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Sur – Human Rights University Network
Rua Pamplona, 1197 - Casa 4 São Paulo/SP - Brasil -
CEP: 01405-030 Tel.: (5511) 3884-7440 - Fax (5511) 3884-1122
E-mail: <surjournal@surjournal.org>
Internet: <http://www.surjournal.org>

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CONTENTS

PRESENTATION

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With the aim of seeking out different perspectives and dealing with subjects of a specialized nature, Conectas Human Rights has been creating partnerships with non-governmental human rights organizations in diverse parts of the world. In this issue of Sur – International Human Rights Journal, which is principally focused on access to medicines, a new cooperative partnership was formed with the Brazilian Interdisciplinary AIDS Association – ABIA.

Founded in 1987, it is the mission of ABIA to promote access to treatment and assistance to persons living with HIV and AIDS. Along these lines, ABIA has been monitoring public policies and developing projects regarding education, prevention, and access to information about HIV/AIDS. ABIA has also been coordinating the Working Group on Intellectual Property of the Brazilian Network for the Integration of Peoples – GTPI – REBRIP, in order to enrich and enlarge the debate over the harmful impacts of the rigid rules regarding intellectual property in the area of access to essential medicines, in addition to contributing to the construction of alternatives to the present model.

This eighth issue of the Sur Journal is divided into two parts: the first specifically examines access to medicines, while the second deals with questions that evaluate the present state of human rights in general.

Beginning with the discussion over access to medicines, the main problems related to the often conflicting interaction between human rights and international trade are debated. Those questions deal with the conflict between the human right to health and the protection of pharmaceutical innovations; efforts at making businesses responsible and breaking away from the protective framework initially confined to the sphere of the State; and the developing of the public debate over the political use of judicial power.

In the article by Chaves, Vieira and Reis the system for the protection of intellectual property is discussed, taking as a starting point the situation in Brazil. The relevance of the Brazilian case is based on Brazil's adoption of a policy of universal access to medicines for the treatment of AIDS as well as its recent adoption of a compulsory license for the supply of antiretroviral medicines. The model of universal access and the adoption of a compulsory license represent important benchmarks for the recognition of the preference of human rights over economic interests. The article also presents the main action strategies adopted by a Brazilian group of activists that has had a profound effect on the area. The description of these strategies is important because it enhances the possibility of exchanging experiences with other activist groups in the South.

In the article by Pogge, the author discusses the argument that patents stimulate pharmaceutical innovation. For the author, this system strengthens monopolies and the

concentration of research on the symptoms, and not the causes, of chronic illnesses. At the same time the treatment of specific illnesses of poorer populations is relegated to a secondary position because it is less profitable, thus increasing the rate of avoidable deaths. The author goes beyond simply spelling out the problem. He presents a proposal that would complement the patent system: a Health Impact Fund, financed by governments. This Fund would stimulate the development of new medicines with the promise of re-compensating successful innovators in proportion to the impact of the medicine on the global burden of illness.

The article by Hunt and Khosla deals with the responsibility of pharmaceutical businesses, along with the presentation of normative guidelines for health rights. In this sense, the article written by the Rapporteur of the United Nations on the right to health could be interpreted almost as "soft law", assisting in the structuring of this right in regard to the access to medicines.

In the last article of this first part of the Journal, which was authored by Contesse and Lovera, the question of access to medicines is analyzed beginning with individual cases that depict the perspective of those that lack access to medicines in Chile. The authors show how the litigation process can be used politically to create a public debate to sensitize the executive and legislative branches of the government to enact new public policies.

In the second part of this issue of the Sur Journal, the following issues are discussed: the justiciability of economic, social, and cultural rights (Cavallaro and Brewer); the growing consolidation of sexual rights as autonomous rights (Mattar); the participatory preparation and adoption of a new international treaty on rights of persons with disabilities (Dhanda); and the challenges that have to be overcome by non-governmental human rights organizations (Abregu).

We would like to thank the following professors and partners for their contribution in the selection of articles for this issue: Alejandro Garro, Bernardo Sorj, Carlos Correa, Denise Hirao, Frans Viljoen, J. Paul Martin, Jeremy Julian Sarkin, Juan Amaya, Julieta Rossi, Mustapha Al-Sayyed, Richard Pierre Claude, Roberto Garretón, Roger Raupp Rios, and Vinodh Jaichand.

Finally, we would like to announce that the next edition of Sur Journal will be a special issue in commemoration of the sixtieth anniversary of the Universal Declaration of Human Rights. The next issue will be published in partnership with the *International Service for Human Rights*.

The Editors

JAMES L. CAVALLARO

Clinical Professor of Law, Harvard Law School; Executive Director, Human Rights Program, Harvard Law School. Petitioner and advocate in some fifty cases litigated before the Inter-American Commission and Court of Human Rights.

