Sur Journal • v.12 • N. 21 • Aug. 2015 • sur.conectas.org

sur international journal on human rights

issue 21

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NGOS AND DRUG POLICY

Rafael Custódio

• *A look at what human rights NGOs can do to combat prohibitionism.* •

ABSTRACT

Prohibitionism, as a drug policy, is responsible for a range of human rights violations around the world. This article presents some of these violations and suggests what human rights NGOs can do to combat them. The author concludes that the most effective course of action is to seek to expand individual rights and limit the powers of state control.

KEYWORDS

United States | Latin America | Prohibitionism | NGOs | Criminal system

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"It always seems impossible until it's done." One of the most famous quotes attributed to Nelson Mandela (1918-2013) perfectly fits the increasingly forceful and persuasive debate that is questioning prohibitionist drug policies all around the world. Among the list of issues informing the debate, one deserves special attention: why should human rights organisations participate in this debate and in what way?

In 1971, then United States President Richard Nixon announced that "America's public enemy number one is drug abuse."[1] This moment marked the beginning of the so-called "war on drugs". Today, however, a young resident of Denver, Colorado can go to the corner and legally purchase up to 28 grams of marijuana per month for recreational use. If the same youth were in San Francisco, California, he would have been able to use medical marihuana to fight chronic pain since 1996.

Why are so many things changing at a relatively fast pace not only in the US, but also in countries as diverse as Portugal, the Netherlands, Finland, Spain and Uruguay? These countries have approved drug policies that move – some more than others – in the opposite direction of prohibitionism.

While it is difficult to identify just one response to an issue informing so many different realities, one thing is clear: if we want a world based on the respect for human rights, anti-prohibitionism should be on everyone's agenda.

Violations of the rights of communities affected by violence, mass incarceration, capricious criminal justice systems, abusive police practices on the street, the militarisation of security policies and the lack of adequate health policies are just some examples of rights violations that characterise the repressive logic underpinning the war on drugs.

In addition to the violations they perpetuate, prohibitionist policies are one of the main incentives for the formation of armed criminal organisations, since violence is the principle mode of regulating illegal markets. As a result, drug trafficking is necessarily accompanied by arms trafficking, territorial disputes, and the corruption and undermining of democratic institutions, namely the police, the justice system and government institutions. Countries such as Colombia,[2] Mexico,[3] Brazil[4] and those that make up Central America are (just some) notorious examples of the negative effects of prohibitionist policy.

On the African continent, consideration of countries such as Guinea Bissau, Mozambique and some from West Africa also reveals the failure of prohibitionism. In this new frontier of the illicit narcotics trade, drug trafficking networks have taken root by exploiting these countries' already weak governance systems and gaps in legislation. This, in turn, feeds the belief that the region is a relatively safe refuge for drug traffickers. The criminalisation of drug use and possession puts significant pressure on already overloaded criminal justice systems, fosters corruption of the justice system as well as the police and causes violence and human rights violations to increase.[5]

The war on drug's failure, and the unacceptable levels of human rights violations it causes is not limited to developing or peripheral countries. The US, for example, has less than 5 per cent of the world's population, but accounts for almost 25 per cent of the global prison population, which earns it the title of the biggest incarcerator on the planet. A true *jailhouse nation*.[6] Analysts of mass incarceration policies frequently describe an unequal and repressive system that disproportionately affects black and Latino people.[7] According to Loïc Wacquant, the only possible explanation for the racial imbalance in US prisons is precisely the war on drugs policy launched by Nixon and expanded by the subsequent administrations.[8]

What is more, the prohibitionist logic is entirely counterproductive: banning the cultivation and use of a given substance only increases its market value and, consequently, the interest of its dealers.[9]

In general, we can suggest that the prohibitionist policy has generated at least five major global effects: 1. The growth of a sizeable criminal market, which has been financed by the gigantic profits obtained from drug trafficking activities supplying an international demand for illicit drugs; 2. The relocation of drug policies from one region, country or city to another without taking into account local contexts or seeking to ensure coordination and cooperation between actors; 3. The geographic relocation of drug production – known as the balloon effect – which sees production migrate from one region or country to another in order to escape repression and without then seeing a reduction in production or trafficking; 4. Consumers switching from one substance to another as repression often makes it harder to access a particular drug, with sometimes even more harmful effects on people's health and safety; 5. The stigmatisation and marginalisation of drug users who are treated as criminals and excluded from society.[10]

In sum, the catastrophic scale of human rights violations that exists today is the direct result of prohibitionist policies. Therefore, reforming this model, which failed a long time ago, must be included in pro-human rights agendas worldwide.

In fact, this is what an increasing number of human rights organisations are doing with increasing coordination and impact. From the activities of such human rights organisations, some actions and strategies can be briefly listed here to indicate possible ways through which real and concrete impact can be made:[11]

> (i) conduct empirical research to identify the profile of prisoners incarcerated for drug trafficking in order to bring to light and denounce the criminalisation of the most vulnerable sectors of society;
>
> (ii) defend users who grow their own marijuana who, in many countries are arrested and tried in court as traffickers;
>
> (iii) undertake legislative advocacy at the domestic level to prevent the enactment of regressive laws on drug policy and, instead, propose a move towards the decriminalisation of the use, regulation, production, trade and consumption of certain substances;

(iv) expand efforts to regulate access to medical marijuana through legal actions focussed on access to health or legislative changes;

(v) approach influential organisations or public figures who publicly position themselves in favour of reforming prohibitionist policies;

(vi) carry out studies on the impact of alternative drug policies on health and criminal justice in countries where such policies have already been implemented;

(vii) build closer ties, exchange information and coordinate strategic efforts with actors with different areas of expertise, such as psychiatrists, anthropologists, jurists, sociologists, police officers, etc. to improve advocacy and to strategise in a multidisciplinary way;

(viii) use international human rights mechanisms to denounce the impacts of prohibitionist policies;

(ix) bring lawsuits that challenge the constitutionality of banning the use of certain substances from the point of view of individual freedom;

(x) generate public debate with different sectors of society (students, religious figures, public servants, journalists, etc.);

(xi) ensure the systematic production of counterintelligence to debunk myths and falsehoods on alternatives to prohibitionist policies; and

(xii) use different communication strategies across different media outlets, especially to generate spaces of discussion and reflection for the general population.

These items are only some examples of what human rights organisations have done to combat human rights violations resulting from inefficient and abusive drug policies. Whilst this is not intended to be an exhaustive list of possible actions and strategies, it does make clear that a lot has been, and can be, done. In short, the suggestions point to the combination of expanding individual rights and limiting state powers as an effective means for remedying human rights violations in this context. And results are beginning to appear everywhere. It seems impossible...

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11. These are actions that have been brought to our attention, mainly by our partners.

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Received in July 2015.
Original in Portuguese. Translated by Karen Lang.

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sur international journal on human rights
- Aug/2015 -
issue 21

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EMPTY SLOGANS, REAL PROBLEMS

Carl L. Hart

• *Looking at how the US and Brazil treat crack addiction reveals responsibilities in perpetuating myths and discrimination.* •

ABSTRACT

The so-called "war on drugs" has been an epic failure, based on ill-informed evidence and has had disastrous consequences, not least in perpetuating racial discrimination and maintaining economic and social deprivation. A recent trip to Brazil prompted the author to question the US's role in perpetuating drug myths and the "war on drugs" and the impact this is having on the human rights of US citizens and those in other countries whose governments continue to follow the US example. In doing so, he addresses some of the main misconceptions surrounding drugs and sets out the damaging effects the misguided policy has on the most vulnerable in society.

KEYWORDS

Brazil | Drug policy | War on drugs | Reform | United States | Crack | Cocaine

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"Why are governments so enamoured with empty slogans and all too willing to spend loads of money promoting them?" That thought raced through my mind as I sat in a traffic jam in one of the most congested city in the Americas. A bumper sticker caught my eye as I reflected on where I had been and where I was headed. It read in Portuguese, Crack, É Possível Vencer (Crack, It's Possible to Win) and was prominently display on the back of a Rio de Janeiro city police vehicle, when I visited the city in May 2014. The slogan may sound aspirational, but it is emblematic for how thoughtlessly some countries have chosen to deal with illegal drug use, especially use by the poor.

