

## **DOSSIER LSA/CRN1 2020: CONTENTIONS AND INNOVATIONS IN *PROTECTING HUMAN RIGHTS***

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### **INTRODUCTION**

**ANNE RICHARDSON OAKES**

The assertions contained in the Universal Declaration of Human Rights and accepted by the General Assembly of the United Nations in the aftermath of the second world war had transformative effect not only because they recognised that human rights inherent in everyone by virtue of a shared humanity but also because they became the basis for an international rule of law “in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>1</sup>

Nearly seventy five years later, this universalised expression of a commitment to human rights has generated a body of international treaty obligations that recognises that responsibility for protecting rights guarantees transcends the limitations of national governments and must be assumed by the international community at large. This recognition in turn has been accompanied by the establishment of an institutional implementation and compliance monitoring framework that ensures that human rights concerns now routinely feature in international diplomacy and political engagement. Global attention to attacks against the Rohingya in Myanmar, the response to the Khashoggi murder involving Saudi Arabia, and the widespread condemnation of the Chinese Government’s treatment of the Muslim Uighurs and of political activists in Hong Kong is a direct reflection of the significance that human rights now play in the international political arena.

Human rights discourse, it is clear, now sits at the centre of a globalised consensus concerning the theory and practice of contemporary democratic governance and has become arguably “*the* ascendant ethical language of contemporary global law and politics.”<sup>2</sup> It has also

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<sup>1</sup> United Nations and the Rule of Law, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>.

<sup>2</sup> ANNA GREAR, REDIRECTING HUMAN RIGHTS (2010) (emphasis in the original).

driven a resurgent interest in constitutionalism, judicial review and the work of constitutional courts that has a global spread and invigorates and informs comparative study and scholarly and judicial dialogue. The papers abstracted in this collection contribute to this dialogue.

Presented virtually to the Law and Society 2020 annual meeting at a roundtable organised by Professors Jon Yorke of the Centre for Human Rights, Birmingham City University U.K. and Fernanda Duarte of Estácio de Sá University, Rio de Janeiro, these papers represent work in progress and extend the collaboration between the Post-Graduate Law Program of the University Estácio de Sá/PPGD-Unesa (with support of the Post-Graduate Administrative Justice Program of the Fluminense Federal University/PPGJA-UFF) and the Centre for American Legal Studies, School of Law at Birmingham City University, (with support of the Centre for Human Rights, School of Law at Birmingham City University).

Storey (BCU) sets the scene with an overview of the monitoring processes of the UN Human Rights Council's Universal Periodic Review (UPR). Established in 2006, when the UN Human Rights Council was set up, the UPR has become an innovative mechanism for monitoring the human rights records of all 193 UN Member States and moreover one which is unique. It provides States with the opportunity to report on the actions they have taken to improve human rights in their countries and to consider and respond to the representations of their fellow Member States. It also recognises a significant role for civil society organisations to participate in the review by the submission of stakeholder reports. Storey draws on her experience of the UPR Project at BCU to encourage scholars who seek to put their research to purposeful effect to consider participation in this mechanism which affords a significant opportunity to make a real difference to the cause of advancing human rights observance throughout the world.

Duarte and Iorio (Estácio and UFF) pick up the challenge with specific reference to the position of migrants and their families in Brazil. They note that, despite seven recommendations that were made in the 2017 UPR of Brazil, the country has yet to sign and ratify the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. They note that, following these recommendations, there was a legislative response in the form of what is generally known as the New Migration Law intended to confer some measure of human rights protection on migrant workers. The statute however makes no mention of workers' families. The extent to which this can be considered a satisfactory response to the PR recommendations will be up for consideration at the next UPR of Brazil, now due to take place in 2022.

Yorke (BCU) comments on the position of the death penalty as a human rights issue in Myanmar. His research reveals an incremental engagement with the international community on this issue. He comments on the Myanmar National Human Rights Commission's *Workshop on the Death Penalty* which took place in 2017 and notes that despite the disappointing response to its UPR 2015 commitments to establish democratic institutions, make justice sector reforms, and promote and protect the rights of women, there is reason to be optimistic that, in

relation to the death penalty at least, real progress has been made and that further progress can be expected.

The work of all four scholars abstracted in this collection demonstrates a shared commitment to the value of human rights discourse and a belief in its capacity to materially improve the conditions of life for much of the world's population. These papers were presented against the background of the coronavirus pandemic which presents considerable challenges for governments of every complexion across the globe. As these governments respond with measures that seriously impact economic and social activity and materially change the way in which we lead our lives, human rights vigilance has never been more important. Restrictions once in place can prove difficult to reverse. As these papers demonstrate, there are opportunities for scholars to use their research to participate in this vigilance. It is the responsibility of scholars to take them.

