

Globalization has promoted the expansion of transnational advocacy networks. Activists have increasingly participated in these networks through transnational legal mobilization. In this paper, I have formulated the concept of “transnational legal activism” to reflect on the strategies of NGOs engaged in human rights disputes brought to the IACHR, using Brazil as a case-study. The concepts of “global judicialization” and “transnational litigation” are too narrow to capture the political aspects of the strategies of transnational legal activism. 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 “subaltern cosmopolitan politics and legality”. 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.

But the strategies of transnational legal activism face two types of limitations. First, legal mobilization alone is not sufficient to promote social change. Second, international human rights norms depend on nation-States for their recognition and enforcement. Depending on local, national and international political conditions, the State may be more or less open to recognize these norms. However, even within the same political context, the development of the politics of human rights may differ at each of these scales of State action. Enforcement of human rights norms by domestic judicial systems is also a major challenge facing transnational legal activism. The concept of a “heterogeneous State” helps to account for the distinctions between the politics of human rights at different levels and sectors of State action.

The case of Brazil reveals that political democracy has not been sufficient to end violations of human rights. NGOs have increasingly used the IACHR to pressure the Brazilian State to recognize and comply with the norms established by the American Convention on Human Rights and other international human rights documents. The Inter-American System of Human Rights has not been designed to replace domestic judicial systems, but it offers some room for human rights NGOs to shape the politics of law and public policies on human rights.

Yet, since the complaints are presented against the Executive branch of the State, the Judiciary remains almost intact and judges have little contact with international human rights norms. Transnational legal activism may help to change the course of a legal dispute pending in the domestic courts, as the cases of the Araguaia Guerrilla and Maria da Penha illustrate. But if the case is not pending, the local judicial system might remain untouched. In addition, the resistance on the part of sectors of the State, at both national and local levels of administration, to accept their responsibility concerning human rights violations makes it difficult for the State to fully comply with the decisions of the IACHR, as illustrated by the cases of the Araguaia Guerrilla and Simone Diniz.

In sum, despite the political context of democratization, the Brazilian State is heterogeneous and has responded to transnational legal activism in contradictory ways. At different levels of State action, the politics of human rights is ambiguous and contradictory, with different sectors of the State formally recognizing human rights norms in some cases, denying such recognition in other cases and rarely enforcing the recognized norms. The impact of transnational legal activism on different sectors of State action at all levels of administration is an important aspect of human rights struggles in Brazil and in other Latin American countries, deserving further investigation.

Appendix

Graph 1

Total number of complaints against Brazil received by the Inter-American Commission on Human Rights, from 1969 to 1973.			
Year	Complaints	Cases or petitions transmitted to the Brazilian government	Cases being processed
1969-1970	40	9	No data available
1971	26	4	No data available
1972	11	3	No data available
1973	No data available	4	No data available
Total	77	20	No data available

Source: Data compiled by the author, drawing from Inter-American Commission on Human Rights, Annual Reports, 1970, 1971, 1972, 1973.

Graph 2

Total number of complaints against Brazil received by the Inter-American Commission on Human Rights, from 1999 to 2006.			
Year	Complaints	Cases or petitions transmitted to the Brazilian government	Cases being processed
1999	13	No data available	46
2000	22	13	58
2001	28	9	42
2002	30	3	55
2003	42	8	65
2004	29	7	90
2005	42	10	72
2006	66	8	72
Total	272	58	72

Source: Data compiled by the author, drawn from the Inter-American Commission on Human Rights, Annual Reports, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006.

