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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION TO THE
UNIVERSAL PERIODIC REVIEW OF
BRAZIL**

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The International Commission of Jurists (ICJ) is a non-governmental organisation founded in 1952, in consultative status with the Economic and Social Council since 1957. The ICJ is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. It takes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law. It provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.

P.O. Box, 91, Rue des Bains, 33, 1211 Geneva 8, Switzerland
Tel: +41(0) 22 979 3800 - Fax: +41(0) 22 979 3801 - Website: <http://www.icj.org> - E-mail: info@icj.org

ICJ submission to the Universal Periodic Review of Brazil

1. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Human Rights Council's Universal Periodic Review (UPR) of Brazil. In this submission, the ICJ brings to the attention of the Human Rights Council's Working Group on the UPR (Working Group) and to the Human Rights Council (Council) issues concerning: (1) access to justice, especially in the context of business and human rights;ⁱ and (2) international human rights instruments and mechanisms.

ACCESS TO JUSTICE, ESPECIALLY IN THE CONTEXT OF BUSINESS AND HUMAN RIGHTS

2. The 1988 Constitution sets out that Brazil's foreign relations will be guided by respect for human rights (Article 4), while Constitutional Amendment 45 establishes that international human rights treaties have Constitutional hierarchy if they are approved by a three-fifths majority in both chambers of Parliament (Article 5.3). To date only the Rome Statute for the International Criminal Court has achieved the status of a constitutional norm, while the core human rights treaties rank at the same level as ordinary legislation. The Constitution contains an expansive catalogue of rights, including civil, economic, social and political rights. Supreme Court jurisprudence makes clear that legal entities, including private associations, are bound to respect constitutional rights. It also provides for the criminal liability of enterprises for offenses against the conservation of the environment and economic crimes.

3. Brazil has recently experienced sustained economic growth and rapid development of economic enterprises importing and exporting raw materials, and processing goods and services. Business enterprises are increasingly part of international economic networks. In this context, there are frequent allegations that labour rights, indigenous and community rights, and other social and economic rights are being infringed as a result of activities of private enterprises.

4. Research carried out by the ICJ indicates that individuals alleging an infringement of their rights due to business-related activities often have recourse to individual civil actions and public civil actions (*ação civil pública*). Private civil actions are most often used to claim compensation for damages caused to identifiable individuals. Public civil actions are used for collective complaints to defend collective rights and interests, such as those relating to environment, historical heritage preservation, as well as rights concerning to a class of victims, such as affected groups of children. Collective actions often draw more public attention, raising public awareness and prompting companies to be more amenable to committing to a solution to the situation that otherwise may entail reputational damage for them.

5. Public/collective civil actions are mostly promoted by civil society groups and the Attorney-General's office (*Ministerio Público*, which defends legality and rights in addition to prosecuting crime). The involvement of the public authority or social organisations in supporting a complaint helps to preserve or restore a procedural balance or equality of arms between plaintiffs (usually community members without economic means) and corporate defendants with economic power.

6. Criminal prosecutions of business enterprises or individual businessmen have been less frequent than civil actions. Brazilian law criminalises slave labour, although prosecutors have found it difficult to prosecute and/or convict the practice of slave labour, occurring mainly in rural areas, due to lack of coordination with the Ministry of Labour, which is responsible for carrying out workplace inspections. Brazilian law does not contemplate criminal liability of corporations or legal entities for offences that do not concern the environment. Brazil also features a law on environmental crimes, which provides for individual and company criminal liability. Criminal prosecution of a company can have a huge impact on a company's public image. Impacts on public credibility can also adversely affect a company's ability to access credit from commercial banks.