## ENGAGING WITH THE UN HUMAN RIGHTS COUNCIL'S UNIVERSAL PERIODIC REVIEW MECHANISM AS AN ACADEMIC

Alice Storey<sup>1</sup>

Non-governmental organisations are vital to the progression and realisation of global human rights. In particular, they play a pivotal role as “Stakeholders” in the United Nations Human Rights Council’s (UNHRC) Universal Periodic Review (UPR). The UPR is an innovative mechanism with the aim of ensuring the protection and promotion of human rights across the world. Stakeholders can submit individual reports, based upon experience and research, detailing both problem areas and advances in human rights on the ground in UN Member States. This paper draws upon the experiences of submitting Stakeholder reports from an academic institution through the “UPR Project at BCU,” and the recognition it has achieved to date through citations in the USA’s final 2020 Stakeholder Report. This paper also seeks to encourage further academic input to the UPR process through the submission of individual Stakeholder reports, in order for scholarly research to support human rights discourse and seek to influence change on the ground.

### *The Universal Periodic Review*

The UPR is an innovative international human rights mechanism, involving intergovernmental and civil society input in the review of all 193 UN Member States’ protection and promotion of human rights.<sup>2</sup> The UPR was created alongside the UNHRC in 2006, and began its first cycle of review in 2008.<sup>3</sup> All 193 Member States have been reviewed at least twice, with the third cycle currently taking place. Each review is recorded in publicly available documentation, and begins with the preparation of the three documents that form the basis of each review: (1) the National Report, compiled by the State under Review; (2) the Compilation of UN Information, compiled by the Office of the High Commissioner for Human Rights (OHCHR) inclusive of comments and recommendations from other UN bodies; and, (3) the Summary of Stakeholders’ Information, which is a ten-page summary of the individual Stakeholder submissions from non-governmental organisations.<sup>4</sup> These individual reports can also include submissions by academics. For example, scholars from the London School of Economics and London Metropolitan University teamed up to submit a joint submission to the

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<sup>2</sup> UN General Assembly, Resolution 60/251 (2006).

<sup>3</sup> *Id.*

<sup>4</sup> UN Human Rights Council, Resolution 5/1 (18 June 2007) para. 15.

United Kingdom's UPR and were cited in the final Stakeholder Report regarding domestic abuse.<sup>5</sup>

Once the documentation has been submitted, the review itself is then held in the UNHRC in Geneva, wherein an interactive dialogue takes place between the State under Review and other Member States. As part of this review, recommendations are provided by the Member States regarding how the State under Review can better protect and promote human rights. The proceedings are written up into the Outcome Report, and the State under Review then decides whether to accept or note each of the recommendations. The Outcome Report will thereafter be adopted at a UNHRC plenary session. Finally, the accepted recommendations must be implemented by the State under Review and implementation is measured during the following cycle.

The UPR is viewed as generally being a success, as it has attracted 100% cooperation from Member States to date.<sup>6</sup> However, it is not without its faults, and scholars have argued for changes to be made to the mechanism.<sup>7</sup> What seems to be agreed upon by all key UPR actors, is that this mechanism is a positive for global human rights and, whilst changes may need to be made, it should continue to operate as a “check” on Member States' human rights records.

### *The UPR Project at BCU*

In order to make an appeal to academics to engage with the UPR as a Stakeholder, this paper details the experiences of academics submitting Stakeholder Reports to the UPR through

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<sup>5</sup> UNHRC, *Summary of Stakeholders Information – United Kingdom of Great Britain and Northern Ireland* (Mar. 11, 2008) UN Doc. A/HRC/WG.6/1/GBR/3, para.18.

<sup>6</sup> See, Natalie Baird, *The Role of International Non-Governmental Organisations in the Universal Periodic Review of Pacific Island States: Can 'Doing Good' Be Done Better?*, Melb. J. Int'l L. Vol. 16 No. 2, FN3 (2015), citing, Alex Conte, *Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism* 9 N.Z. Y. Int'l L. 187 (2011); Elvira Dominguez-Redondo, *The Universal Periodic Review – Is There Life beyond Naming and Shaming in Human Rights Implementation?*, 4 N.Z. L. Rev. 673 (2012); Rosa Freedman, *New Mechanisms of the UN Human Rights Council*, 29 N.Q.H.R. 289 (2011); Edward McMahon and Marta Ascherio, *A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council*, 18 Global Governance 231 (2012); Constance de la Vega and Tamara N Lewis, 'Peer Review in the Mix: How the UPR Transforms Human Rights Discourse' in M Cherif Bassiouni and William A Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011); Hilary Charlesworth & Emma Larking, 'Introduction: The Regulatory Power of the UPR' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (CUP 2015). See, also, Gareth Sweeney & Yuri Saito, *An NGO Assessment of the New Mechanisms of the UN Human Rights Council*, Human Rights Law Review 9:2 203-223 (2009); James Gomez and Robin Ramcharan (eds) *The Universal Periodic Review of Southeast Asia* (Palgrave Macmillan 2017) 33-34.