In Brazil, many people are convinced that the "cracolândias" (and by extension, the people who inhabit them, although this is almost never stated explicitly) are some of the country's most pressing problems. "Cracolândia," literally translated as "crack land," is a pejorative Brazilian term commonly used to describe places where so-called crack cocaine addicts gather to use the drug. And their crack use is believed to have led to a host of problems including unprecedented rates of addiction, crime and unemployment.[1]

As a neuroscientist with 20-plus years of drug education and research on psychoactive drugs, I find this description eerily similar to depictions of Miami in 1986. I grew up materially poor in one of Miami's exclusively black neighbourhoods around that same time and decided to study neuroscience specifically because I wanted to fix the drug addiction problem. I believed the poverty and crime that my community faced was a direct result of crack cocaine. I reasoned that if I could cure drug addiction, I could fix the poverty and crime in my community.

We were told, and I whole-heartedly believed, that crack was so addictive that a user only needed one hit and they were hooked; we blamed crack for the apparent lawlessness and widespread joblessness that surrounded us; we referred to women crack users as “crack whores” and accused them of abandoning their children in pursuit of the drug, even though little evidence supported this view; we promoted slogans proclaiming a “war on drugs” and our desire for a “drug-free America.”

Then, the United States Congress passed and President Ronald Regan signed the now infamous Anti-Drug Abuse Acts of 1986 and 1988. These laws set penalties that were 100 times harsher for crack than for powder cocaine violations. Specifically, they required a minimum prison sentence of at least 5 years for people caught with even small amounts of crack, but not so with powder cocaine. This legislation also dramatically increased hiring of police officers and enhanced their role in dealing with drug-related issues. As a result, complex economic and social issues were reduced to criminal justice problems; even more resources were directed toward law enforcement rather than neighbourhoods’ real needs, such as school improvement and job creation.

What is worse is that crack was steeped in a narrative of race and pathology. While powder cocaine came to be regarded as a symbol of luxury and associated with whites, crack was portrayed as producing uniquely addictive, unpredictable and deadly effects and, importantly, was associated with blacks. By the 1980s, of course, references to race in such a context were no longer acceptable. So problems related to crack were described as being prevalent in “poor,” “urban” or “troubled” neighbourhoods, “inner cities” and “ghettos,” terms that were codes for “blacks” and other undesired people.

The racialised discourse on crack was reflected in the enforcement of the Anti-Drug Abuse laws. An astonishing 85 per cent of those sentenced for crack offenses were black, even though the majority of users of the drug were, and are, white. This kind of selective targeting and racial discrimination contributes to the horrifying statistic that one in three black boys born in the US is projected to spend time in prison. By comparison, only one in 20 white boys face this damning prospect.[2]

I sat in the Rio traffic and a battle was waging in my mind, as we made our way to visit a cracolândia in one of the favelas of the Complexo da Maré. I thought about how I had given thousands of doses of drugs to people as a part of my research, how I had carefully studied their immediate and delayed responses, how I now know that the addictive potential of even the most vilified drugs such as crack or methamphetamine is not extraordinary. The fact is nearly 80 per cent of all illegal drug users use drugs without problems such as addiction.[3] In other words, the effects of crack were greatly exaggerated; crack is no more harmful than powder cocaine. They are, in fact, the same drug.[4]

I recognise, of course, that some people struggle to control their consumption of various substances, including crack cocaine, which may disrupt their ability to meet important obligations, such as childcare, employment, social interactions, etc. It would be a mistake, however, to conclude that the substance itself is the problem and, as a result, wage a war on it. People become addicted for a variety of reasons ranging from psychiatric disorders to economic desperation to underdeveloped responsibility skills. Empty slogans obfuscate this fact. That is why firstly it is critically important to determine the reasons underlying each person’s addiction before perpetuating myths about the cause and before intervening with half-baked solutions. For example, if a person is abusing alcohol or heroin to deal with anxiety or trauma, effective treatment of the psychiatric illness should lessen the abuse of either drug. Likewise, providing destitute addicts with employable skills and viable economic opportunities goes a long way in helping them to overcome their addiction.[5]

The above evidence helped change my views on addiction and its role in causing chaos in communities, certainly in the US context. But now, I had arrived at Maré in Rio and had to remind myself to keep an open-mind because the situation in Brazil may differ from that in the US. I had been warned that the “cracolândias” here would be replete with unpredictable “zombies” driven primarily by their desire for another hit. My mind was open.

Indeed, I saw people smoking crack out of makeshift pipes as well as drinking alcohol out of plastic cups. I witnessed heated and animated discussions. But, these were a minority of behaviours that I noticed during several visits and meetings with the residents. I also saw people talking, laughing, and tending lovingly to their children and pets

The most conspicuous observation, however, was the widespread abject poverty. A large number of people lived in poorly constructed wooden shacks, devoid of basic services and surrounded by piles of rubbish. It seemed that the local government had not removed the rubbish in some of these communities for months. I grew up in a housing project and was still absolutely shocked and disturbed by these conditions. Yet, I tried not to show my dismay, because I was happy to be there with the people. They were extremely warm and welcoming. So-called drug users and traffickers were eager to share their stories with me. Some told stories of male loved ones being rounded up by the police for suspected drug trafficking and were never seen alive again. Others presented astute observations about the forces that worked to perpetuate the horrid conditions under which they live. In addition, residents were acutely aware that widespread poverty, inferior education, high unemployment and violence plagued their communities long before the appearance of crack, less than a decade ago.

The popular rhetoric is that drug gangs are largely responsible for the violence and social instability in Brazilian urban centres such as Rio. It is true that Brazil's homicide rates are among the highest in the world. In 2012, the rate was 25.2 per 100,000 residents. Note, however, that this is well below the rates of 53.7 and 90.4 per 100,000 residents for its Latin American neighbours Venezuela and Honduras, respectively.6 Another point often stressed in these discussions is the high number of police officers killed in cities such Rio. In 2014, an estimated 106 Rio police officers were killed (18 while on duty).[7] The number of people killed by the police, on the other hand, receives far less attention. From 2003 to 2013, on average Rio police killed 915 of its citizens each year (70 per cent of these individuals are of African descent. This number peaked in 2007 at 1,330.[8] These figures suggest that rather than the drug gangs being responsible for the violence and social instability in urban centres in Brazil, it is in fact government policy, manifested by overly repressive law enforcement authorities.

The spread of crack has been blamed as a major contributor to these horrifying statistics, even though these numbers have remained almost unchanged since 1990. Crack did not appear until after 2005. The prominent role ascribed to crack in this mix is simply inconsistent with the evidence, just as was the case in the US 30 years earlier. Crack became widely available in the US in 1985 and it was blamed for rising murder and unemployment rates in the early 1990s. The problem is that per capita murder and unemployment rates were higher in 1980 and 1982, respectively, before the introduction of crack.[9] But, this reality did not stop US officials and citizens from advocating for tougher penalties targeting crack offences.

Brazil seems to be going down this same path in response to their so-called crack problem. Recently, the country allocated R$4 billion in this effort.[10] Public awareness and education campaigns (e.g., the Crack, É Possível Vencer) are included, although what parades as education cannot be considered informative. Few people, for example, seem to be aware that crack and powder cocaine are the same drug. Drug education amounts to telling people not to take illegal drugs. Funding for drug treatment programmes is also included in this new initiative. In Brazil, drug treatment primarily consists of mandating users to facilities run by evangelical Christian organisations, where the focus is on prayer and manual labour. By any modern standard of medicine, this can hardly be considered treatment, let alone effective treatment. But, the bulk of the funds and focus of Brazil's crack efforts are geared towards law enforcement, just as was done in the US decades earlier.

In the US, crack is no longer considered the worst drug in the history of humans. Many acknowledge that exaggerations about crack-related effects led us to adapt inappropriate policies and this contributed to the further marginalisation of blacks. In fact, on August 3, 2010, President Barack Obama signed the Fair Sentencing Act that reduced the sentencing disparity between crack and powder cocaine from 100:1 to 18:1. This was an important acknowledgement, but, to be absolutely clear, any sentencing disparity in this case makes no sense.

Nearly 30 years after the US implemented draconian policies to deal with its so-called crack problems, Brazil is poised to pursue a similar path. This will undoubtedly contribute to African-Brazilians being pushed further to the margins of society. For instance, African-Brazilians make up about 50 per cent of the population[11] but represent less than 5 per cent of elected officials[12] and are virtually non-existent in middle-class positions.[13]

Empty slogans, with their easy-to-relate sound, are excellent for galvanising the uninformed, but they too often obscure the real problems and impede our ability to implement appropriate solutions. We no longer have the excuse

of ignorance for implementing policies based on catch phrases such as "drug-free America." Besides, there never has been a drug-free America, there never will be, and you do not want to live in such a mythical place.

It is long past time for the US to acknowledge to the global community its drug policy missteps so that other nations do not have to make the same mistakes, especially when these mistakes have racist effects and increase human rights violations.