Address: Human Rights Program, Harvard Law School
400 Pound Hall, 1563 Massachusetts Avenue
Harvard Law School, Cambridge, MA 02138

STEPHANIE ERIN BREWER

Harvard Henigson Fellow and Sheldon Traveling Fellow, Centro de Derechos Humanos Miguel Agustín Pro Juárez, Mexico City, 2007-2008. A.B. Harvard College, 2004, J.D. Harvard Law School, 2007.

Address: Human Rights Program, Harvard Law School
400 Pound Hall, 1563 Massachusetts Avenue
Harvard Law School, Cambridge, MA 02138
Email: Internacional2@centroprodh.org.mx

The views expressed in this piece are solely those of the authors.

ABSTRACT

This article contends that efforts to expand the justiciability of economic, social, and cultural (ESC) rights before supranational tribunals may not always be the best way to increase respect for these rights on the ground. In the Inter-American System, the authors maintain that human rights lawyers will best advance social justice and ESC rights when they use supranational litigation as a subsidiary tool to support advocacy efforts led by domestic social movements, a role that may often entail litigating ESC claims strategically within the framework of civil and political violations.

Original in English.

KEYWORDS

Inter-American – ESC rights – Justiciability – Social movements – Strategic litigation

THE VIRTUE OF FOLLOWING: THE ROLE OF INTER-AMERICAN LITIGATION IN CAMPAIGNS FOR SOCIAL JUSTICE

James L. Cavallaro and Stephanie Erin Brewer

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

For two decades, human rights lawyers have sought to advance the enjoyment of economic, social, and cultural (ESC) rights by establishing the justiciability of these rights before domestic and supranational human rights tribunals. However, in the race to make ESC rights justiciable before courts, the human rights movement has failed to consider thoroughly whether expanding the ability of courts to render decisions on ESC rights per se is always the best way to increase respect for these rights and promote social justice on the ground. We contend that advocacy of ESC justiciability as an end in itself fails to appreciate the instrumental nature of litigation in advancing human rights.

Thus, in certain contexts, the most successful strategies for promoting social justice through litigation will not necessarily emphasize making ESC rights justiciable. Instead, we maintain that human rights lawyers will best advance ESC rights when they use supranational litigation as a subsidiary tool to support advocacy efforts led by domestic social movements, a role that may often entail litigating ESC claims strategically within the framework of civil and political violations. This is often the case, we argue, for litigation before the Inter-American Court of Human Rights.[1]

Notes to this text start on page 93.

Introduction

In an earlier piece published in the Hastings Law Journal,[2] one of the authors of this piece together with Emily Schaffer set out what we believed to be the wisest path forward for advocates seeking to advance ESC rights through Inter-American litigation, specifically litigation before the Court. That piece, based in significant part on its authors' combined experience working with rights defenders and social justice movements in Latin America for two decades and litigating scores of matters in the Inter-American system, challenged some of the conventional wisdom regarding the expansion of the justiciability of ESC rights. In particular, it questioned the wisdom of alleging direct violations of article 26 of the American Convention (referring to progressive implementation of ESC rights). The piece argued that given the Court's reluctance to recognize alleged violations of article 26, litigating direct ESC claims under this article was an approach unlikely to convince the Court and even less likely to be implemented by states. We also set out a range of alternative ways that litigants might seek to advance social justice by litigating in the Inter-American system. These included, for example, invoking the ESC rights protected in the American Declaration before the Commission. Before the Court, we emphasized litigation strategies that focus on ESC elements in civil and political rights, frame cases in terms of the non-discrimination principle, and invoke the economic and social rights for which clear access to the Court is recognized in the San Salvador Protocol.[3]

In a piece published last year in the N.Y.U. Journal of International Law and Politics,[4] human rights attorney Tara J. Melish responded to these arguments, contending that article 26 is a viable path for alleging ESC rights violations provided that litigators limit their claims to individual-oriented, conduct-based duties on the part of states. Melish maintains that so long as human rights lawyers conscientiously fulfill all of the other legal requirements of an admissible case before the Inter-American system, the Court can recognize article 26 claims to the same extent as traditional civil and political claims.[5]

Much of the debate between us and Melish focuses on the technical viability – from a litigator's perspective – of alleging direct ESC rights claims before the Court. In this regard, the present authors continue to have serious doubts about the prospects of success under this approach and to advocate that litigators within the system bear in mind the legal and practical limits of article 26 when framing their cases. However, in evaluating this debate, we have come to place increasing emphasis on a much broader question: rather than asking how litigators can persuade the Court to expand the justiciability of ESC rights under article 26, practitioners must ask themselves whether aiming for such declarations is the best means of improving enjoyment of ESC rights in practice. Answering the latter question, in turn, requires human rights lawyers to ask themselves what role a given Inter-American Court case can and should play in advancing human rights and social justice on the ground. We take this opportunity to refine and reiterate what we believe this role to be.