<sup>7</sup> See, Alice Storey, *Challenges and Opportunities for the United Nations' Universal Periodic Review: A Case Study on Capital Punishment in the USA*, (Forthcoming 2021, Volume 90.1 UKMC Law Review); Olivier de Frouville, 'Building a Universal System for the Protection of Human Rights: The Way Forward' in M Cherif Bassiouni and William Schabas (eds) *New Challenges for the UN Human Rights Machinery: What Future for the UN Treaty Body System and the Human Rights Council Procedures?* (Intersentia 2011).

the UPR Project at BCU, facilitated by the Centre for Human Rights at Birmingham City University. The UPR Project at BCU currently has a number of Stakeholder Reports in preparation,<sup>8</sup> although this paper will specifically focus upon its inaugural submission to the United States of America's (USA) third cycle UPR in September 2019.<sup>9</sup>

### *The USA Stakeholder Submission*

The UPR Project at BCU's first report was submitted in September 2019, in preparation for the third cycle of the USA's UPR. This was scheduled to take place in May 2020 but, due to the COVID-19 pandemic, has been pushed back until November 2020.<sup>10</sup> The report was written in conjunction with the Elisabeth Haub School of Law at Pace University, New York and focused on three human rights issues in the USA: capital punishment, climate change, and compassionate release for prisoners. It harnessed the expertise of academics in the School of Law at BCU and Pace University, to allow academic research to inform human rights practice.

The UPR Project at BCU's submission was recognised by the OHCHR when it compiled the USA's 2020 Stakeholder Report, as it was cited four times in the final Report.<sup>11</sup> Regarding capital punishment, the UPR Project's work was referenced to affirm the American Civil Liberties Union's observations that the death penalty in the USA is "applied in an arbitrary and discriminatory manner, based on race, geography, socioeconomic status, and the quality of representation."<sup>12</sup> It was also cited to support Amnesty International's claims regarding miscarriages of justice in death penalty cases, that in many cases "prisoners [have] gone to their deaths despite serious doubts about the proceedings that led to their convictions."<sup>13</sup> On the issue of climate change, the UPR Project at BCU was referenced to support the findings of the Women's International League for Peace and Freedom that the USA's "energy policy was still mainly focused on the use of fossil fuels and that oil and gas industries benefited from favourable taxation."<sup>14</sup> It also affirmed the Women's International League for Peace and Freedom's recommendation for the USA to reinstate the Paris Agreement.<sup>15</sup> It remains to be seen whether other Member States will utilise these points to formulate their recommendations to the USA during the November 2020 review.

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<sup>8</sup> Reports in preparation will be submitted to the UPRs of: Myanmar, eSwatini, Namibia, Pakistan, and the UK.

<sup>9</sup> UPR Project at BCU, *Stakeholder Report – USA UPR* (2019) available at: <https://bcuassets.blob.core.windows.net/docs/The%20UPR%20Project%20at%20BCU%20-%20US%20Stakeholder%20Report.pdf> <accessed 3 June 2020>.

<sup>10</sup> UNHRC, *Human Rights Council's Universal Periodic Review Working Group May 2020 Session Postponed* (Mar. 20, 2020) available at <<https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25733&LangID=E>>.

<sup>11</sup> UNHRC, *Summary of Stakeholders Information – United States of America* (Mar. 6, 2020) UN Doc. A/HRC/WG.6/36/USA/3 [hereinafter referred to as 'USA Stakeholder Report 2020'].

<sup>12</sup> *Id.* at para. 21, FN 63.

<sup>13</sup> *Id.* at para. 22, FN 66.

<sup>14</sup> *Id.* at para. 12, FN 38.

<sup>15</sup> *Id.* at para. 14, FN 43.

These citations are evidence that academic submissions are not only taken seriously within the UPR process, but that scholarly research can support human rights discourse and seek to influence change on the ground in key areas. Furthermore, the USA is one of, if not the most, popular Member State to receive Stakeholder submissions. For example, for the 2020 USA UPR, the OHCHR had to compile information from 139 individual Stakeholder submissions into one ten-page report.<sup>16</sup> Therefore, academic submissions to countries that receive much fewer submissions have a greater potential to be recognised by the OHCHR and have an impact on human rights on the ground.

### *An Appeal for Academic Submissions to the UPR*

Academics across the globe are conducting timely and pertinent human rights research that could be used by other non-governmental organizations and Member State governments. The UPR provides a practical way of disseminating this research to a wider audience than just other academics. There are 193 Member States that academics can bring their expertise to. This spans all countries under the UN's remit and all human rights issues. Whilst academics may not always be out and out "human rights" scholars, oftentimes their expertise can be related back to human rights. For example, the academics who wrote the climate change section of the UPR Project at BCU report are predominantly Constitutional Law scholars, but their work also had a strong link to human rights. The UN's encouragement of jointly written Stakeholder submissions allows non-human rights focused scholars to work with international human rights academics in order to relate their work back to international law and human rights. Therefore, joint submissions not only prevent an overload of information for Member States, but can also foster networks between academics and practitioners across the world.

In order to ensure that the information being submitted by academics is "credible and reliable"<sup>17</sup> as the UN guidelines state that it must be, academics must submit on their area of expertise. This also removes a significant time burden, as the majority of the research, data, findings, and conclusions should already have been carried out, meaning that writing this up for a UPR submission should not be overly burdensome. Additionally, the reports must be relatively short, according to UPR guidelines they should only be 2815 words if a single submission, or 5630 words if a joint submission between two or more Stakeholders.<sup>18</sup> This means that the reports must be short, snappy and to the point, but also written simply and for a lay audience. Moreover, should further research be required, this is the perfect opportunity to enlist student research assistants. Working with undergraduate and postgraduate research assistants is beneficial for both academics and students. For academics, this allows for time consuming data collection and analysis to be carried out for them, and for students, it provides

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<sup>16</sup> USA Stakeholder Report 2020, *supra* n. 11.