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Received in: June, 2015
Original in English

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sur international journal on human rights
- Aug/2015 -
issue 21

THE SUR FILE ON DRUGS AND HUMAN RIGHTS

DRUGS POLICIES AND PUBLIC HEALTH

Luís Fernando Tófoli

• *Some inconsistencies between drug policies, public health and human rights.* •

ABSTRACT

In this article the author gives a medical perspective of drug policies in Brazil and their challenges. Two ethical and assistance dilemmas resulting from the current model of combating drugs in the country are addressed in more detail. First, the author examines the real application of harm reduction strategies in Brazil and the friction with the model based on abstinence. He then analyzes the public funding of therapeutic communities for the treatment of drug misusers founded on the idea of abstinence. The author concludes by pondering how these dilemmas contradict and undermine the official policy of harm reduction.

KEYWORDS

Brazil | Health | Harm reduction | Drugs | Therapeutic communities | Psychiatry

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In March 2012 twelve United Nations entities issued a joint statement criticising compulsory detention and rehabilitation centres for drug users.[1] Despite the enormous differences in the regulatory status of these types of centres, the reports of abuse and health risks resulting from inadequate services for the treatment of drug users are monotonously similar worldwide, although more severe in East Asia, Eastern Europe and Latin America.

Nevertheless, this statement by the international organisations can be considered nothing short of contradictory. The pragmatic response conceived by the current prohibitionist framework of global agreements – and reinforced by the system of international organisations – dwarfs any attempt to find solutions to the problem of drug use that are not based, in one way or another, on the elimination of demand.[2]
With a clear enemy to fight – the use of illegal drugs, regardless of evidence of their impact on public health – it is not a stretch to also brand the people involved in this context – those who use and/or sell these substances – as enemies. Several issues exemplify inconsistencies of this type between drug policy, public health and human rights. These include forced internment, the opposition to the legalisation of cannabis, the criminalisation of drug possession for personal use and resistance to the therapeutic use of prohibited substances.

Among other equally important issues in a discussion on human rights and drug policy from a health perspective, I shall address the abuse of rights in rehabilitation centres for drug users and the ineffectiveness of such centres. In this article I shall briefly examine two of the ethical and assistance dilemmas arising from the current model of dealing with drug abuse and I shall present them in the contemporary Brazilian context. First, I shall examine the real application of harm reduction strategies in Brazil and the friction with the model based on abstinence. I shall then address the public funding of therapeutic communities for the treatment of drugs misusers, which run counter to the official policy of harm reduction.

Harm reduction in Brazil, more on paper than in practice

Harm reduction is a pragmatic strategy for treating drug abuse that does not assume the need for abstinence. It is – or should be – designed primarily for people who are unwilling or unable stop using drugs and it focuses mainly on mitigating the negative impacts of this consumption and promoting the health of the user. In this respect it is worth noting that there is an interesting body of literature that discusses the harm reduction approach and its interface with the rights of people who use drugs.[3] Towards the end of the 20th century Brazil pioneered harm reduction initiatives for injectable drug users. These initiatives were developed by health workers and activists from the HIV/AIDS and mental health fields. They were not introduced without controversy and those responsible for them had to contend with accusations of condoning drug use when they attempted, in the late 1980s, to establish a needle exchange programme in the port city of Santos in the state of São Paulo.

Over time the harm reduction initiatives were consolidated, although by no means did they become part of the standard procedure in Brazilian drug policy. Still, isolated harm reduction initiatives remained in place in some cities, such as Salvador and Campinas. Although Brazil's National Anti-Drug Policy had already sanctioned harm reduction initiatives – albeit tentatively – in 2001, the strategy was only officially made the primary approach to substance abuse by the Ministry of Health in 2003[4] after the political group historically associated with supporters of harm reduction was established in power.

However, despite the official policy, the range of state-funded services for the treatment of substance abuse – the Psychosocial Treatment Centres for Alcohol and Drugs (CAPS-AD) – were created within other programmes whose primary model was the treatment of severe mental disorders. According to the official discourse, primary care – comprised of the network of professionals at health centres that provide essential treatment to the population – should also provide treatment for demands associated with substance abuse. Nevertheless, Brazil's primary care professionals have proven to be ill-equipped to treat users that abuse substances and generally refer them to specialised services.[5]

In addition to the potential criticisms of the relative inefficiency of the CAPS model for the "AD clientele," since it was originally developed to cater to the social reintegration needs of patients diagnosed with psychosis, the CAPS-AD centres also have a paradoxical mission. While these centres are supposed to focus on the harm reduction model – a strategy aimed primarily at controlled use instead of abstinence – their public consist almost exclusively of users who have reached the stage of their addiction in which their personal preference is often for abstinence, as has already been demonstrated in other countries.[6]

It should be noted that although abstinence-based treatments can also form part of a harm reduction approach,[7] a place that basically treats users in search of abstinence cannot be considered as being geared towards harm reduction. As such, the friction resulting from the "official" affiliation with a model within a context that is not well suited to its application is not something that can be ignored.
On the other hand, until the Brazilian Ministry of Health issued the decree that established the Psychosocial Care Network (RAPS) in 2011,[8] there were no clear forms of federal funding for harm reduction initiatives. After the formation of RAPS, these initiatives could be applied for the first time, to an extent, in a programme known as Street Clinic (*Consultório na Rua*), a primary health care project for homeless people that features many components of harm reduction for drug use in its services.

Nevertheless, despite being official, harm reduction is far from being a consolidated policy in Brazil. The harm reduction profession has never been regulated and the initiatives that are not covered by the Street Clinic programme are funded at the local level. Services that do not require abstinence by users are the exception, there are no rooms allocated for the safe use of drugs and innovative programmes such as Open Arms (*De Braços Abertos*) launched in 2014, which provides accommodation, food and employment for crack misusers in the city of São Paulo without requiring abstinence in exchange, are admirable but rare exceptions.

There has been a recent growth of conservative political forces in the country that often have ties with religious

groups and are closely associated with models of treatment that focus on abstinence. This has jeopardised the acceptance and the potential of harm reduction and has not helped the progress and expansion of this approach, which has nevertheless continued resolutely as an official policy of the Brazilian state.

The case of therapeutic communities in Brazil: secular state, religious treatment?

Brazil has seen a dramatic increase in the number of CAPS-AD centres: from zero in 2002 to more than 400 today.[9] Although this constitutes an investment that deserves to be recognised, the country is still clearly deficient when it comes to catering to the demands generated by people who use the health system and who want treatment for drug abuse.

The most traditional service in the context of care for these people in Brazil undoubtedly consists of therapeutic communities (TCs). The model of recovery for drug users proposed by Brazilian TCs is similar to the one inspired by the system in the US and combines the therapeutic community model, which served as one of the pillars for the movement to reform the country's mental health service, with elements of the 12-step programmes of Alcoholics Anonymous (AA) and Narcotics Anonymous (NA).[10] These programmes make several assumptions, but in particular that drug abuse is without exception a chronic and incurable illness and an opportunity to develop spiritually. Both notions are essential to the working structure of the therapeutic communities and the second establishes a link with groups that, given the almost complete vacuum left by the state until the 21st century, have invested in these types of treatment centres: Evangelicals, Catholics and Spiritualists.

Brazilian TCs are extremely diverse and estimates on their number in Brazil are elusive.[11] One of the problems is the extremely flexible use of the term, something that some TC federations have expressed an interest in combating. Strictly speaking, a TC should be centred on voluntary attendance and not involve the administration of drug therapy. From this point of view, it makes sense that many of these communities do not wish to be considered health services. However experience shows that there are many such communities – especially private ones – that do not respect these criteria but are still called TCs.

Two complex problems that have still not been satisfactorily resolved by the Brazilian state are the regulation and funding of these services. Contrary to the wishes of the TCs that are organised into federations, the decree issued by the Brazilian Ministry of Health that established the Psychosocial Care Network (RAPS) considers TCs to be part of the health system. This means that they have to operate in compliance with the regulations governing the SUS (Brazil's public health care system), which, as we have already seen, includes harm reduction strategies, something that therapeutic communities vehemently reject. Recently the National Council on Drug Policy (CONAD) issued a resolution in an attempt to organise the myriad of TCs.[12] The resolution prompted harsh criticisms from various social actors in the Brazilian health and human rights fields, who argued that the regulations it established are inadequate for settings where there is a risk of slave labour, among other human rights violations, and religious indoctrination as a form of state-funded treatment.