As an initial matter, practitioners must come to terms with the limited access that the Inter-American system provides in real, numerical terms. In the last three years, for instance, the Inter-American Court has resolved an average of 15 cases annually [6] - less than one case per year for each country that has recognized the Court's contentious jurisdiction.[7] In light of the system's limited capacity to address directly the vast majority of rights violations in the Americas, we assert that any litigation strategy that does not seek to produce or at least encourage effects beyond the individual litigants is rendered inefficient at best and misguided at worst.

Moreover, as argued in the Hastings piece, the on-the-ground impact of the Court's determinations has not correlated directly with the merits of those determinations, but rather has varied in relation to parallel organization, media mobilization, and civil society strategies.[8] As a consequence of this broader context, we call on practitioners to promote social justice through well grounded litigation that plays a secondary, supporting role to the broader advocacy efforts of domestic social movements and organized civil society. We contend that listening to social movements and working to support them have real consequences for the framing of litigation and for the ways in which supranational bodies are best deployed. For instance, domestic social movements may prefer that litigation before the Court be grounded in civil and political rights as part of a broader strategy to advance a given ESC right. In this regard, we emphasize the strategic importance of cases that involve violations of the right to life.

Listening to social movements and civil society

Rather than relying on litigation as the primary means to advance a given human rights agenda, we maintain that human rights practitioners must recognize and support the key role of social movements, civil society, and media advocacy in developing campaigns to foster social justice. Many if not most human rights advocates already recognize that litigation has a larger impact when it occurs in conjunction with advocacy by social movements, media coverage, and other forms of domestic and international pressure. However, human rights lawyers often operate under the assumption that litigation should drive the advocacy strategy and that the other elements mentioned above should support it. We argue that the reverse is true. That is, broader advocacy campaigns may include litigation in the Inter-American system, as appropriate, but supranational litigation preferences should not, as a general rule, impose limits on advocacy for social justice. Social justice advocacy strategies, however, may lead to restrictions or modifications of methods of litigation.

Under this view, the relationship between litigation and other strategies will have real consequences for the nature of petitions submitted to the Inter-American system as well as the way they are framed and litigated. In practice, social movements are often more interested in the Court as an avenue for raising the profile of particular agendas rather than as a forum in which the justiciability of ESC rights may be

advanced. Moreover, in light of the extremely limited access to the Court in numerical terms, these two objectives often come into conflict. The Commission and Court adjudicate a handful of cases per year. For example, since 1979, ninety-two contentious cases have been resolved by the Court, leading to 167 determinations; the Court has resolved an additional seventy-six requests for precautionary measures, and has issued nineteen advisory opinions.[9] If one measures from 1986, the year the first contentious cases were forwarded to the Court, this yields an average of just over four contentious cases per year. While these numbers have increased dramatically in recent years, particularly after the reforms of 2001, the Court continues to address an average of less than one case per country per year.[10] Based on these severe limits, we argue that petitioners must rethink their understanding of the system. With such remarkable limits on its access, the system cannot reasonably be viewed as capable of responding to every injustice in the Americas.[11] Instead, it should be seen as a tool that must be used to magnify a very, very limited universe of cases. Which universe of cases, we argue, is the fundamental question. If deployed intelligently, litigation before the system may provide opportunities for thoughtful practitioners to promote social justice more broadly. At the same time, the bottom line is very often one that involves real tradeoffs. Should the one case in any given year that the Court addresses from Ecuador focus on extending the justiciability of protections against forced eviction or on the killing of an indigenous leader seeking control of resources on traditional lands? Should the one case that proceeds to the Court against Brazil in a given year address the concerns of persons with mental health issues, through the prism of a patient beaten to death in a closed mental hospital, or on efforts to encourage the Court to recognize an article 26 claim to the right to food? Admittedly, these questions are not presented in absolute terms to any individual petitioner, but they flow directly from the extremely limited capacity of the system and, in particular, the Court.

If, as we argue, the main objective of supranational litigants in the Inter-American system should be to place issues before supranational bodies in conjunction with other advocacy strategies, then it should not matter whether the Commission or Court addresses a particular question from the framework of civil and political or ESC rights. More important, we contend, is which issues are addressed and what broader efforts are included in the advocacy campaign. If the civil and political rights frame offers greater opportunity for advocacy and promotion of change, then this frame, rather than the ESC frame, should be given priority.