<sup>17</sup> UN General Assembly, Resolution 5/1, *supra* n. 4 at para. 15(c).

<sup>18</sup> OHCHR, *Universal Periodic Review: Information and Guidelines for Relevant Stakeholders' Written Submissions*, available at: <[www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf](http://www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf)> last accessed 3 June 2020.

them with invaluable research experience. Cumulatively, this means that writing a Stakeholder submission, disseminating important research to a wider audience, and potentially influencing change on the ground should not take an inordinate amount of time for academics.

The UN provides technical guidelines to be followed when writing and submitting a Stakeholder submission, including the type of information that should be included.<sup>19</sup> Some of the guidelines are compulsory, whereas others are advisory, however all of them, along with reading previous submissions, should be used as a guide for potential academic reports.

### *Conclusion*

This paper has sought to appeal to academics across the globe whose research spans any human rights issue, to consider using their research as the basis of a Stakeholder submission to any of the 193 UN Member States' UPRs. There are many benefits to this, including disseminating research to the wider world and generating global networks, but perhaps most importantly is that this is a platform for scholarly research to support human rights discourse and seek to influence change on the ground in key areas.

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<sup>19</sup> OHCHR, *supra* n. 18.



## **THE UNIVERSAL PERIODIC REVIEW: A DEVICE FOR BUILDING UP COOPERATION WITH HUMAN RIGHTS MECHANISMS IN BRAZIL AND MIGRATION PROTECTION**

Fernanda Duarte<sup>1</sup>  
Rafael Mario Iorio Filho<sup>2</sup>

### *Introduction*

This presentation is part of a research project developed within the scope of the international academic cooperation program between Estácio de Sá University, the Fluminense Federal University and Birmingham City University, under the Erasmus + program, electing as its motive theme the Universal Periodical Review- UPR, adopted by the Human Rights Council of the United Nations. One of the objectives of this UPR mechanism is to assure that human rights obligations and commitments are fulfilled by the States in order to promote the universality and indivisibility of civil, political, economic, social, and cultural rights as well as the right to development. In this sense, one of the axes of relevance for improvement of the human rights situation in every country with significant consequences for people all around the globe focuses on building up a legal framework (with international legal sources or roots) that could be articulated locally as a shield for those who (legally bound to the State) find themselves in situations of human rights violations. This shield makes the State internationally accountable for violating its duty to comply with international norms. Even though this spectrum of legal normativity is not enough to assure human rights full effectiveness in all the levels and complexities of human life and existence, it brings the symbolic weight of the idea of the rule of law. In this opportunity, we intend to present the legal framework for the promotion and protection of human rights in Brazil, taking into account Brazil's constitutional order and its relation with international legal instruments. Then considering Brazil's performance within the UPR 3rd Cycle, 2017, 27th Session, we will discuss Brazil's compliance with this international environment of instruments for protecting human rights taking the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* recommendation as an example to be studied.

### *Human rights and international law*

The theme of Human Rights (HR) is open to a series of different perspectives that pass through different areas of human knowledge, both because it is said that human rights are cross-cutting, and because it is a theme that runs perpendicularly through society. This transversality would reinforce the aspects of the universality, indivisibility and interdependence of Human Rights.

Thus, the studies regarding HR can deal with many different themes and approaches, such as reports of violations, strategies in education for HR, social and political actions to be taken in favor of HR, costs and funding mechanisms for the promotion and protection of HR,

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initiatives to empower vulnerable groups, the consolidation of democracy as a prerequisite for HR, tensions between majorities and minorities, the relationship between culture and HR, conflicts between freedom and equality and so forth.

A more formal study can also be carried out, focusing on the regulatory framework that will enable the adoption of actions to promote and protect HR. This can be considered the legal environment which is linked to a prescriptive approach and would help the States to build up strong institutions committed to the theme.

This is exactly the main interest of our investigation now, since compliance to international human right law is one of the aspects to be reviewed by the UPR mechanism and it has been part of the recommendations made to the Brazil in its last cycle, in 2017.

As we are dealing with international law, first we will see how international law gets into effect in Brazil, then we will discuss the some special features of HR law in Brazil in relation to the Brazilian Constitution and finally we will exam Brazil's performance in the last UPR Cycle regarding HR international law, considering the case of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

### *The system of integration of international treaties in Brazil*

As it is well known, the term treaty is used generically to describe a variety of international legal instruments, including conventions, agreements, arrangements, protocols, charters etc. But, in a *stricto sensu* meaning, treaties are binding instruments (based on the principle of *pacta sunt servanda* which determines that agreements must be kept<sup>3</sup>). In this sense, a treaty is a binding formal written document that establishes obligations between two or more subjects of international law, either being States (nations) and/or international organizations. In this sense treaties are known as hard law. However, if this binding feature is not present, they are known as soft law; in other words, they are based on and binding for moral reasons only and are not subject to judicial adjudication.

Even though a treaty might be signed between the parties, it is necessary to understand which other measures should be taken within a State's internal system so that the treaty can be considered in force or if the signature is enough to give effectiveness to the treaty. And this relationship between the international legal order and the domestic legal order engages the debate on monism and dualism.<sup>4</sup>

Throughout Brazilian legal history, the country has been acknowledged as a dualist system. However, considering the particularities of the Brazilian system now, this distinction

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<sup>3</sup> This binding effect is expressed in article 26 of VCLT (the Vienna Convention of the Law of Treaties, from 1969).