Despite the still uncertain regulation, funding for TCs is already being released by municipal, state and even federal authorities through the National Department on Drug Policy (SENAD), which is potentially problematic in a country that is constitutionally defined as secular. The existence of religious institutions that use their doctrines as a form of treatment is not in itself a problem, provided they are charities that receive no state funding and are run exclusively for the care of their faith communities. In a public health context, however, this amounts to public funding for the proselytism of any Brazilian citizen. Agnostics, atheists and people of minority faiths have no public option other than to be subjected to the treatment of a given religious creed if they are referred to a faith-based TC.

Although the spiritual component can, in theory, have a positive effect on the treatment of people with substance abuse issues, the potential for coercion, however subtle, towards the doctrine of one particular religion is at best questionable for a state-funded programme, especially when there are serious allegations of abuse.

A report on human rights violations at treatment centres for drug misusers prepared by the Federal Psychology Council illustrated just how far these abuses can go.[13] It is difficult to quantify how many communities present the serious situations identified in the report – forced confinement, slave labour conditions, medical neglect – but even supposing they are exceptional, this would require the Brazilian state to establish strict rules and intense oversight, since the political forces sympathetic to TCs appear not to permit – with a few rare exceptions – secular services accredited with RAPS to cater to people who need and want temporary refuge in residential facilities. These services, called Refuge Centres, do exist but generally speaking they are in the early stages of development.

Concluding remarks

As even this brief report has been able to demonstrate, we can see that the supposedly official responses of drug policies constitute a field in full dispute. Even though the political group allegedly associated with the defence of harm reduction, public health care and human rights has remained in power now for twelve years, this defence has not been strong enough to overcome the conservative mindset aligned with the ethics of the "war on drugs" that is embedded in the ideology of a nation bombarded on a daily basis by incidents of violence, but instead has turned the discussion on the official policy and the pragmatic execution of this policy into a field fraught with contradictions.

More serious than this, the firm defence of human rights is also plagued with these contradictions. Currently in Brazil it is not certain whether the defence of the rights of drug users is, in practice, a priority. Similarly, there is clearly a great deal of friction surrounding the need to introduce strict oversight and challenge the model of therapeutic communities as a public service. As a result of this situation, therefore, it is important for organisations committed to human rights in the country to be aware, active and informed, since they will definitely need to be ready to contribute and reduce the harm that will emerge from these paradoxes.

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Received in April 2015.
Original in Portuguese. Translated by Barney Whiteoak.

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sur international journal on human rights - Aug/2015 -

issue 21

THE SUR FILE ON DRUGS AND HUMAN RIGHTS

BRAZIL: CRITICAL REFLECTIONS ON A REPRESSIVE DRUG POLICY

Luciana Boiteux

• *How alternative national drug policies reinforce the need for changes at the global level.* •

ABSTRACT

This article addresses the topic of international drug control and Brazil's adherence to drug conventions and human rights treaties. Moreover, it analyses the changes in the current prohibitionist drug model based on new international experiences and on the UN General Assembly Special Session (UNGASS) to be held in 2016, given the inefficiency of repressive policies that have led to increased violence, incarceration and rights violations.

KEYWORDS

Drug policy | International treaties | Prohibition | Repression

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Current statistics on the abusive consumption of psychoactive substances, the rising number of users and the enormous amount of drugs that are sold illegally point to a far worse problem of use/abuse than existed in the early the 20th century,[1] when narcotic and psychotropic substances were not yet subject to any form of legal or specifically criminal control.[2]

Similarly, the creation of a prohibitionist system[3] - due to international conventions that have imposed a strict criminal control on illegal drugs and the expansion of international cooperation against drug trafficking - has not brought the results which the prohibitionist system claims it would bring: eradicating the production of illegal drugs and reducing consumption through a supposed increase in protection of public health.

Given this situation it should be noted that Brazil is a signatory to all the international drug control conventions, which have been, without exception, translated into domestic law, and that Brazil is characterised by its broad implementation of the prohibitionist policy, which was easily adapted to Brazil's own repressive model.[4]

Although it was not Brazil, but rather the US, that was the primary instigator of prohibition, there have been at least two occasions when Brazil was a protagonist of prohibition. First was the criminalisation of the possession and sale of cannabis in 1830 in Rio de Janeiro by the state legislature, before this substance was included on the list of internationally controlled drugs.[5] Second, was the support given by the Brazilian delegate Dr. Pernambuco Filho during discussions at the Second International Opium Conference, held in Geneva in 1924, for the prohibition of marijuana. Dr. Pernambuco Filho sided with the Egyptian delegation in defending the inclusion of this plant, together with opium and cocaine, on the list of controlled substances, even though the issue was not initially on the agenda

for discussion.[6] According to Kendell,[7] the speech by the Brazilian delegate, who claimed that marijuana was "as dangerous as opium", helped rally support for the Egyptian proposal that ended up being approved at the conference.

Currently, international drug policy is based on three conventions: the Single Convention on Narcotic Drugs of 1961 and its Additional Protocol of 1972, the Convention on Psychotropic Substances of 1971 and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. All three were established under the aegis of the United Nations and have been signed and ratified by more than 95% of the world's countries.[8]

Nevertheless, Uruguay has recently passed a law regulating the production, sale and consumption of cannabis both for recreational and therapeutic purposes. In the US - the "cradle" of prohibition - four states have already legalised the consumption of cannabis for recreational purposes: Colorado, Washington State, Oregon and Alaska, despite the ban at the federal level. Another twenty-four US states have authorised the drug for medical purposes.[9] There are also initiatives in place in countries such as Costa Rica, which has reduced sentences for women convicted of drug trafficking, and Ecuador, which has pardoned "mules" and small-time dealers and changed its drug law to recognise objective quantities in order to distinguish between users and traffickers, establishing more proportional penalties for these offences. These and other international experiences with alternative approaches that are now recognised, even by the Organization of American States,[10] have marked the current moment in history and are partly in conflict with the texts of the prohibitionist conventions.

These changes on the national level are threatening the stability of the international system, particularly given the shift in public opinion, which is now more open to reforming the current model of drug laws and treaties. Moreover, in addition to the examples cited above, the positive results of the new drug law in Portugal should also be noted. In 2001 the country decriminalised the possession of all drugs for personal use and has managed to reduce consumption among adolescents as well as increase access to treatment.[11] Against this backdrop there are at least three countries that have assumed a prominent role in international discussions - Colombia, Mexico and Guatemala - which are the leading voices calling for discussions to be reopened on the topic at the United Nations. The most recent news on this front is the UN General Assembly Special Session (UNGASS) in 2016 which will discuss the drug issue.[12]

Accordingly, what we have today, more than 100 years since the first prohibitionist treaties, is the realisation that despite the widespread acceptance (and ratification) of drug control conventions by governments, the intended goals of reducing consumption, curbing production and eradicating these substances have not been achieved. This is despite the fact that incarceration rates for drug crimes are high in most countries, especially in Latin America.[13] Meanwhile the authorities, by prioritising incarceration and the enforcement of "anti-drug" conventions over international human rights treaties, which are hierarchically superior, have been inflicting large-scale and widespread rights violations worldwide under the pretext of complying with drug laws.[14]

To understand this issue, we can take the example of Brazil. In 2006 Brazil passed the "new" Drug Law, No. 11,343/06, which makes formal progress in both recognising the rights of users and also in the harm reduction strategy it establishes. This law, despite providing for the decriminalisation of the user (article 28),[15] increased the minimum sentence for the crime of trafficking (article 33) from three to five years, which has been identified as the primary cause of over-incarceration in Brazil. The country ranks fourth in absolute number of prisoners, behind only the US, China and Russia, with more than 500,000 prisoners in total, while drug trafficking is the second highest cause of incarceration (nearly 26%).[16] A survey conducted in Rio de Janeiro and Brasília found that most prisoners convicted of drug trafficking were first-time offenders who were arrested alone, unarmed, in possession of small amounts of drugs and with no connection to organised crime.[17]

Since this offence is considered a "heinous crime", the Brazilian judiciary reinforces the repressive model by routinely denying suspects the right to release pending trial and also by rarely applying alternative sentences to imprisonment.[18] This has resulted in a significant increase in the number of people imprisoned in inhumane conditions, as has already been denounced in the Inter-American Court of Human Rights, in the case of the Urso Branco Prison.[19] In 2002 a massacre of dozens of inmates occurred at the prison, which is located in the state of Rondônia.

Briefly, some other examples of human rights violations committed in the name of enforcing "anti-drug" laws can be seen in Indonesia, which frequently applies the death penalty for drug traffickers, and in Latin America where the spraying of coca plantations causes serious ecological and human harm due to the chemicals that are used. Moreover, we can also cite the violation of the individual rights of consumers to privacy and the freedom to use their own bodies as they wish without harming others. Finally, we should also mention the collective rights of the indigenous populations of Latin America to use traditional psychoactive substances, such as the coca leaf, essential to the affirmation of their customs and culture, which are not respected by drug control laws and treaties.