A. Working with social movements to promote agrarian reform: the Corumbiara and Eldorado dos Carajás cases

One case that demonstrates the utility of working with social movements and litigating strategically within the framework of civil and political rights is Corumbiara v. Brazil.[12] The case involved the violent forced eviction of over 500 families from a parcel of

land called the Santa Elina ranch. To remove the families from the land, Brazilian military police stormed the ranch in a surprise nighttime attack, using grossly excessive force and leaving 11 settlers dead and 53 wounded. The case therefore presented several possible angles from which to argue that Brazil was liable for violations of the settlers' human rights. For instance, advocates could have framed the case primarily as a violation of the right to housing. However, the petitioners in the case decided instead to focus their arguments on the brutal violence used by the military police during the eviction.[13]

For advocates of expanding the justiciability of ESC rights, Corumbiara may appear as a missed opportunity given that the petitioners focused on civil and political rather than economic or social rights.[14] In Brazil at the time, however, the vision of those working with landless and human rights leaders was quite different. Indeed, the extreme violence employed by the police, particularly after seizing control of the Santa Elina ranch, was an issue that helped to catapult the land reform debate—in its many dimensions—to national prominence in Brazil.

The choice to emphasize conflicts involving extreme violence was important for the broader land reform strategy. A similar strategic decision was made the following year when police attacked a group of landless squatters pressing for expropriation in Pará state. In that April 1996 incident (known as the Eldorado dos Carajás massacre), the squatters were occupying the main road connecting the south of Pará state with the capital, Belém, when military police opened fire on them and attacked the squatters with their own hoes and machetes, killing nineteen and wounding scores of others.[15]

In both cases, the advocacy agenda focused on highlighting the violations of the right to life in an effort to mobilize domestic and international public opinion against the use of police violence to resolve land conflicts. This, rather than a pronouncement by the Inter-American system on forced evictions, was the main goal of the litigation strategy. Moreover, such a focus made sense in light of the domestic advocacy strategy at the time. Brazil's landless movement, most probably Latin America's best developed social movement, regularly deployed a range of strategies designed to end forced evictions and to bring about change in land tenure patterns. These included pressure for legislative change, litigation within Brazil, and, primarily, land occupations. Because the last element was so central to its overall strategy, reducing the threat of future massacres by police was vital to the landless movement.

At the same time, framing the Inter-American litigation in terms of violations of the right to life did not prevent ESC rights from playing a prominent role in the advocacy campaign. First, the submissions to the Commission focused on the context of gross inequality in which the killings occurred. At the time of the initial Corumbiara case (October 1995), the Eldorado dos Carajás massacre (April 1996) and filing (September 1996), and the litigation of the two cases (for the next several years), those engaged in promoting land reform routinely addressed the underlying ESC claims in a range of fora (including domestic courts, the Brazilian parliament,

international debates, etc.). The advocacy campaign thus addressed the issues of forced eviction, as well as questions related to land distribution, financing, and credit for land reform, even beyond the scope of what could have been presented to the Inter-American Commission.[16] Media sources, as well, in their coverage of the Corumbiara matter, routinely analyzed the broader context of land reform, squatter occupations, the demand for land settlement, and respect for housing rights.[17]

Interestingly, the record demonstrates the partial success of this strategy. While land conflicts still continue to dominate rural Brazil, incidents of multiple deaths caused by police firing at squatters virtually ceased after the Corumbiara and Eldorado massacres. Likely in response to this mobilization and joint strategy, after the killings of twenty-eight people in the Corumbiara and Eldorado incidents in a period of just eight months, the number of people killed by police in rural land conflicts decreased dramatically. Over the next four years, police killed a total of eight civilians in this context. All but one of the conflicts involved a single victim; the bloodiest caused two[18] fatalities.[19] One of Brazil's leading weekly magazines, IstoÉ, reported months after the Eldorado massacre that the State Government in Pará—the epicenter of Brazil's most violent rural clashes—expressly ordered its military police to avoid all situations that might lead to violent conflicts similar to that in the Eldorado massacre.[20]

At the same time, as multiple killings by police in rural conflicts practically ceased, land occupations intensified, leading to the settlement of hundreds of thousands of squatters.[21] According to official data, in relation to the preceding twenty-five years, between 1995 and 1999 the average number of families settled per year increased by all accounts. By some, the surge was as much as five hundred percent.[22] According to the Landless Movement, the number of land occupations more than doubled from 1995 to 1999, compared to the previous five years.[23] Official figures demonstrate that more families were settled from 1995 through 1999 than in the twenty-five years preceding that period.[24] As for land expropriation (desapropriação)—areas ordered redistributed for land reform purposes—more than double the number of hectares were expropriated in the 1995 through 1999 period than in either of the two previous five year periods.[25]

Notably, among the areas expropriated by the federal government was the Macaxeira fazenda, the focus of the highway occupation and brutal police response that resulted in the killing of nineteen squatters in the Eldorado case.[26] In addition, in response to the domestic and international outrage over the Corumbiara and Eldorado massacres, federal authorities implemented a range of other measures, including expediting expropriations for land reform and providing additional funding for landless settlements.