NOTES

1. Paper written for submission to the *Sur-International Journal on Human Rights* on 7 March 2007.
2. Steven R. Ratner, "The International Criminal Court and the Limits of Global Judicialization", *Texas International Law Journal*, v. 38, n. 3, 2003, pp. 445-453.
3. Anne-Marie Slaughter, "A Global Community of Courts", *Harvard International Law Journal*, v. 44, n. 1, 2003, pp. 191-219.
4. For a critical analysis of 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, see Jane Jenson and Boaventura de Sousa Santos, "Introduction: Case Studies and Common Trends in Globalization" in Jane Jenson and Boaventura de Sousa Santos (Org.), *Globalizing Institutions: Case Studies in Social Regulation and Innovation*, Burlington, Ashgate, 2000, pp. 9-28. See also Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, London, LexisNexis Butterworths Trolley, 2002.
5. Elsewhere, I have discussed the literature and some data presented here in light of the relationship between transnational legal activism and counter-hegemonic globalization. See Cecilia MacDowell Santos, "Transnational Legal Activism and Counter-Hegemonic Globalization: Brazil and the Inter-American Human Rights System", *Oficina do CES 257*, September 2006. An earlier version of this article was presented at the Law and Society Association (LSA) annual meeting, Baltimore, 6-9 July, 2006. Research for this article was funded by the Jesuit Foundation and the Faculty Development Fund of the University of San Francisco. I also would like to acknowledge the support of the Portuguese Foundation for Science and Technology (FCT), through the Associate Laboratory Grant to the Center for Social Studies at the University of Coimbra, which made possible the development of the present research. Thanks to Brianna Dwyer-O'Connor and Adriana Carvalho for their invaluable research assistance. Thanks to Seth Racusen for his insightful feedback on the version presented in Baltimore. Thanks to an anonymous reviewer of *Sur* for the pertinent critiques and excellent suggestions on how to improve an earlier version of this article. I am especially grateful to the victims, human rights activists, attorneys, and public officials who gave me interviews.
6. On the concept of "heterogeneous State", see Boaventura de Sousa Santos, "The Heterogeneous State and Legal Plurality" in Boaventura de Sousa Santos, João Carlos Trindade and Maria Paula Meneses (Org.), *Law and Justice in a Multicultural Society: The Case of Mozambique*, Dakar, Council for the Development of Social Science Research in Africa, 2006, pp. 3-29.
7. See, for example, Richard H. Kreindler, *Transnational Litigation: A Basic Primer*, Dobbs Ferry, N.Y., Oceana Publications, 1998. See also Anne-Marie Slaughter, *op. cit.*; and Steven R. Ratner, *op. cit.*
8. 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 John J. Barceló III and Kevin M. Clermont (Org.), *A Global Law of Jurisdiction and Judgments: Lessons from the Hague*, The Hague, Kluwer Law International, 2002.
9. See Anne-Maria Slaughter, *op. cit.*, p. 192.

10. See Steven R. Ratner, *op. cit.*, p. 445.
11. See, for example, Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics*, Ithaca and London, Cornell University Press, 1998; Jeremy Brecher et al. *Globalization from Below: The Power of Solidarity*, Cambridge, Mass., South End Press, 2000; Michael Burawoy et al (Org.) *Global Ethnography: Forces, Connections and Imaginations in a Postmodern World*, Berkeley, University of California Press, 2000; Peter Evans, "Fighting Marginalization with Transnational Networks: Counter-Hegemonic Globalization", *Contemporary Sociology*, v. 29, n. 1, 2000, pp. 230-241; Sidney Tarrow et al (Org.), *The New Transnational Activism*, Cambridge, Cambridge University Press, 2005.
12. Margaret E. Keck and Kathryn Sikkink, *op. cit.*, p. 8.
13. Margaret E. Keck and Kathryn Sikkink, *op. cit.*, pp. 8-9.
14. See, for example, the papers in the volume edited by Volkmar Gessner (Org.), *Foreign Courts: Civil Litigation in Foreign Legal Cultures*, Aldershot, UK, Dartmouth, 1996. See also the collection of papers published by the International Institute for the Sociology of Law in Oñati, edited by Johannes Feest, Johannes (Org.), *Globalization and Legal Cultures: Oñati Summer Course 1997*, Oñati, The International Institute for the Sociology of Law, 1999.
15. Volkmar Gessner, "The Institutional Framework of Cross-Border Interaction" in Volkmar Gessner (Org.), *Foreign Courts: Civil Litigation in Foreign Legal Cultures*, Aldershot, UK, Dartmouth, 1996, p. 18.
16. Austin T. Turk, "Law as a Weapon in Social Conflict", *Social Problems*, v. 23, 1976, pp. 276-291.
17. Paul Burstein, "Legal mobilization as a social movement tactic: the struggle for equal employment opportunity", *American Journal of Sociology*, v. 96, 1991, pp. 1201-1225. See also Michael McCann (Org.), *Law and Social Movements*, Burlington, Ashgate, 2006.
18. See the collection of articles in Boaventura de Sousa Santos and César A. Rodriguez-Garavito (Org.), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge, Cambridge University Press, 2005.
19. Boaventura de Sousa Santos, *op. cit.*, p. 283.
20. Boaventura de Sousa Santos, *op. cit.*, p. 283.
21. Boaventura de Sousa Santos, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality" in Boaventura de Sousa Santos and César A. Rodriguez-Garavito (Org.), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge, Cambridge University Press, 2005, p. 30.
22. *Ibid.*
23. Cf. Juan E. Méndez, Guillermo O'Donnell and Paulo Sérgio Pinheiro (Org.), *Democracia, Violência e Injustiça: O Não-Estado de Direito na América Latina*, São Paulo, Paz e Terra, 2000.
24. The major principles of the Brazilian doctrine of "National Security and Development" can be found in Golbery do Couto e Silva, *Conjuntura Política Nacional, o Poder Executivo e Geopolítica do Brasil*, Rio de Janeiro, Livraria José Olympio Editora, 1981.