There are currently more signatory countries of the UN drug conventions, which operate under the war on drugs paradigm, than countries that have ratified and enforced human rights treaties. If we analyse the situation in Brazil, while the country was quick to sign all the anti-drug conventions, the same cannot be said about its efforts to adhere to international human rights treaties. Indeed the very opposite occurred, i.e. a belated ratification of international human rights treaties, which only started in the 1980s and 1990s. Moreover, some important treaties still need to be incorporated into Brazilian law, namely the UN Convention for the Protection of All Persons from Enforced Disappearance.[20]

Therefore it can be said that Brazil's broad acceptance of drug control treaties, including during the civil-military dictatorship of 1964-1984, is not the result of a general endorsement of the international agenda, but rather a specific internal interest to intensify repression in various fields, including in its drug policy. Meanwhile the country has been slow to adhere to the universal and regional systems of human rights protection as a result of the structural violence practiced by the Brazilian state and its adoption of a punitive criminal policy. The result has been an increase in violence, overcrowding of prisons and a rise in the consumption of illegal substances such as crack, the use of which has spread throughout the country[21] as a direct result of prohibition.[22]

More recently, prohibition of some drugs has prevented the population from having access to essential medicines for certain critical illnesses, such as autism and epilepsy in children, for which medical marijuana may be an effective treatment.[23] Regardless of this medical evidence, the repressive model restricts access to this treatment and thus denies any therapeutic benefits of cannabis. There has however been some recent progress, such as the decision of the Federal Council of Medicine and the Regional Council of Medicine of the State of São Paulo (CREMESP), which authorised, for specific cases, the use of cannabidiol, a derivative of cannabis sativa.[24]

Medical discourse in relation to health protection plays a prominent role in the current drug control policy. Despite this rhetoric, economic interests shape the policy in several ways. For example, it is noted that prohibited drugs and semi-clandestine consumption coexist – in a contradictory manner - with legal "therapeutic" substances manufactured by large multinational companies. It is therefore clear that the distinction between what is prohibited and what is legal is made by political and legislative criteria influenced especially by economic interests and not by considerations based on health protection.[25]

The fact is that, in the choice of the behaviours that are criminalised under the justification of "health protection", and in the actions of the courts that enforce such criminalisation, there is a major contradiction between drug control treaties and human rights treaties. For example, the Convention of 1961 expressly bans the smoking and ingestion of opium, as well as the simple chewing of coca leaves (an ancestral practice in the Andean region), and it bans the non-medical use of cannabis (a cultural tradition of Mexicans), establishing a time frame for the eradication of these plants, i.e. in blatant violation of the human rights of these people and their ancient customs.

Similarly the Convention of 1988 contains provisions intended to eradicate the cultivation of narcotic plants, and it was this treaty that definitively internationalised the "war on drugs" policy that legitimised, among other things, US military intervention in other countries. This policy also recommended longer prison sentences for drug crimes, not only for drug traffickers but also for users.[26]

The problem of this punitive discourse is that it not only defines the enemy, but that it also transfers most of the responsibility to the Latin American countries that produce the drugs. The militarisation of the "war" on drugs, police

violence, the preference for a symbolic criminal law,[27] increased sentences and mass incarceration are consequences of the incorporation and reinforcement of this punitive discourse in Brazil.[28]

This repressive policy, reinforced by the commotion and sensationalism propagated by the corporate media, is intended to guarantee the election of "hardline" conservative politicians and to secure, both in the US and in Brazil, the approval of large budgets for public security and the construction of prisons or, in the words of Christie, "*for the crime control industry*",[29] a market that is worth billions of dollars per year.

Overcoming the binary model of repression and prohibition: experiments at the national level

Since the last century, most developed countries have established a prohibitionist and militaristic policy, influenced by the US, the primary goal of which is to reduce the production of drugs at any cost, while imposing excessive obligations on developing countries, but guaranteeing high profits for the black market that has thrived from drug prohibition.

Meanwhile, some European countries such as Portugal (since 2001), Holland (since the 1970s) and, more recently, Uruguay (since 2014) and the US states mentioned earlier, have taken steps to decriminalise and regulate the consumption and sale of cannabis and to introduce harm reduction programmes.

Since 1912, when the international community created the first multilateral drug control treaty, thirteen such treaties have been discussed, drafted, signed and ratified by most countries in the world, which decided to adopt a common strategy to address the drug problem. However few concrete results have come from the implementation of these treaties, while the production, trafficking and consumption of illegal substances continues worldwide.

In light of this situation, we must seriously ask ourselves whether this international policy is the best approach and stress the need to consider alternatives to the current model with respect to the cultural, ethnic and economic elements of the problem, instead of persisting with a uniform and repressive system that has not even come close to achieving its proposed goals.

Notably in developing countries like Brazil, where the social impact of illegal drugs and trafficking is particularly high and where violence against racial minorities is still a major problem, it is especially urgent to criticise the current model - which is totally outdated - and look for new solutions. This includes the need for an urgent reform of the international drug control system in order to develop national models that can be assessed by their results in terms of realising rights rather than restricting them.

Although there is no possibility of a radical overhaul of the international drug control system in the near future, even though this would be desirable, perhaps with the opportunity of UNGASS 2016, and despite the resistance to change by the vast majority of countries, there is a chance of reaching some consensus towards a more flexible interpretation (while keeping the formal integrity) of the treaties. That way, countries can pursue their own alternative solutions to the international model.

And what about the situation in Brazil? The prospects are not encouraging, given the ultra-conservative profile of the National Congress elected in 2014, not to mention the repressive institutional practices - so entrenched in the judiciary and in the population itself, which legitimise imprisonment as a magic solution to crime and drug abuse. On the other hand, a bill is already pending in Congress that would create a regulated cannabis market, proposed by Federal Congressman Jean Wyllys. Therefore, given the greater international openness for discussion and the new alternatives adopted in some countries, it is hoped that Brazil will engage in the debates on the topic in order to try and break with this repressive tradition that violates human rights and, in doing so, reach new heights as a country that is more just and protective of rights. This, however, will only be possible if we change the current paradigm.

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Received in June 2015.
Original in Portuguese. Translated by Barney Whitoak.

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sur international journal on human rights
- Aug/2015 -
issue 21

THE SUR FILE ON DRUGS AND HUMAN RIGHTS

THE ELEPHANT IN THE ROOM: DRUGS AND HUMAN RIGHTS IN LATIN AMERICA

Juan Carlos Garzón, Luciana Pol

• *A revision of the current drug policy in the region and the world is necessary in order to address systematic human rights violations.* •

ABSTRACT

This article seeks to expose the tensions between the enforcement of drug laws and human rights. Due to their varied impacts and negative consequences, drug policies can act to increase violence against, and cause the repression of, the most vulnerable sectors of the population in the countries where they are being implemented.

Starting with an analysis of the impacts of the implementation of the international drug control regime and critical factors related to the violation of human rights, the authors highlight the challenges that United Nations Special Session of the General Assembly in 2016 (UNGASS 2016) faces in defining drug policies for decades to come, with special attention given to Latin America.

KEYWORDS

War on drugs | Human rights | International Drug Control Regime | United Nations Special Session 2016 | Latin America | UNGASS

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The workings of the International Drug Control Regime (IDCR) has led to systematic abuses of human rights and fundamental freedoms. Despite considerable evidence of the harm caused by the punitive enforcement of drug laws, it is only recently that people have begun to talk openly about this issue. For decades, the implementation and monitoring of drug control conventions has ignored states' obligations in the area of human rights. The multilateral bodies in charge of overseeing the IDCR have been carrying out their mandates while ignoring the elephant in the room.

In this context, calls for a review of current drug policies are growing stronger in the run-up to the United Nations Special Session on the world drug problem in 2016 (UNGASS 2016), which will convene to assess the strengths and weaknesses of the current regime.

The purpose of this article is to briefly analyse the tension that exists between the implementation of the IDCR and the protection of human rights by showing how, in the framework of the so-called "war on drugs," human rights obligations have been overlooked or, at best, only marginally acknowledged. In the second section, evidence will demonstrate how, in practice, the enforcement of drug laws has produced varied effects and negative consequences, with special attention on Latin America. Finally, this text will discuss recent developments in relation to UNGASS 2016.