The Corumbiara and Eldorado cases underscore the importance of understanding that social movements, not international human rights lawyers, should take the lead in designing social change strategies. Human rights lawyers, of course, play a prominent role in litigation, applying legal rules and developing arguments before supranational

tribunals. But they should do this in a way that supports the objectives of those directly affected by grave social injustice, rather than in ways that promote particular jurisprudential agendas. The Corumbiara case is one example among many in which the need for litigants to work more closely with social movements shapes the legal strategies adopted. This case also underscores that advocacy strategies that do not place the Inter-American system at their center often demonstrate greater promise to promote social justice than strategies that rely primarily on supranational litigation.[27]

Such an approach – in which supranational litigation plays a secondary and supporting role – stands in contrast to campaigns in which litigants rely upon an Inter-American Court case to drive social change. For instance, in the case of Yean and Bosico v. Dominican Republic,[28] the Inter-American Court considered the Dominican Republic's discriminatory failure to provide two children of Haitian descent with the nationality certificates necessary for their enrollment in school. The case occurred against a backdrop of entrenched prejudice against individuals of Haitian descent in the country; indeed, the opinion in Yean and Bosico notes testimony regarding the unpopularity of the issue of equal rights for these Dominicans.[29] In contrast to the experience of the landless movement in Brazil, activists in the Dominican Republic had encountered severe difficulties in mobilizing widespread pressure by the public and media for the equal treatment of children of Haitian descent. This resulted in the Inter-American Court case becoming, at key moments, the most visible element of the advocacy strategy. Unsurprisingly, the Court's finding of violations in the case met with backlash in the Dominican Republic,[30] where this outcome did not resonate with the majority of the population and drew criticism from the government. In general, we argue that supranational litigation in controversial areas such as this – when not well supported in the domestic agenda – is unlikely to produce social change.[31]

Other cases before the Court have been developed as part of broader advocacy strategies. These cases have generally led to greater compliance pressure on states and change on the ground. One such case was decided by the Court in mid-2006. The case, Ximenes Lopes v. Brazil,[32] concerned a killing within a psychiatric clinic operating pursuant to a contract with Brazilian authorities in Ceará state. Initially filed by the sister of the victim before the Commission, the Ximenes Lopes case attracted the support of the Ceará state legislature's human rights commission, a major Brazilian human rights organization, psychiatric professionals and progressive insiders within the Brazilian government, as well as favorable media. While the case was framed in terms of civil and political rights, it provided an important vehicle for addressing the broader situation of persons with mental health disabilities, particularly those in closed institutions in Brazil. The discussion fostered by the supranational litigation occurred both within the terms of the litigation and in the broader debate within Brazil.

After finding that the death of the victim was attributable to the State, the Inter-

American Commission recommended that Brazil take necessary measures to avoid the recurrence of such violations in the future. By this time, efforts by domestic stakeholders including patients' relatives, health professionals, and local and national health commissions had already triggered an ongoing shift from an internment model of mental healthcare to a system focused on outpatient care and respect for patients' rights.[33] This context of domestic reform encouraged greater discussion of the underlying issues of mental health policy before the Inter-American Court in the Ximenes Lopes case. For instance, Brazil presented testimony regarding steps it had taken to reduce the frequency of confinement of persons with mental health problems and to restructure its national mental health program.[34] The Court case, in turn, fostered fresh debate within Brazil about national public health policy. The Ximenes Lopes case thus exemplifies, among other things, how an issue framed legally in terms of civil and political rights may address questions of social justice, including ESC rights.

Jurisprudence and integrated advocacy meet: framing cases using the right to life

As emphasized above, litigation in the Inter-American system, by its inherent, limited nature, excludes the overwhelming majority of victims of rights abuse in the Americas and will continue to do so until the system is radically overhauled. Until that time, cases should be designed carefully and, we argue, jointly with social movements and organized civil society. We take this opportunity to highlight briefly a pattern that emerges from following this approach: namely, when practitioners follow the lead of social movements, they will often place priority on violations of the right to life due to the strategic value of petitions involving this right.

Over the past several years, the Court has developed an increasingly broad understanding of the right to life, including in cases involving underlying ESC rights violations. In the Sawhoyamaxa case,[35] for instance, the Court found the state of Paraguay responsible for the deaths of nineteen indigenous community members (including eighteen children) due to the state's failure to provide adequate conditions to ensure their well being.[36] This line of jurisprudence opens opportunities for many advocates litigating cases of ESC violations to frame the underlying violations in terms of the right to life. Such an approach avoids the riskier strategy of relying on article 26 of the American Convention and offers a well-established body of caselaw from which to draw support.