<sup>4</sup> In general, scholars point out that there two different legal traditions when considering the integration of international treaties into the national order: the monism and the dualism. The monist system understands that international law does not need to be integrated into domestic law. The act of ratifying an international treaty is enough to the incorporation of that international law into national law. On the other hand, for the dualist system international law is not directly applicable within the internal legal order. So in order to be applied locally by the national courts, first it must be translated or integrated into domestic legislation and there is a variety of ways in which domestic systems incorporate international law. A critical view of this classification is offered by Charlesworth, Hilary, Madelaine Chiam, Devika Hovell, and George Williams, eds. *The Fluid State: International Law and National Legal Systems*. Sydney, Australia: Federation Press, 2005.

has little applicability, since we can be considered moderate monists and/or dualists as we will discuss latter.

Based on the current Constitution, the process of internalizing international law has the following steps:

- I. the President of the Republic, in the exercise of his powers foreseen in art. 84, VIII, of the Federal Constitution, celebrates the international treaty;
- II. then, as provided for in art. 49, I, of the Federal Constitution, the National Congress is responsible for endorsing the international treaties signed by the President of the Republic, which is done by means of a Legislative Decree;
- III. when the referred Legislative Decree is published, the treaty is ratified, by the President upon deposit of the respective instrument, confirming the Brazilian desire to be bound by the terms of that document;
- IV. finally, the treaty is promulgated by a presidential decree and becomes effective after its publication in a daily official report called *Diário Oficial* which is broadly similar to the U.S. Federal Register, but not confined to federal government communications, once Federal legislative acts, as well as judicial decisions (including federal courts of all tiers), are communicated to the public through these reports.

This means that as long as the President does not promulgate the treaty by decree, the instrument is not capable of producing any effects at the domestic level, even if duly ratified at the international level, since it is still devoid of validity and enforceability at the level of positive Brazilian domestic law.

Therefore, if the treaty has not been yet admitted as part of the domestic law:

- there is no direct effect which means that the ability of the international standard to have an immediate impact on the rights and obligations of individuals in the legal sphere is still lacking,
- there is no immediate applicability meaning that Brazil does not accept the automatic validity of the international standard in the domestic legal system.

By the way, this is the exact position taken by the Brazilian Supreme Court on the matter, as shown in *Carta Rogatória* (Rogatory Letter) No. 8279, for instance.

This legislative procedure described before has prevailed as the rule for international law integration for treaties on general topics and for human rights treaties, within Brazilian law until 2004, when the current Constitution was amended and a third paragraph<sup>5</sup> was added to article 5 (which is the normative paramount clause of Brazilian legislation regarding HR since the 1988 Constitution promulgation).

This change deals exactly with the efficacy of HR treaties in Brazilian law and their normative status regarding the statutory legislation. It has given a prestigious framework for treaties of human rights and reinforces the constituent position that the procedure for treaties integration in Brazil remains dualistic. Now, depending on the quorum of approval, the HR convention becomes part of the Brazilian law having status of constitutional amendments, if

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<sup>5</sup> See Constitutional Amendment No. 45.

approved in each House in two rounds of voting, by three fifths of the votes of its member (either being congressmen and senators), as provided for in paragraph 3, art 5 of the 1988 Constitution<sup>6</sup>.

But even though the HR treaties stand at the top of the hierarchy of Brazilian norms, whether from the legal perspective or from the political perspective, the formal requirement for their approval makes the situation of HR treaties more laborious which may pose an extra burden to the integration process.

*Brazil's performance within the UPR 3rd Cycle, 27th Session, 2017 to the theme "Acceptance of international norms" and the case of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.*

Regarding Brazil's performance within the UPR, 3<sup>rd</sup> Cycle, twenty recommendations were made considering the HR international law framework.

Basically, the recommendations deal with either signing or ratifying a specific treaty or its protocols or amendments. Almost 30 countries have made recommendations, as we can see in the following chart:

International HR treaty in focus	Frequency of recommendation	Origin of recommendation	What is expected from Brazil
<b>the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity</b>	1x	(Armenia)	Ratify the treaty
<b>the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment &amp; the UN Nelson Mandela Rules</b>	1x	(Czechia)	Proceed with the enactment of legislation effectively implementing the treaty, at both state and federal level  Adopt measures to adhere to the rules
<b>the Arms Trade Treaty and adapt its national legislation to the Treaty</b>	1x	(Guatemala)	Ratify the treaty
<b>the Kampala amendments to the Rome Statute</b>	1x	(Liechtenstein)	Ratify the amendments with a view to contributing to the activation of the jurisdiction of the International Criminal Court over the crime of aggression in 2017
<b>the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)</b>	1x	(Ecuador)	Ratify the treaty
		(Albania; Angola; Argentina; Montenegro and Portugal)	Ratify the treaty

<sup>6</sup> This is the mentioned text of paragraph 3: "International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments."