7. Several non-judicial mechanisms and instruments are used in cases of business-related human rights abuses to avoid lengthy judicial proceedings. Amongst non-judicial public instruments commonly used to counter corporate human rights abuse is the *Termo de Ajustamento de Conducta-TAC*, a negotiated agreement that is promoted and approved by the Attorney General's office. The TAC allows for a process of direct negotiation between the victims and company perpetrators about the terms of settlement and their implementation. This instrument has been very effective in cases such as child pornography on the internet. The negotiated agreement is then certified and signed by the Attorney General's office giving it legal value and enforceability. However, practice shows that in most cases the signed and certified agreements are not monitored properly. Many are only partially implemented and the public attorney seldom demands execution of the agreement before the courts. In other cases, the agreement does not foresee consequences or penalties in case of non-compliance. Such agreements may provide the company with a means of committing to compliance with the law in a flexible and gradual way. However, the victims are not always satisfied, because the agreement does not usually entail an admission of responsibility for wrongful acts on the part of the company.

8. Mechanisms within the public administration, including ministries and decentralised regulatory agencies, also play an important and sometimes effective role in countering abuses and affording relief to those negatively affected. Inspections from the Ministry of Labour and Employment are carried out *in loco* and may result in fines and other sanctions for companies where there is a lack of compliance with labour laws and regulations. These sanctions can prove effective where they affect the ability of the company to carry out business (i.e. closure of shop). However, these sanctions can be challenged in court. The Ministry of Labour also hosts a public list of companies that have been found using slave work, or those that are frequently litigators for consumer rights or worker rights. This not only affects company image, but also its ability to access to public funding or loans.

9. Among the practical obstacles to access to justice are slow judicial proceedings, lack of adequate knowledge about rights and mechanisms for their protection, limited public interest law practice within NGOs and outside NGOs, and lack of full compliance with TACs. Other obstacles include the lack of clarity about the situations in which it is legally possible for a judge to pierce the corporate veil, and the practice of retaliation against victims, their representatives or their witnesses in cases brought against business enterprises.

10. The Public Defender (*Defensoria pública*) is the body that lends free legal assistance to persons who cannot pay for it. Its role is an important means of affording access to justice to people economically deprived. However, it does not have the resources and structure necessary to meet the existing and potential demand. In 2008 there were 4,374 defenders for about 140 million potential clients, defined legally as people who earn less than 3 months' minimum wages. Most of the work of public defenders focuses on cases relating to family issues or criminal matters, and has also been largely limited to big cities leaving rural

populations without sufficient attention. A number of Brazil's Federal States organise their public defender offices in groups of specialists on various issues (i.e. consumer rights, collective rights, etc), with the aim of providing more specialised and effective legal assistance. Fourteen States have specialised groups of defenders on human rights issues, the Federal Office of the Public Defender being one of them. The creation of these specialised groups in all public defender offices would help to improve opportunities to access to justice, including in cases where the perpetrator is a business enterprise or corporation.

11. Together with the Public Defender Offices and the Attorney-General Offices, non-governmental organisations play a lead role in assisting victims to have access to justice. However, NGO involvement has been limited to a small number cases mainly due to insufficient capacity and financial resources. There are few opportunities for NGOs that do provide free legal assistance to have access to public funds. Some interesting alternative funding schemes can be found in initiatives such as the Fund for the Defence of Collective Rights (*Fundo de Defesa de Direitos Difusos*) that operates with fines paid by business enterprises found in breach of competition law rules. This fund supports projects relating to protection and defence of the rights of the child, consumer rights and the environment. Expansion of this kind of scheme would be beneficial.

12. Another option to make funding more available to civil society groups and NGOs is the expansion of the rules relating to the payment of legal costs that exist in labour courts and require the unsuccessful party to pay the legal costs of the successful party, when the latter has been represented by a class not-for-profit organisation.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND MECHANISMS

13. Brazil is party to all of the core human right treaties, with the exception of:

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and
- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

14. Brazil is up-to-date in its periodic reporting obligations to the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women. However, despite its pledge to “[strengthen] its relationship with treaty-monitoring bodies by preparing periodic reports” when standing for membership in the Human Rights Council,ⁱⁱ Brazil has failed to adhere to reporting deadlines for periodic reports to the Human Rights Committee (HRCttee), Committee against Torture (CAT), and Committee on the Rights of the Child (CRC):

- Brazil is yet to submit its third periodic report to the HRCttee (due 31 October 2009);
- While Brazil submitted its initial report to the CAT (due 27 October 1990) in May 2000, it has since failed to submit its second periodic report (due 27 October 1994), third periodic report (due 27 October 1998), fourth periodic report (due 27 October 2002) and fifth periodic report (due 27 October 2006);
- While Brazil submitted its initial report to the CRC (due 23 October 1992) in October 2003, it has since failed to submit its second periodic report (due 23 October 2007), third periodic report (due 23 October 2007) and fourth periodic report (due 23 October 2007).