The elephant in the room: the divorce between drug policies and human rights

The international drug control regime is based on three treaties: the Single Convention on Narcotic Drugs, 1961; the Convention on Psychotropic Substances, 1971; and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. As a whole, the regime's objective is to control drugs to guarantee that they are available for medical and scientific purposes, and prevent the diversion of a defined set of substances for other uses. From a human rights stance, it is important to highlight that the preambles of the three conventions contain references to "health" and "welfare of mankind" as superior "moral" objectives. Human rights, on the other hand, are only explicitly mentioned once in the three treaties: in Article 14(2) of the Convention of 1988.

Although, and as is the case with many other treaties, there are only minor references to human rights, the conventions must be applied and interpreted in accordance with existing human rights obligations. As Rodrigo Uprimny points out, the state's duty to respect these rights is an obligation that has its basis in the Charter of the United Nations – a treaty that prevails over all other conventions. Thus, states' obligations with regards to drug control must be interpreted in a way that is compatible with international human rights obligations – and not the other way around.[1] However, in practice, there has been a divorce between the fulfilment of the commitments required under the IDCR and human rights obligations.

How does one explain this divorce? There is no single answer. On one hand, one can argue that the conventions oblige countries to adopt criminal sanctions to combat all aspects related to the production, possession and trafficking of drugs, and that this has resulted in the adoption of repressive policies.[2] It is the predominantly punitive interpretation of responsibilities that has led to human rights abuses and the deterioration of personal freedoms. From this standpoint, compliance with drug conventions has led to non-compliance with human rights obligations.

On the other hand, and as the United Nations Office on Drugs and Crime (UNODC) argues, while it is true that human rights have been violated in the name of the war on drugs, nothing in the drug conventions permits acts such as torture, coercion, humiliating and degrading treatment or the death penalty.[3] In fact, the conventions permit countries to adopt a proportional response, for example offering non-custodial alternatives for minor offences. From this perspective, the problem is not the conventions themselves, but rather how they are interpreted.

Reality obliges us to analyse the conventions not solely for their intentions, but rather their results, which have not been consistent with, nor have given priority to, the human rights obligations of states. As Damon Barrett has suggested, the IDCR has ignored the risks arising from its implementation, lacks clear and specific guidelines on such issues and cannot count upon bodies to regulate and monitor compliance as is the case, for example, for trade or counterterrorist activities.[4]

It was only in 2008 that the UN Commission on Narcotic Drugs (CND) even adopted a resolution on human rights[5] and approval for this resolution only became possible once references to the death penalty, the rights of indigenous peoples and specific UN human rights mechanisms had been removed.[6] Since that date though, human rights protections have appeared more frequently in resolutions and declarations.

In 2009, the UN Special Rapporteur on torture, Manfred Nowak, cited the enforcement of drug laws as one of the arguments used by governments to justify human rights violations. In 2010, the Special Rapporteur on the Right to Health expressed his concern about "the fact that the current focus on drug control was causing more harm than it aimed to prevent." In 2012, a joint statement of several UN bodies called upon states to close compulsory rehabilitation centres and to set up health care services based on a human rights approach.[7] In 2010, the UNODC produced a report for the CND on drug control and criminal justice policies from a human rights perspective.[8] Furthermore, in 2012, the UNODC published a guidance note addressed to its personnel.[9]

What is more, the 2015 report of the International Narcotics Control Board (INCB) expressed concern with states which continue to use the death penalty for drug-related offences.[10] The UN Human Rights Committee called upon these countries to put an end to this practice.

Little by little, acknowledgment of the "elephant in the room" has increased, even though there is still considerable resistance from some states who do not see the need to have drug enforcement laws comply with human rights obligations. For example, more than twelve countries include corporal punishment as a potential punishment for drug-related crimes in their legislation.[11] Moreover, countries such as Russia and China openly oppose having this debate. However, even though the debate on abuses has intensified, the negative consequences persist. The punitive approach is still the norm, as is the excessive use of criminal law to address problems that are directly linked to public health and development.

"The war on drugs": a history of human rights abuses

There is a correlation between the creation and development of an international drug control regime and a variety of abuses and negative consequences. In 2008, the UNODC World Drug Report[12] identified a series of "unintended negative consequences" of drug control actions. The same year, in a guide for its employees, UNODC admitted that "there is a small, but ever present, risk that UNODC activities could have a negative impact on human rights."[13] In practice, the IDCR has become a system of risks in which "collateral damage" is the rule, not the exception.

The recently published report of the United Nations Development Programme (UNDP) affirms that "In many countries around the world, drug control efforts result in serious human rights abuses."[14] Moreover, UNDP states that "Communities also face serious human rights abuses by large-scale drug trafficking organizations."[15] Under the current regime, not only have states not refrained from interfering in the enjoyment of human rights (the duty to respect), they have also failed to adopt the necessary measures to guarantee and protect human rights.

The list of impacts is long and their implications are far-reaching. The most severe forms of drug enforcement laws have resulted in torture, extrajudicial executions and forced disappearances by agents of the state. In the name of the "war on drugs" and the fight against crime, institutions have ignored their obligations in relation to systematic violations, and not just in a few serious but isolated cases. The brunt of these actions has fallen mainly on vulnerable populations: the young, the poor and the marginalised.[16]

In countries where the fight against drug trafficking has been most intense – Colombia, Brazil, Mexico and Honduras, to name a few examples – repression of drug activities has literally led to a "war" with a clearly defined enemy (growers, consumers, smugglers and drug "lords"), the use of armed units (including military forces deployed in public policing and security roles) and thousands of victims.[17]

The interventions initiated under the IDCR have exacerbated the violence and the insecurity they were meant to resolve. The fight against drug trafficking has had impacts on numerous communities that find themselves directly affected either due to their geographic proximity to drug trafficking routes or through the dynamics of the violence associated with drug trafficking and sales.

A meta-analysis conducted by Werb et al. concluded that armed violence and high homicide rates could be a consequence of the prohibition of drugs.[18] In Mexico, a recent study elaborated by Valeria Espinosa and Donald Rubin found that interventions carried out by the army to repress narco-trafficking caused an increase in homicide rates.[19] In Colombia, some estimates indicate that drug production operations cost the lives of between 4,000 and 7,000 people each year and have displaced between 180,000 and 277,000 people.[20]

Severe drug prohibition regimes favour criminal sanctions as a primary response, leading to the application of disproportionate punishments and ever increasing sentences. In Latin America in particular, both minimum and maximum sentences have increased up to twenty fold in the last 50 years.[21] A special mention should also be given to the use by 33 countries and territories of the death penalty for drug-related crimes.[22] Hundreds of people have been executed in countries such as China, Iran, Pakistan, Indonesia and Thailand. Also, half a million people are being held in detention centres – as part of their punishment – in countries such as Cambodia, Vietnam and Laos.[23]

In some countries, the need to repress the illegal drug market has been used to justify the introduction of exceptional legislative measures that override due process protections. Based on arguments that the exceptional threat posed by organised crime and the complexity involved in addressing the problem, laws and policies such as arbitrary pre-trial detention have been adopted, unjustifiably expanding the state's detention powers, in contradiction to normal understandings of justice. As Alejandro Madrazo points out, the costs of the war on drugs also include costs at a constitutional level: that is, the abandonment of certain basic democratic requirements mainly in the form of the reduction or abandonment of fundamental principles of law or the restructuring of government obligations. Such modifications are introduced on the basis they are needed to fight the threat of drug production and trafficking.[24]

The excessive use of repressive measures – which, the majority of the time, are related to minor offenses – have caused prison populations to grow. This, in turn, has worsened the problem of overcrowding in various countries. In the United States alone, the total number of people in prison rose from 330,000 in 1972 to nearly 2.3 million people in 2011.[25] 50% of the prisoners in federal prisons and 20% of those in state prisons were convicted of selling or buying drugs.[26]

In the case of Brazil, the Law on Drugs (Law n° 11.343/06), was adopted in 2006, which raised the minimum sentence for trafficking and, at the same time, decriminalized possession for personal use. However, the law did not make a clear distinction between these categories. As a result, the incidence of these crimes in the justice system rose considerably, and contributed to the overall increase in the total number of prisoners. In 2006, 47,472 people were detained for drug trafficking, which represented 14% of arrests for all crimes.[27] The official data for 2013 shows that 30% of the prison population had committed drug trafficking crimes. People imprisoned for drug-related offences are a sizeable group in the majority of Latin American countries: 45% in Bolivia, 34% in Ecuador and 24% in Peru.[28] Authors such as Loic Wacquant identify imprisonment as a mechanism for controlling marginalised groups (even replacing ghettos) and the war on drugs is the process that sustains and justifies these criminal prosecutions.[29]

A matter of special concern is the incarceration of women for drug-related crimes. In Latin America, the female prison population practically doubled between 2006 and 2011, rising from 40,000 to more than 74,000. The majority of these women are imprisoned due to minor drug-related offenses. Imprisonment has devastating impacts on the detained women, their children, families and communities.[30]