<b>the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights</b>	4x	(El Salvador and Ukraine) (Gabon) (Finland)	(and accept the competence of the Committee as regards the inquiry procedure and inter-State communications)
<b>the Domestic Workers Convention, 2011</b>	2x	(Nicaragua) (Philippines)	Ratify the treaty
<b>the Optional Protocol to the Convention on the Rights of the Child on a communications procedure</b>	4x	(Albania; El Salvador; Georgia; Montenegro and Liechtenstein) (Ukraine) (Croatia and Mongolia) (Czechia)	Ratify the treaty  (before the next universal periodic review cycle)
<b>the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</b>	7x	(Sierra Leone)  (Chile; Indonesia and Sri Lanka) (Togo) (Guatemala) (El Salvador) (Philippines) (Ecuador)	Sign the treaty  Finalize the domestic procedures to accede to the treaty

*Brazil's response: the level of implementation and the case of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)*

Brazil has supported all the recommendations with no exceptions, but it is necessary to follow the measures that have been taken by the country in order to verify the level of implementation, considering all the due procedures that should be taken domestically in order to internalize an international treaty.

For the purpose of this presentation, we will deal with one specific case: the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*<sup>7</sup> which was chosen because of its the numbers of recommendations (seven), being the most recurrent topic within the theme “Acceptance of international norms”.

Nowadays migration issues are seen as a humanitarian crisis and there are many recent episodes in the world's history that support this view<sup>8</sup>. But it can be portrayed with different

<sup>7</sup> The full text of the treaty can be found here: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx>

<sup>8</sup> The seriousness of the migration phenomenon and its grave consequences specially to women and children migrants is expressed by Ms. Kate Gilmore, Deputy High Commissioner for Human Rights in her Statement in 31st Session of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families that took place on 2 September 2019, Geneva. “the significance of today's migration for the future of justice, sustainability, peace and prosperity in our world. As old as human history, nonetheless, it is our era that is distinguished by unprecedented movement within and across borders. That same migration is a phenomenon from which so many of us here have benefited directly. Yet, for the vast majority of those who never will enjoy the privilege of sitting in such rooms, migration involves a flight from fear; not a choice to explore new frontiers nor an achievement to celebrate. Precarious migration within and across borders, is invariably more than a humanitarian concern alone; the many indignities of flight, reception and destination without choice combine to

shades as well, as the Chair of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families calls attention to:

Migration, which is a continuous cycle of human progression, is often portrayed as a crisis. It need not always be seen as such and is and will not go away. Treating it as a problem instead of a natural process is not a solution according to José Brillantes, Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). Population growth, climate change, desertification, war and famine will continue to force people to migrate and migrants will also choose voluntarily under some circumstances to move in search of better employment opportunities, for example. Nevertheless, while root causes persist, migrants will continue to take various measures including risks as long as there is a cross-border supply and demand for work and inadequate legal migration frameworks<sup>9</sup>.

It is one of the most important topics of contemporary times which has attracted attention not only in the academic world, but as well in the international arena as part of the UN political, legal and social agenda, demanding policies and legal commitment. As a result of this necessity international pacts are made, such as the *ICRMW*.

The *ICRMW* is a comprehensive document which establishes basic standards for the laws and the judicial and administrative procedures to be followed by individual States in order to protect migrant workers and members of their families from exploitation and human rights violations regardless of their migration status. It can be considered as a minimum moral standard to guide the protection and promotion of migrants HR, reaffirming the fundamental rights that are cherished in the Universal Declaration of Human Rights and in the other international human rights documents. Equality of treatment and dignity can be considered as the core values of the treaty which emphasizes that migrants are human beings and because of this inherent condition are entitled to have access to a minimum degree of protection.

The Convention endorses that all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status are entitled to due respect and protection. It also acknowledges civil and political rights with a view to the particular situation of migrant workers<sup>10</sup>. The instrument bans collective expulsion stating that each case of expulsion shall be examined and decided individually. Economic, social and cultural rights of migrant workers in view of their particular situation are set out as well, for example, the right to urgently required medical treatment or the right of access to education for children of migrant workers.

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place irregular migrants – as individuals and as families - in comprehensive human rights crises. Refugees fleeing conflict, persecution. People compelled to flee extreme poverty, environmental degradation, the impacts of climate change; the absolute absence of decent work. Families responding to gang violence, to lack of education and healthcare for their children, to the consequences of long-term separation from family members.” Her full statement is found here:

(<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24947&LangID=E>)

<sup>9</sup> Statement by the Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Mr. José Brillantes, on the need for ensuring a human rights based approach to the Global Compact on Migration. 20 October 2017. [https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1\\_Global/INT\\_CMW\\_STA\\_8317\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/INT_CMW_STA_8317_E.pdf)

<sup>10</sup> Amongst the rights granted in the Convention, the migrant workers and members of their families have the right to have consular or diplomatic authorities informed in the event of detention. They may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.), and contains provisions on violations of migration law and respective prohibitions (such as the prohibition of collective expulsions)

The *ICRMW* also extends its protection to the entire migration process of migrant workers and members of their families, including preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

Regarding its review mechanisms<sup>11</sup>, the Convention establishes a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (*CMW*)<sup>12</sup>. The Committee sits in Geneva and, as usual, is a body of independent experts in charge of monitoring the states parties in the implementation of their obligations under the Convention. The states parties must report regularly on the measures taken to implement the provisions of the Convention and document both progress and difficulties<sup>13</sup>. Its first held session was held in March 2004.