25. See, for example, Arquidiocese de São Paulo no Brasil, *Brasil: Nunca Mais*, Petrópolis, Vozes, 1981; Maria Helena Moreira Alves, *Estado e Oposição no Brasil (1964-1984)*, Petrópolis, Vozes, 1987; and Luciano Oliveira, *Do Nunca Mais ao Eterno Retorno: Uma Reflexão sobre a Tortura*, São Paulo, Brasiliense, 1994.

26. For analyses of the social, political and historical relevance of these movements, see, for example, Eunice Ribeiro Durhan, "Movimentos Sociais: A Construção da Cidadania", *Novos Estudos*, v. 10, 1984, pp. 24-30; Emir Sader, *Quando Novos Personagens Entraram em Cena: Experiências e Lutas dos Trabalhadores da Grande São Paulo, 1970-1980*, Rio de Janeiro, Paz e Terra, 1995; Eduardo J. Viola, "O Movimento Ecológico no Brasil (1974-1986): Do Ambientalismo à Ecopolítica", *Revista de Ciências Sociais*, v. 1, n. 3, 1987, pp. 5-26; Sonia E. Alvarez, *Engendering Democracy in Brazil: Women's Movements in Transition Politics*, Princeton, Princeton University Press, 1990; and Maria Amélia de Almeida Teles, *Breve História do Feminismo no Brasil*, São Paulo, Brasiliense, 1993.

27. See Maria Helena Moreira Alves, *op. cit.*

28. See Janaína Teles (Org.), *Mortos e Desaparecidos Políticos: Reparação ou Impunidade?*, São Paulo, Humanitas/FFLCH/USP, 2001.

29. Today, there are 127 women's police stations in the state of São Paulo, and Brazil has over 365 of these stations. For a sociological and feminist analysis of the emergence and operation of these police stations in São Paulo, see Cecília MacDowell Santos, *Women's Police Stations: Gender, Violence and Justice in São Paulo, Brazil*, New York, Palgrave Macmillan, 2005.

30. 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, see Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional*, São Paulo, Max Limonad, 5th edition, 2006.

31. In the 1980s, some international treaties and conventions were also ratified by the Brazilian State, such as the Convention on the Elimination of All Forms of Discrimination against Women, also known as CEDAW, approved by the United Nations in 1979 and ratified by the Brazilian State on 1 February 1984. However, only in the 1990s were the Inter-American human rights norms recognized by the Brazilian State.

32. See Jayme Benvenuto Lima Jr., Fabiana Gorenstein, and Leonardo Ferreira Hidaka (Org.), *Manual de Direitos Humanos Internacionais: Acesso aos Sistemas Global e Regional de Proteção dos Direitos Humanos*, São Paulo, Edições Loyola, 2003.