Furthermore, compulsory crop eradication and fumigation programmes have had negative impacts on the population. In some cases, these actions have led to the displacement of people, a decline in their standard of living, food insecurity and social conflict. In the specific case of Colombia, there is evidence that the use of glyphosate for spraying has had negative effects on human health and the environment.[31]

What is more, the criminalisation of consumption and the obstacles to implementing harm reduction programmes have stimulated high risk behaviour – such as sharing syringes and needles – and the spread of HIV and Hepatitis C in some countries.[32] Punitive treatment of a public health problem – such as addiction to, and the problematic use of, drugs – has also limited the access to quality health treatments and augmented the likelihood of drug overdose.[33]

In sum, the negative impacts of the punitive enforcement of a prohibitionist model have been broad and severe. Meanwhile, with regards its own objectives, the IDCR has made only modest progress. Despite partial advances in some countries – such as declining cocaine consumption in the United States and Europe, which has contributed to a decrease in production[34] – the magnitude of the demand for drugs has not changed substantially at the global level. Yet, in spite of its low levels of efficiency, the IDCR has succeeded in creating real humanitarian crises in a number of countries with consequences falling upon the most vulnerable sectors of the population. This is especially true of countries that adopt repressive measures in circumstances of institutional weakness marked by low levels of transparency and little state capacity to provide citizens with public services.

Repeated human rights abuses and restriction of freedoms constitute a systematic problem that is hard to hide. In spite of the evidence, there is still strong resistance to implementing drug policies from a human rights perspective.

The IDCR tends to protect itself and preserve its hermetic nature, arguing that changes to drug policies could erode the system and put its legitimacy at risk.[35] In view of this, UNGASS 2016 and its preparation process – which includes various spaces for discussion in multilateral forums – provides an opportunity to expose the divorce between the IDCR and human rights, as well as the need to incorporate guidelines that guide the enforcement of drug policies.

Prospects for the future: human rights and UNGASS 2016

In recent years, the debate on drug policies has intensified, as experts, non-governmental organisations and, more recently, current and former political leaders have adopted more critical stances that not only question the policies' effectiveness, but also their grave side effects. One of the issues raised is the negative effects the IDCR has had on respect for, and guarantee of, human rights; a debate that has been particularly strong in Latin America.

At the multilateral level, the joint declaration in 2012 by three Latin American countries – Colombia, Guatemala and Mexico – calling upon United Nations Member States to assess the scope and limitations of current policy is worth highlighting. In that statement, leaders requested that an international conference be held with the goal of taking the necessary decisions. In response to this request, the United Nations General Secretary convened a special session of the General Assembly (UNGASS) in 2016. Since that announcement, there has been an intense discussion on how to guarantee that human rights are kept at the centre of the debate.

The preparatory process for UNGASS is being conducted in Vienna by the Commission on Narcotic Drugs (CND), the UN organ responsible for defining international policies related to illegal substances. Even though in the past the CND showed resistance to the inclusion of other agencies and the participation of external actors, it recently adopted a resolution[36] authorising civil society organisations and academics to participate in the preparation and holding of UNGASS.

In its last session in 2015, the UN Human Rights Council took a fundamental step towards ensuring that the human rights perspective will be present at UNGASS. It approved by consensus a resolution – co-sponsored by 47 countries from Europe, Latin America, Asia, Africa and Oceania – that determined that more information is needed to inform the discussion.[37] The resolution calls for a panel of experts to discuss drug policies and their impacts on individual rights. This resolution also requests that the High Commissioner for Human Rights prepare a technical report on the issue.

A special section is expected to be included in the UNGASS agenda to address this issue, which constitutes a major opportunity to make up for the historical absence of human rights from discussions on drug policies. Damon Barrett suggests that, similar to other areas – for example, trade – countries should adopt a special procedure on human rights and drug control. This could be the path to establishing criteria to guarantee that IDRC takes into account existing obligations in the human rights field.

A good point of reference is the Organisation of American States (OAS) General Assembly Resolution 44: "Promotion and protection of human rights in the search for new approaches and effective solutions in the development and implementation of policies for addressing the world drug problem in the Americas." Through this resolution, states reaffirm that "...drug policies must be implemented with full respect for national and international law, including due process and full respect for human rights."[38]

Latin America undoubtedly plays a vital role in this debate, but it must overcome not only its internal differences, but also face strong resistance from other blocks and countries. China and Russia are hard-line opponents to reforming the system. The European Union has a cautious and, on occasions, disinterested attitude towards the debate. Africa has been defending the *status quo* and the need to combat drugs. The United States has recently moderated its position and appears more open to discussion, partly due to the prison crisis it is facing and partly because of the legislative reforms various American states have introduced legalising cannabis. Late 2015 and early 2016 will set the stage for the preparation of UNGASS and may (or may not) bring concrete changes to the current regime.

Regardless of what happens at UNGASS 2016, this change must also be driven from below through more active participation of human rights organisations, especially in the countries that have borne the greatest costs of the implementation of drug policies. It is important to give a voice to the victims of the "war on drugs," which now number in the thousands, while taking measures to ensure that the negative consequences of the punitive approach will not be repeated.

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Received in: April, 2015.
Original in English.

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Received in: April, 2015.
Original in English.

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sur international journal on human rights - Aug/2015 -

issue 21

THE SUR FILE ON DRUGS AND HUMAN RIGHTS

ASIA: ADVOCATING FOR HUMANE AND EFFECTIVE DRUG POLICIES

Gloria Lai

he International Drug Policy Consortium calls for greater civil society engagement in drug policy in the run up to UNGASS 2016.

ABSTRACT

In many parts of the world, governments have begun to openly question the effectiveness of repressive drug control policies. However in Asia, drug policy debate is seriously limited. Both the use and supply of controlled drugs are regarded as a threat to state security that must be eradicated, justifying the implementation of severely punitive drug policies. There is little public support for challenging these harsh policies. The author argues that civil society must advocate for, and help facilitate, a more open and rational dialogue with governments to encourage them to engage in an honest assessment of the current approach. This dialogue is urgently needed in the lead up to the UN General Assembly Special Session on the world drug problem in April 2016.

KEYWORDS

Drug Policy | Human rights | Harm reduction | Drugs | Public health | Advocacy | Development | Asia | Southeast Asia

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Many countries outside Asia are experimenting with alternative drug policy approaches. This includes, for example, the decriminalisation of drug use, wide-ranging harm reduction interventions, alternatives to incarceration and criminal sanctions for minor drug offences, and legally regulated cannabis markets. However, Asia as a region seems unable to move away from a repressive and punitive approach to drugs. Both the use and supply of controlled drugs are often regarded as a threat to state security that must be eradicated, as demonstrated by regional and national drug strategies that aim for “drug-free” societies.[1] The use of any controlled drug is considered a moral failing that cannot be tolerated.

As a result, there is little public support for challenging the implementation or effectiveness of harsh drug policies. This is despite the inadequacy of existing approaches, which have not only failed to prevent rapidly expanding drug markets and drug-related harm but also have led to human rights violations ranging from the compulsory detention of people who use drugs to mandatory death penalty sentences.[2] In addition, many governments in the region do not permit space for critical civil society engagement on the topic of drug policy, due partly to the framing of drugs as a threat to state security and to the general repression of civil society activism in some countries. In China, for example, the activities of non-government organisations are closely monitored and their staff subject to random interrogations by public security forces if they engage in activities deemed threatening to the state.[3]

Nevertheless, after injecting drug use and associated HIV prevalence rates began increasing in the 1990s, international funding for HIV prevention, treatment and care helped to facilitate the establishment of harm reduction programmes in the region which enabled, to a limited extent, civil society organisations and networks of people who use drugs to gain a role as expert providers of essential health and harm reduction services.[4] In response, many Asian governments introduced some level of policy reform to approach drug use as a health issue rather than a crime, often featuring the seemingly well-meaning yet inaccurate and stigmatising slogan "drug users are patients, not criminals."[5] However, the prevailing drug policy frameworks and fundamental objectives of eradicating drug markets have not changed. Drugs continue to be regarded as a social evil that must be eliminated, and people who use drugs continue to be the target of punitive drug policies, even though the region's expanding drug markets show the failure of governments to achieve the drug policy objectives they have set for themselves.