Although the *ICRMW* was adopted by the UN (Resolution 45/158 by the General Assembly) on 18 December 1990, it entered into force 13 years later, on 1 July 2003, when the requirement of having 20 signatures was achieved. Even though it is considered one of the most important conventions regarding HR international framework, it has been facing a lot of difficulties to be ratified or acceded<sup>14</sup> by the countries. By 1 October 2005, 33 States had ratified it or acceded to it. And in 2019, the number of countries that have ratified it sums up 55 countries<sup>15</sup>, as shown by the chart provided by the UN Human Rights Office of the High Commissioner that follows<sup>16</sup>. The HR Office registers that up to last August 130 countries have taken no action towards the accession of the treaty- which is the Brazilian case.

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<sup>11</sup> Other review mechanisms are also designed. In addition to the state reporting procedure, states parties may recognize the competence of the Committee to consider interstate and individual complaints. This mechanism has not yet come into effect, however, as less than 10 states have recognized the Committee's competence in this matter.

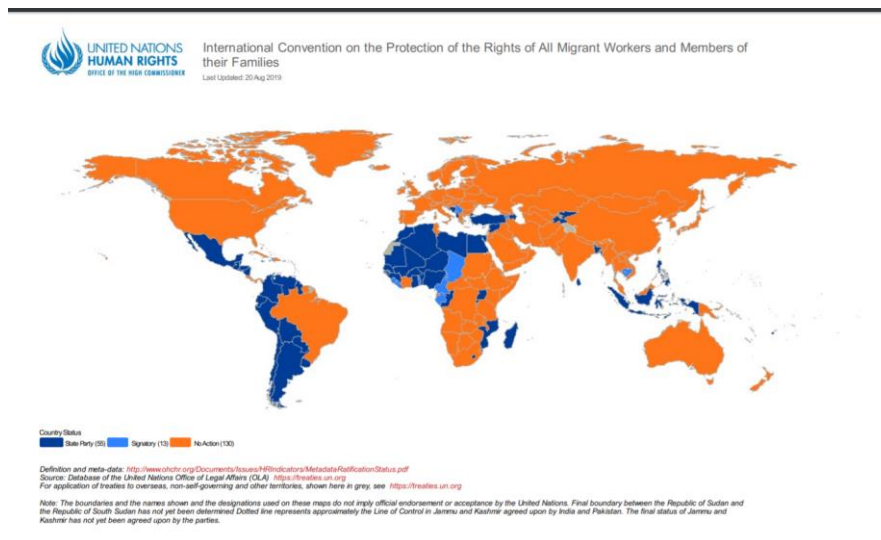
<sup>12</sup> More information about the CMW is available here: <https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIntro.aspx>

<sup>13</sup> These reports are to be periodical, in this fashion: each state party is to submit a first report to the Committee within the first year following ratification and further reports are due on a five-yearly basis.

<sup>14</sup> According to the basic categories of international law: "Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. [Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]" whereas "Accession is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. [Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]" (UN Glossary of terms relating to Treaty actions. [https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1\\_en.xml](https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml))

<sup>15</sup> As of December 2019, the following 55 states have ratified the Convention: Albania, Argentina, Algeria, Azerbaijan, Bangladesh, Belize, Bolivia, Benin, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Congo-Brazzaville, East Timor, Ecuador, Egypt, El Salvador, Fiji, Gambia, Ghana, Guatemala, Guyana, Guinea, Guinea-Bissau, Honduras, Indonesia, Jamaica, Kyrgyzstan, Lesotho, Libya, Madagascar, Mali, Mauritania, Mexico, Morocco, Mozambique, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sri Lanka, Saint Vincent and the Grenadines, Syria, Tajikistan, Turkey, Uganda, Uruguay, and Venezuela. On the other hand, Armenia, Benin, Cambodia, Cameroon, Chad, Comoros, Gabon, Haiti, Liberia, Palau, Serbia and Montenegro, Sierra Leone, and Togo have signed the Convention but not yet ratified it.

<sup>16</sup> The chart is available here: <https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx>



It is interesting to notice that the countries that have adopted the Convention are primarily countries of origin of migrants (such as Mexico, Morocco, and the Philippines) and for them the treaty can be considered as an important shield to protect their citizens living abroad. But no migrant-receiving state either in Western Europe or in North America has ratified the Convention. Neither have other relevant receiving countries, such as Australia, Arab states of the Persian Gulf, India and South Africa ratified the Convention. As for the Mercosul countries, all the states within the agreement have adhered to the document, except for Brazil. It is also interesting to see that countries that have a reputation of championing the HR protection have kept quiet and the *ICRMW* is not domestically binding for them which points to the need for more studies about this reticent attitude.

Regarding Brazil's position towards the *ICRMW*, despite the seven recommendations that were made in the last UPR cycle, the country has not yet promoted any effective measures towards the treaty accession.