More importantly, the advocacy value of a claim involving the right to life goes to the core of what gives an issue salience for media campaigns, grassroots organizing, and networking with civil society. Violations of the right to life—whether in the context of urban police killings, prison revolts, conflicts over land, failure to treat HIV patients, or failure to prevent precarious housing from flooding—tend to carry more weight than violations that do not threaten life. Recognizing this is part and

parcel of working with advocacy groups (social movements, NGOs, etc.) and taking one's cues from them as a litigator. For example, if one is listening to these groups, one will often hear a preference for focusing on those who have died in their struggles, rather than all those who, on a daily basis, suffer other rights abuses. Not surprisingly, social movements tend to value quite highly the sacrifices made by their members whose lives are lost in the course of their struggles for social justice. Supporting this civil and political rights frame—rather than fighting against it—makes good sense from the perspective of a legal practitioner focused on social justice rather than jurisprudential development. The key is to find ways to use this right to life focus to advance other aspects of social justice campaigns—including ESC rights.

Conclusion

In thinking about future avenues of litigation in the Inter-American system, we urge practitioners to avoid the assumption that increased justiciability of ESC rights alone will lead to increased social justice on the ground. We call on litigators to consider instead strategies such as employing expansive constructions of civil and political rights to embrace ESC rights elements or filing petitions that involve violations of both civil and political and ESC rights. Most importantly, we urge practitioners to work closely with social movements, organized civil society groups, and the media in the countries involved. By taking their cue from these groups and recognizing the subsidiary role of supranational litigation in advocacy campaigns, human rights lawyers can help to ensure that efforts to deploy the Inter-American system maximize its potential to advance not merely the justiciability of ESC rights, but the enjoyment of these rights in practice.

NOTES

1. Much of this piece is based upon a previous article published last year in the N.Y.U. Journal of International Law and Politics. See CAVALLARO, J. L. & SCHAFFER, E.. Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change. *New York University Journal of International Law & Politics,* p. 345, New York, v. 39, 2006.

2. CAVALLARO, James L. & SCHAFFER, Emily J. Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas. *Hastings Law Journal* p. 217, v. 56, 2004. In the text, we refer to this piece as *Less as More* or as the Hastings piece.

3. The San Salvador Protocol is the Inter-American treaty that deals specifically with economic, social, and cultural rights. It explicitly provides for petition to the Inter-American system to enforce the right to education, protected in Article 13, and of certain labor rights, established in Article 8, clause (a). *Additional Protocol*

to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights "Protocol of San Salvador", Inter-Am. C.H.R. 67, OEA/ser. L./V./II.82, doc. 6 rev.1 (1992).

4. MELISH, Tara J.. Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas. *New York University Journal of International Law & Politics* p. 171, v. 39, 2006.

5. See id. p. 205 (asserting, "direct litigation in the Inter-American system of economic, social, and cultural rights presents no greater justiciability or legitimacy problems than does direct litigation of classic civil and political rights").

6. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Jurisprudence*. Available at <http://www.corteidh.or.cr/>. Last visited on 29 Sept. 2007.

7. More than twenty states have now recognized the Court's competence to adjudicate contentious cases. See INTER-AMERICAN COURT OF HUMAN RIGHTS, *B-32,* American Convention on Human Rights ("Pact of San José, Costa Rica"). Available at <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>. Last visited on 29 Sept. 2007.

8. CAVALLARO & SCHAFFER, *supra* note 2, p. 240, 251.

9. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Jurisprudence.* Available at <http://www.corteidh.or.cr/>. Last visited on 7 Nov. 2007.

10. Ibid.

11. We cannot underscore this point enough. Our analysis of litigation strategies is entirely contextual. If the Inter-American system were expanded and were provided with greater resources and state support, we would support expansion of litigation of all types. However, given that very, very few cases are able to proceed to the Court, we argue for great care in selecting cases to be petitioned.

12. *Corumbiara Massacre*, Petition no. 11.556, Inter-Am. C.H.R., Report No. 32/04. Available at <http://www.cidh.org/annualrep/2004eng/Brazil.11556eng.htm.>. Last visited on 28 Feb. 2008.

13. James L. Cavallaro, at the time, director of CEJIL/BRASIL and Brazil office director of Human Rights Watch, was one of several petitioners in both the Corumbiara case and the Eldorado dos Carajás matter, discussed below.

14. Indeed, in her critique of the *Hastings* article, Tara Melish argued that the petitioners in the Corumbiara massacre erred in not framing the case primarily in terms of ESC rights violations. MELISH, *supra* note 4, p. 315-323.

15. *Admissibility El Dorado dos Carajás*, Petition no. 11.820, Inter-Am. C.H.R., Report No. 4/03. Available at <http://www.cidh.org/annualrep/2003eng/Brasil.11820.htm.>. Last visited on 28 Feb. 2008.

16. OSAVA, MARIO. *Brazil: Fear of Social Unrest Revives Land Reform*. Rio de Janeiro: IPS – INTER PRESS SERVICE, 28 September 1995; see Corumbiara: Deadly Eviction. *Time*, v. 146, n. 9, 28 Aug. 1995, p. 8; Land Question Develops into Crisis: Military Fear Conflicts May Lead to Guerrilla Violence, *Latin American Weekly Report* p. 447-48, London, 1995.