33. Brasil, Secretaria de Direitos Humanos, *Programa Nacional de Direitos Humanos*, Brasília, SEFOR, 1995, p. 5.

34. For further details of these and other critiques, see Janaína Teles, *op. cit.*

35. See, for example, Sydow, Evanize and Maria Luisa Mendonça (Org.), *Direitos Humanos no Brasil 2006: Relatório da Rede Social de Justiça e Direitos Humanos*, São Paulo, Rede Social de Justiça e Direitos Humanos, 2006; Evanize Sydow and Ramirez Tellez Maradiaga, *Derechos Humanos en el Campo Latino-Americano: Brasil, Guatemala, Honduras y Paraguay*, São Paulo, Rede Social de Justiça e Direitos Humanos, 2007; Centro de Justiça Global and Núcleo de Estudos Negros (Org.), *Execuções Sumárias no Brasil (1997-2003)*, São Paulo, Centro de Justiça Global and Núcleo de Estudos Negros, 2003; AGENDE-Ações em Gênero, Cidadania e Desenvolvimento and CLADEM Brasil-Comitê Latino-

Americano e do Caribe para a Defesa dos Direitos da Mulher, *O Brasil e a Convenção sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher: Documento do Movimento de Mulheres para o Cumprimento da Convenção sobre a Eliminação de Todas as Formas de Discriminação contra a Mulher – CEDAW, pelo Estado Brasileiro: Propostas e Recomendações*, Brasília, AGENDA-Ações em Gênero, Cidadania e Desenvolvimento, 2003; Juan E. Méndez et al, *op. cit.*

36. Cf. Margaret E. Keck and Kathryn Sikkink, *op. cit.*

37. See Patricia Ferreira Galvão, "Brazil and the Inter-American System of Human Rights" in *Human Rights in Brazil 2002: A Report by the Social Network for Justice and Human Rights in Partnership with Global Exchange*, São Paulo, Social Network for Justice and Human Rights, 2002; Liliana Tojo and Ana Luisa Lima, "O Brasil e o Sistema Interamericano de Proteção dos Direitos Humanos" in Evanize Sydow and Maria Luísa Mendonça (Org.), *Direitos Humanos no Brasil 2004: Relatório da Rede Social de Justiça e Direitos Humanos*, São Paulo, Rede Social de Justiça e Direitos Humanos, 2004, pp. 297-305.

38. For a comprehensive historical and doctrinal account on the OAS, established in 1948, and its human rights system, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, Oxford, Clarendon Press, 1996. See also Olaya Sílvia Machado Hanashiro, *O Sistema Interamericano de Proteção aos Direitos Humanos*, São Paulo, Editora da Universidade de São Paulo/Fapesp, 2001; and Flávia Piovesan, *op. cit.*

39. Only State parties to the Convention and the IACHR can submit a case to the Inter-American Court of Human Rights.

40. The Court is the system's judicial organ in charge of the interpretation and application of the Convention. 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.

41. See Inter-American Commission on Human Rights, Annual Report, 2006. "Complaint" refers to a communication presented in writing by an individual or NGO, concerning an alleged violation by an OAS member State. "Case" refers to a complaint or petition that is opened for examination of admissibility and merit by the ICHR, being transmitted to the member State in question.

42. See Graph 1 in the Appendix; see also Inter-American Commission on Human Rights, Annual Report, 2006.

43. See Inter-American Commission on Human Rights, Annual Report, 2006.

44. See Graph 1 in the Appendix.

45. See Graph 2 in the Appendix.

46. See Inter-American Commission on Human Rights, Annual Report, 1999. See also Graph 2 in the Appendix.

47. See Inter-American Commission on Human Rights, Annual Report, 2006. See also Graph 2 in the Appendix.

48. See Graph 2 in the Appendix.

49. See Henry J. Steiner and Philip Alston, *op. cit.*, p. 641.

50. The credibility of the Inter-American System of Human Rights among human rights NGOs and a positive assessment of the effects of its decisions are illustrated in the following article by members of the Center for Justice and International Law (CEJIL): Beatriz Affonso and Rita Lamy Freund, "Efeitos Práticos das Decisões dos Órgãos do Sistema Interamericano de Direitos Humanos", available at <<http://www.social.org.br/relatorio2005/relatorio035.htm>>, last access on 24 April 2007.

51. See Graph 1 in the Appendix.

52. See Inter-American Commission on Human Rights, Annual Reports, 1970, 1971, 1972 and 1973.

53. See Inter-American Commission on Human Rights, Annual Report, 1973, Case no. 1,683, opened in 1970. The IACHR does not specify the names of the petitioners. At the time, the commissioner from Brazil, Carlos A. Dunshee de Abranches, dissented from the report on the merits of this case. The Brazilian government, through its Ambassador at the OAS, insisted that Hansen had committed suicide. He claimed that the State could not accept those recommendations and expressed surprise at the decision, arguing that the International Organization of Labor had examined the same case and had not condemned the Brazilian State.