As it is part of the Brazilian legislative rite there are two possibilities of starting the process of internalizing a treaty. The President can sign the treaty *ad referendum* of the National Congress (according to art.84, VIII of the 1988 Constitution) or he can defer directly to the Congress which has the competence to decide conclusively on international treaties (as provided for in art. 49, I of the 1988 Constitution). Only in this case after the approval by the Congress, the President will have the capacity to accede to the Convention. And, as we have previously discussed, the instrument itself to become effective within Brazilian law needs to be promulgated by a presidential decree.

So, choosing the second option, in December 2010, the Brazilian President sent a message to the National Congress (Mensagem nº 696, de 2010) urging the Legislature to consider the Convention and the possibility of accession. The Brazilian Congress in its turn has been quite dormant. The Congress waited until 2015 to create a special commission responsible to evaluate the presidential message. Since then, nothing else has happened<sup>17</sup>.

<sup>17</sup> The legislative processing regarding the approval of the *ICRMW* (Message 696/2010) can be followed here: <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=489652>



Even though Brazil's position follows the majority of countries regarding the instrument, which could suggest a low level of implementation, from a normative perspective, it cannot be considered as worthless in term of legal protection.

In the same year of the UPR, 3<sup>rd</sup> cycle, Brazil passed a new law regarding migrants: Law 13.445 which is known as the New Migration Law<sup>18</sup>. This statute is acknowledged as a change of paradigm within Brazilian law regarding migration and towards human rights protection<sup>19</sup>. This law in general terms mirrors the protection enshrined in the ICRMW, affirming the same goals (equal treatment and dignity) as well as a catalogue of fundamental rights, even to undocumented migrants. However, the law makes no direct mention of migrants' family members.

### *Our final comments*

From what we have studied so far, under a strict legal normative evaluation, we can say in general that the Brazilian normative system has adopted a position of fair appreciation of HR law, both internationally and internally, in an effort to follow those western countries with strong legal traditions, in order to recognize human dignity as the core and foundation of the democratic rule of law, even though some treaties are still in need be internalized.

On one hand, the domestic procedures that are required to be followed, despite the constitutional change we have already mentioned towards HR international law, stress the role of state sovereignty; on the other these same procedures work as hindrances towards HR international law once they stand as (political, legal and cultural) domestic obstacles to be overcome.

At the same time, if we take into consideration the recommendation regarding the ICRMW, it is true that Brazil has not acted effectively in the direction of the internalization of the ICRMW, which might be understood as a low level of implementation, but on the other hand domestic legislation was passed granting migrants the same kind of protection which shows a commitment to the idea of the rule of law.

So the question that arises is: is it enough? Despite the role of the rule of law as a tool for protection and promotion of HR, in the real world, if HR are in fact to be fully realized for all Brazilians and migrants in Brazil, there is a challenge that has yet to be met.

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<sup>18</sup> An actual copy of the law published in the *Diário Oficial* is provided by ACNUR here: <https://www.acnur.org/fileadmin/Documentos/BDL/2017/11166.pdf>

<sup>19</sup> See TRAUB, Isabella. Lei de Migração: um avanço para os direitos humanos, *Novo Jurista*. março 25, 2018: <https://novojurista.com/2018/03/25/lei-de-migracao-um-avanco-para-os-direitos-humanos/>

## **THE INCREMENTAL RESTRICTION OF THE DEATH PENALTY IN MYANMAR: A STEP TOWARDS ABOLITION?**

Jon Yorke<sup>1</sup>

Myanmar's political and legal institutions are engaged in a constitutional conversation which has created an incremental approach to restricting the death penalty. This dialogue has historically focused on the internal mechanisms expressing the evolving constitutional competences of the President, the parliament (Pyidaungsu Hluttaw) the courts, and the Myanmar National Human Rights Commission (MNHRC). Since 1988 the military government has ceased imposing executions but allowed the capital judicial process to impose death sentences, and following the adoption of the Constitution in 2008, the hybrid military and civilian governance of Myanmar has continued the de fact abolitionist position with the non-imposition of executions. This internal process has revealed an incremental restriction of the punishment, which it is argued is also reflected in Myanmar's engagement with the international community on the death penalty. This is most significantly experienced in the country's shift in perspectives in the UN General Assembly's biennial vote on the Resolution on the moratorium on the use of the death penalty, and in the first two cycles of Myanmar's Universal Periodic Review.

This paper argues that there are identifiable incremental stages to Myanmar's restriction of the death penalty, which are:

- (a) 1947-1988 that includes a fully functioning Burmese capital judicial system and the imposition of executions in the era of an absence of an international commitment for global abolition;
- (b) 1989-2013 the maintenance of a partially functioning Myanmar capital judicial process with a rejection of the multilateral initiatives and international principles promoting global abolition; and,
- (c) 2014 to 2020 the maintenance of a partially functioning Myanmar capital judicial process and an abstaining from affirming the multilateral initiatives and international principles promoting global abolition.

Whilst it is by no means a forgone conclusion that the next incremental step towards abolition will be taken—and there could be a step backwards—the passage of time will tell whether the argument will come to fruition that following the Myanmar National Human Rights Commission's Workshop on the Death Penalty in 2017, the current constitutional interaction on the death penalty can reasonably allow for the next incremental stage to be take in:

- (d) the process for an official moratorium to transition this de facto abolitionist position into a de jure domestic legal abolition, and then for Myanmar to positively engage with the international efforts promoting global abolition.

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