17. OSAVA, M. op. cit. Corumbiara: Deadly Eviction, op. cit.; Eleven Die in Land Conflict: Lula Claims Cardoso Has No Interest in Agrarian Reform, *Latin American Weekly Report,* p. 374-75, London, 1995 SCHEMO, D. J.. Brazilian Squatters Fall in Deadly Police Raid, *N.Y. Times,* 19 Sept. 1995, p. A1.

18. It is possible to interpret this figure as three. According to CPT data, military police and gunmen killed two civilians on March 2, 2001 in the municipality of Confresa, state of Mato Grosso. Two days later, they killed another civilian in the same municipality. It is unclear whether these should be considered two separate conflicts. See COMISSÃO PASTORAL DA TERRA, *Conflitos no Campo: Brasil 1997,* 1998, p. 10-11. After 2001, CPT stopped including information on the identity of murder suspects.

19. Nevertheless, despite the reduction in the numbers of landless squatters and protesters killed by police after Corumbiara and Eldorado dos Carajás, rights groups in Brazil have documented an increase in other forms of repression. For instance, according to Landless Movement (MST) data, instances of arrests of landless peasants vastly increased in the years after 1996, suggesting a displacement in repressive techniques and highlighting the continued need for advocacy related to civil and political rights that would allow the landless movement to continue its land reform push. See MOVIMENTO DOS TRABALHADORES RURAIS SEM TERRA, *Prisões – 1989 a 2003.* Available at <http://www.mst.org.br/mst/pagina.php?cd=1501>. Last visited on 28 Feb. 2008.

20. According to *IstoÉ,* "[t]he Government of Pará, after the massacre of Eldorado dos Carajás, ordered the Military Police not to involve itself in any situation that might result in confrontation". (The original in Portuguese reads: *O governo do Pará, após o massacre de Eldorado do[s] Carajás, determinou ao comando da Polícia Militar paraense que não se envolva em nenhuma situação que possa resultar em confronto.)* See CHIMANOVITCH, M.. Tensão permanente: Relatórios reservados informam que os sem-terra pretendem crier versão nacional de Chipas no Pará, *IstoÈ,* 7 Aug. 1996. Available online at <http://www.zaz.com.br/istoe/politica/140112.htm>. Last visited on 28 Feb. 2008 [hereinafter *Tensão permanente*]

21. According to the MST data, from 1990 until 1995, the number of land occupations [*acampamentos*] fluctuated from a low of 78 in 1991, with 9,203 families, to a high of 214 in 1993, with 40,109 families. Then, from a low, in 1995, of 101 land occupations representing 31,619 families, the number of occupations grew each year to 538 with 69,804 families in 1999. (A participação da polícia em assassinatos e chacinas não é novidade, mas ela vem crescendo nos últimos anos.) COMISSÃO PASTORAL DA TERRA, *Conflitos no Campo: Brasil 1995,* 1996, p. 5.

22. According to the government, an average of 11,870 families were settled per year from 1970 through 1984. That figure increased modestly to 15,013 over the next ten years. From 1995 through 1999, the average number of families settled each year, according to government reports, surged to 74,644. See INSTITUTO NACIONAL DE COLONIZAÇÃO E REFORMA AGRÁRIA. *Relatório de Atividades INCRA 30 Anos.* Available at <http://incra.gov.br/arquivos/0173400476.pdf>. Last visited on 28 Feb. 2008 [hereinafter *Relatório de Atividades*]. Different INCRA reports provide somewhat contradictory figures, though all affirm the stated trend of increasing settlements from 1995 through 1999, in varying degrees. Another INCRA report released some time after the thirty-year retrospective, asserts that only 218,000 families were settled from 1964—the year of the passage of the Land Statute [Estatuto da Terra]—until 1995. Then, from 1995 through 1999, 372,866 families were reported settled. See INSTITUTO NACIONAL DE COLONIZAÇÃO E REFORMA AGRÁRIA. *O Futuro Nasce da Terra.* Available at <http://www.incra.gov.br/arquivos/0173500477.pdf>. Last visited on 28 Feb. 2008 [hereinafter *O Futuro Nasce da Terra*].

23. MOVIMENTO DOS TRABALHADORES RURAIS SEM TERRA, *Acampamentos – Total dos Acampamentos, 1990-2001*. Available at <http://www.mst.org.br/mst/pagina.php?cd=897>. Last visited on 28 Feb. 2008.

24. In its thirty year retrospective, the Instituto Nacional de Colonização e Reforma Agrária (INCRA)

reported that while 316,327 families were settled from 1970 until 1995, in the five years that followed, a total of 373,220 families were settled. See Relatório de Atividades, *supra* note 22.