15. Brazil has issued a standing invitation to Special Procedures, in place since 10 December 2001.

RECOMMENDATIONS

16. The ICJ calls upon the Working Group and the Council to urge the Government of Brazil to:

Concerning access to justice:

- i). Increase the number of public defenders working in public defender offices in the union and their presence outside the large cities so that they are more accessible to rural people;
- ii). Create in all public defender offices specialised groups of defenders on human rights issues with a mandate to consider abuses by private entities, including business enterprises;
- iii). Support civil society organisations that provide free legal assistance by increasing their opportunities to access public funds or publicly established funds such as the Fund for the Defence of Collective Rights;
- iv). Expand the rules concerning the payment of legal costs by the losing party so as to extend the existing practice of labour courts to all cases concerning human rights where the winning party is represented by an NGO;
- v). Actively encourage the judiciary to take measures to overcome the chronic delays in the administration of justice by establishing mobile courts and chambers, and promote conciliation in disputes that are amenable to that kind of solution;
- vi). Extend the application of special procedural rules for expediting cases involving older persons to apply to other cases relating to human rights, including when business corporations are named as subjects;
- vii). Strengthen mechanisms to monitor compliance of TAC (*termo de ajustamento de conduta*), including through the participation of civil society in such mechanisms;
- viii). Strengthen and expand the capacity of the Ministry of Labour, the Ministry of the Environment and State-level departments and secretariats to carry out inspections *in situ* through mobile task forces or other similar mechanisms, and the imposition of sanctions when breaches of labour rights and related rights are verified;
- ix). Create an inspection mechanism within the national Human Rights Secretariat capable of carrying out monitoring and *in situ* inspections and sanctions for breaches of human rights by business enterprises;
- x). Require by law that companies domiciled in Brazil or carrying out substantive business in the country must publish on their website the steps they take, if any, to ensure that child labour, slave labour or bonded labour, or similar egregious practices, are not used in their supply chain;
- xi). Enact legislation providing for criminal responsibility of legal persons, including business enterprises, for serious offences;
- xii). Promote corporate respect for human rights by adopting provisions that require disclosure of steps taken to ensure respect of human rights in the ambit of all company operations;

Concerning international instruments and mechanisms

- xiii). Become a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;
- xiv). Immediately sign, with a view to ratification, the Third Optional Protocol to the Convention on the Rights of the Child;
- xv). Provide without delay its third periodic report on the implementation of the International Covenant on Civil and Political Rights to the Human Rights Committee;

- xvi). Provide without delay its second, third, fourth and fifth periodic reports on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the CAT;
- xvii). Provide without delay its second, third and fourth periodic reports on the implementation of the Convention on the Rights of the Child to the CRC;
- xviii). Present to the Council, during the plenary session to adopt the outcome document for the UPR of Brazil, a national plan of action for the implementation of accepted recommendations and voluntary pledges and commitments;
- xix). Present to the Council, two years after adoption of the outcome document, a mid-term progress report on the status of implementation of recommendations and voluntary pledges and commitments.

ENDNOTES:

ⁱ Information relating to access to justice in the context of Business and human Rights is taken from the publication "Acesso à Justiça: violações de Direitos Humanos por empresas- Brasil" (International Commission of Jurists, 2011).

ⁱⁱ Voluntary pledge made by Brazil in support of its candidacy to the Human Rights Council during the election at the 62nd session of the General Assembly, UN Doc A/62/777 (2008), p.3, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/62/777&Lang=E.