54. See Inter-American Commission on Human Rights, Annual Report, 1985, Resolution no. 12/85, Case no. 7,615.

55. See Paulo Sérgio Pinheiro, "Prefácio" in Olaya Sílvia Machado Hanashiro, *O Sistema Interamericano de Proteção aos Direitos Humanos*, São Paulo, Editora da Universidade de São Paulo/Fapesp, 2001, pp. 13-17.

56. Cf. Olaya Sílvia Machado Hanashiro, *op. cit.*, p. 45.

57. The last session of the UN Commission on Human Rights occurred in March 2006. Since then its work has been continued by the newly-created UN Human Rights Council.

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

59. Interview with James Cavallaro, Coimbra, 14 August 2006.

60. Interview with Renata Pelisan, Brasília, 22 August 2006; and interview with Carolina de Campo Melo, Brasília, 22 August 2006.

61. See the report of the Inter-Ministerial Commission created by Decree n. 4850 of 2 October 2003 with a view to identifying those who disappeared during the "Araguaia Guerrilla" uprising, Brasília, 8 March 2007.

62. See <<http://www.desaparecidospoliticos.org.br>>, last access on 20 September 2007.

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

64. See Decree no. 4,553/2002, signed by former President Cardoso. See also Decree no. 5,301/2004, signed by President Lula, later transformed into Law 11,111/2005.

65. Inter-American Commission on Human Rights, Report no. 54/01, Case no. 12,051.

66. *Ibid.*

67. Center for Justice and International Law (CEJIL), Latin American and Caribbean Committee

for the Defense of Women's Rights (CLADEM) and AGENDE – Action in Gender Citizenship and Development, *Document for CEDAW on the Compliance by Brazil of the Shrunken Obligations as State-party of the Convention Concerning Violence against Women. Violence against Women: The Case of Maria da Penha, Brazil, 2003.*

68. Center for Justice and International Law (CEJIL), Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) and AGENDE – Action in Gender Citizenship and Development, *op. cit.*

69. See Secretaria de Estado dos Direitos da Mulher–SEDIM, “Secretaria de Direitos da Mulher Lamenta Morosidade no Julgamento de Crimes contra a Mulher”, Brasília, DF, Ministério da Justiça, Secretaria de Estado dos Direitos da Mulher, 2002.

70. Phone interview with Maria da Penha Maia Fernandes, 3 April 2007.

71. In 2003, a similar complaint of racial discrimination was lodged in the IACHR by *Geledés-Instituto da Mulher Negra*. In 2006, the IACHR published the report of admissibility on this case. See report no. 84/06, petition no. 1068-03.

72. See Inter-American Commission on Human Rights, Report no. 37/02.

73. The report no. 83/04 was published in the ICHR's annual report on October 26, 2006 (see Inter-American Commission on Human Rights, Report no. 66/06). Two commissioners, José Zalaquett and Evelio Fernández Arévalos, though concurring with the majority decision with respect to the substantive violation of the right to equality before the law, did not follow the majority with respect to the State's response to the complaint that the victim filed with the Police Office for Investigation of Racial Crimes on March 2, 1997. As they stated, “Our opinion in this respect is that, in the context of the specific factual and legal circumstances in this case, the actions of the Brazilian police, the Public Ministry and the Judicial Branch taken as a whole do not constitute a response that would amount to a violation of Articles 8, 25 and 1(1) of the American Convention” (Inter-American Commission on Human Rights, Report no. 66/06).

74. Inter-American Commission on Human Rights, Report no. 66/06.

75. Interview with public attorney Mariângela Sarrubbo, São Paulo, 8 September, 2006.

76. See Pàtricia Ferreira Galvão, *op. cit.*, p. 215.

77. The case concerns 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. See Inter-American Commission on Human Rights, Report no. 95/03; see also Liliana Tojo and Ana Luisa Lima, *op. cit.*

78. This can be illustrated by the status of compliance in cases decided by the IACHR in the last six years, as indicated by Inter-American Commission on Human Rights, Annual Report, 2006.