25. According to the government, 4,191,147 hectares were expropriated from 1985 through 1989, falling to 3,858,828 hectares from 1990 through 1994 before jumping to 8,785,114 hectares from 1995 through 1999. See O Futuro Nasce da Terra, *supra* note 22

26. See Tensão permanente, *supra* note 20.

27. As demonstrated in *Less as More* through an assessment of several case studies, instances in which litigation before the Inter-American system occurred in relative isolation from domestic activism were least likely to produce significant change. See CAVALLARO & SCHAFFER, *supra* note 2, p. 240-251.

28. *Yean and Bosico Case v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130, 8 Sept. 2005.

29. Id., p. ¶¶ 85-86.

30 See PINA, Diógenes. Acatamiento Parcial a Corte Interamericana, *Inter Press Service News Agency*, 23 Mar. 2007. Available at <http://ipsnoticias.net/interna.asp?idnews=40469>. Last visited on 28 Feb. 2008 (citing a document released by the Dominican Secretary of Foreign Relations in which the government challenged both the procedural integrity and the outcome of the Court case); DÍAZ, J. B.. ¿Haitianos, dominicanos ó domínicohaitianos?, *El Diario Hoy*, San Salvador, 16 Oct. 2005. Available at <http://www.clavedigital.com.do/Portada/Articulo.asp?Id_Articulo=6231>. Last visited on 28 Feb. 2008 (reporting that most Dominicans who knew of the Court sentence had strong negative reactions to it); Consideran política, excluyente y discriminatoria, sentencia de la Suprema Corte de Justicia Dominicana, *AlterPresse*, Port-au-Prince:, 19 Dec. 2005. Available at <http://www.alterpresse.org/spip.php?article3809>. Last visited on 28 Feb. 2008 (reporting a decision by the Dominican Supreme Court (issued 14 Dec. 2005) that contradicted the Inter-American Court's holding in *Yean and Bosico* that children born in the Dominican Republic cannot be denied Dominican nationality based on their parents' immigration status).

31. To be sure, we do not counsel an absolute rule against using litigation as one's central advocacy strategy. Rather, we suggest that practitioners assess the political context in which they operate and reach out to other actors and social movements in designing mobilization and litigation strategies. There may well be instances in which no other mobilization strategies besides international pressure, and by extension, international litigation are viable. However, litigating a case before the Inter-American Court in these circumstances should be the result of a deliberative process, rather than an instinctive, legalistic response to a perceived violation of human rights law.

32. *Ximenes Lopes v. Brazil*, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 4, 2006).

33. See id., p. ¶ 46.2. (summarizing documentary evidence regarding Brazil's ongoing reform efforts aimed at reducing confinement of mental health patients and "humanizing" the mental health care system with input from patients, their relatives, and healthcare professionals).

34. One of the witnesses presented by Brazil was Pedro Gabriel Godinho Delgado, National Coordinator of the Mental Health Program of the Ministry of Health. Godinho Delgado's testimony focused on measures taken by the state to increase outpatient care, as opposed to confinement, as well as measures designed to promote and respect human rights within the mental health system. See id., p. ¶ 47.3.b.

35. *Sawhoyamaxa Indigenous Community v. Paraguay Case*, Inter-Am. Ct. H.R. (ser. C) No. 146, 29 Mar. 2006.

36. See id., *p.* ¶¶ 151, 153, 178.

RESUMO

Esse artigo defende que os esforços para expandir a justiciabilidade dos direitos econômicos, sociais e culturais (ESC), perante tribunais supranacionais, possivelmente não venha a ser sempre a melhor forma para aumentar concretamente o respeito a esses direitos. No Sistema Interamericano, os autores deste artigo afirmam que os advogados de direitos humanos serão mais capazes de promover a justiça social e os direitos ESC quando usarem a litigância supranacional como uma ferramenta subsidiária, destinada a apoiar esforços de mobilização já promovidos por movimentos sociais internos. Esse papel coadjuvante pode com freqüência implicar, como uma medida estratégica, a litigância de casos relacionados a direitos ESC dentro da estrutura própria das violações a direitos civis e políticos.

PALAVRAS-CHAVE
Sistema Interamericano – Direitos ESC – Justiciabilidade – Movimentos sociais – Litigância estratégica

RESUMEN

Este artículo sostiene que el esfuerzo por expandir la justiciabilidad de los derechos económicos, sociales y culturales (DESC) ante tribunales internacionales no siempre puede ser la vía más adecuada para mejorar el respeto efectivo de estos derechos. En el sistema interamericano, según los autores, los abogados de derechos humanos lograrán más avances en materia de justicia social y de DESC cuando utilicen el litigio internacional como una herramienta subsidiaria para apoyar esfuerzos de incidencia sostenidos por movimientos sociales locales, una función que a veces puede requerir plantear violaciones de DESC con la perspectiva de violaciones a derechos civiles y políticos.

PALABRAS CLAVES
Sistema Interamericano – DESC – Justiciabilidad – Movimientos sociales – Litigio estratégico

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