In Asia, all countries imprison people for using drugs and many countries carry out police raids to arrest users, as well as subjecting them to human rights abuses ranging from forced urine testing, compulsory registration with security agencies, torture and multiple forms of arbitrary detention.[6] It has become clear that the region needs not only civil society to advocate for the scaling up of harm reduction and drug treatment service provision, but also drug policies that are not based on criminalisation and punishment but upon principles of health, harm reduction and human rights. In the lead up to the UN General Assembly Special Session on the world drug problem, to be held in New York between 19 – 21 April 2016, the need for such civil society engagement is urgent in order to ensure that member states participate in open and honest dialogue about drug policies that are working, and those that are not.

The International Drug Policy Consortium in Asia

As a global network of over 130 civil society organisations, with a secretariat based in Bangkok and London, the International Drug Policy Consortium (IDPC) advocates for national and international drug policies that are grounded in the principles of human rights, human security, social inclusion, public health, development and civil society engagement. A key mission of the IDPC is to promote evidence-based drug policies that are focused on reducing the harmful consequences rather than solely aiming at reducing the scale of drug use and markets.

As with other regions of the world, IDPC seeks to stimulate open and objective dialogue on drug policy in Asia by publishing and disseminating relevant research and policy analysis, and organising forums to offer space for such dialogue. Open and meaningful drug policy dialogue relies also on the equal participation of policymakers and civil society, including experts and people most affected by drug policies, especially people who use drugs. IDPC therefore works to increase civil society capacity by ensuring effective communications on drug policy developments and advocacy opportunities throughout the network, and by conducting workshops on drug policy advocacy in countries including Thailand, Indonesia, India, Malaysia and Myanmar.

Developing constructive relationships with civil society representatives, policymakers and key international institutions working on global drug policy issues, including the United Nations Office on Drugs and Crime (UNODC) and World Health Organisation (WHO), is a critical and constant task for IDPC. This helps to ensure the equal participation of all stakeholders in ongoing, evidence-based drug policy dialogue. The challenges to achieving this goal in Asia are significant, ranging from lack of capacity and engagement amongst civil society actors to lack of transparency, accountability and opportunity for civil society input in drug policymaking processes.

The work of the IDPC in Asia can be exemplified by its actions following the Indonesian President's announcement in December 2014 that all the 64 people on death row for drug offences would be executed. IDPC worked alongside local and international advocates representing people who use drugs, non-government organisations providing legal, health and harm reduction services, and academics to call for a halt to the executions through multiple advocacy strategies aiming to sway policymakers and public opinion. Joint activities included a protest at the entrance to the annual meeting of the global drug policymaking body, the UN Commission on Narcotic Drugs (CND), in Vienna, Austria, as well as at the UN headquarters in New York during another CND meeting; discussions with the Indonesian

delegation and open dialogues at CND to discuss better drug policy alternatives; sending letters to the Indonesian President and heads of the two UN institutions with primary responsibility for drug control issues (the UNODC and the International Narcotics Control Board); challenging the accuracy of data the President had cited in declaring a state of emergency in relation to drugs; and liaising with several media outlets to broadcast these messages.[7] It is horrific and disappointing that the Indonesian Government nevertheless proceeded to execute eight people convicted of drug trafficking offences on April 28, 2015, following the execution of six people also convicted of drug offences in January 2015.[8] Although some regional countries, such as Vietnam,[9] Malaysia[10] and Singapore, [11] have taken steps toward abolishing or reducing use of the death penalty, the executions in Indonesia indicate the general trend across Asia in favour of punitive drug policies.

ASEAN and the dangers of "drug-free" mantras

In Southeast Asia, it is not only the regional body—the Association of Southeast Asian Nations (ASEAN)—that adopts a vision of becoming drug-free in its drug strategy, but also some of its member states including Indonesia and Myanmar.[12] ASEAN ministers committed to achieving a drug-free region by 2015 in 1998,[13] after the previous UN General Assembly Special Session on Drugs in the same year adopted a political declaration stating that member states would aim to "eliminate or significantly reduce" illicit crop cultivation and "promote a society free of drug abuse."[14] The UN Commission on Narcotic Drugs also adopted the slogan "A drug-free world, we can do it!" for its ten-year drug strategy in 1998.[15] The UN body responsible for assisting member states in implementing the international drug control treaties, UNODC, has now shifted its objectives towards stabilising or containing drug markets.[16] Although Asia is clearly not on track towards becoming drug-free by the end of 2015, there is no indication of an intention to shift away from that rhetoric as ASEAN officials begin to contemplate a new regional drug strategy after 2015.

The 2013 IDPC advocacy note on the ASEAN drug strategy[17] posits that setting the goal of becoming drug-free is not merely futile and unachievable, but in framing drugs and any activity relating to it as a "social evil" to be eliminated, such rhetoric helps to justify policies that inflict an extensive range of harms. Setting such policy goals has also led to the unbalanced investment of resources in criminal justice interventions – based on the mistaken belief that punitive measures will deter drug-related activities. This is not supported by any evidence and is at the expense of ensuring adequate provision of evidence-based, cost-effective health and social programmes to manage the harms associated with drug use and markets.[18] As a result, over the past few decades, Asia has seen large-scale human rights abuses committed in the name of the war on drugs including abusive practices by police against people who use drugs. This was demonstrated in the most grotesque manner when an estimated 2,800 people were killed by police in 2003 when Thailand's prime minister at the time sought to eliminate drugs from the country within four months. Many people were killed in extra-judicial executions by police and other law enforcement agencies for suspected involvement in drug-related activities. Another estimated 7,000 people were injured in human rights violations, including intimidation of human rights defenders and violence by police.[19] In addition, most countries in the region impose punitive and stigmatising measures in response to drug use, including compulsory registration with security agencies, criminal conviction, imprisonment, and denial or inadequate provision of life-saving health measures such as needle and syringe programmes. Furthermore, governments tend to impose disproportionate sentences and penalties for drug-related activities, including lengthy imprisonment sentences for low-level, non-violent offences, and continued use of the death penalty.[20]

It is also in the pursuit of unrealistic drug-free goals that countries in the region either imprison or detain people in so-called rehabilitation centres to stop them from using drugs. As of 2012, over 200,000 people were held in over 1,000 compulsory centres for drug users (CCDU) in China and most countries in Southeast Asia: Cambodia, Lao PDR, Indonesia, Malaysia, Myanmar, Thailand, the Philippines and Vietnam.[21] In recent years condemnation, by the UN[22] and civil society advocates, of the torture and other abuses inflicted upon people detained in CCDU along with denial of essential healthcare services, has led to more open discussion amongst countries about the need to transition from CCDU to voluntary services for people who use drugs.[23] Vietnam has even taken concrete steps to gradually reduce the number of CCDU facilities.[24]

After decades of increasing rates of drug use and dependence, there remain scarcely any humane, effective, evidence-based drug treatment services to speak of in the region. At a time when more countries in the region are beginning to acknowledge the failure and damaging consequences of CCDU, it is critical for policymakers to develop an accurate understanding about drugs and the nature of drug use (for example, the majority of people who use drugs do not become dependent and do not require treatment).[25] It is urgently necessary for the region's policymakers to shift away from punitive approaches towards drugs, and to invest instead in building capacity to deliver humane and effective drug treatment and harm reduction services.

Barely tangible shifts in the region toward addressing the harms of drug use and markets

Some countries in Asia have acknowledged and sought to address certain negative consequences resulting from their drug policies. Three examples can be mentioned. Malaysia established voluntary harm reduction and treatment services in 2010 to start replacing compulsory detention centres for people who use drugs.[26] As the first country amongst those operating compulsory detention centres to seemingly transition away from the punitive practice, Malaysia was lauded as a role model by international agencies such as UNAIDS.[27] Thailand, in seeking to eradicate opium crop cultivation, implemented an alternative development programme that is widely regarded as the most successful in the world, for not only reducing cultivation levels but also improving the livelihoods for farmers in its project areas.[28] Finally, Myanmar conducted a relatively open and inclusive consultation on proposed revisions to its drug law in February 2015, which involved international agencies, experts, representatives of people who use drugs and civil society organisations. The proposed revisions included ensuring the provision of evidence-based drug dependence treatment rather than imprisonment for people who use drugs, and reduced penalties to establish more proportionate sentencing for drug offences.[29]

These countries and many others in Asia claim to approach drug use as a health rather than criminal justice issue, implementing some harm reduction services aimed at reducing HIV and other health risks amongst people who inject drugs—with the notable exceptions of Japan, South Korea and Singapore. However, criminalisation and punishment remain the key policy responses in Asia to people who use drugs.[30] Cambodia for example, explicitly supports harm reduction in its drug policy and implements programmes offering HIV prevention, treatment and care services for people who use drugs. At the same time, Cambodia has established the Village/Commune Safety policy. This requires the elimination of production, dealing and use of drugs in all villages and communes, enforced by police arrests and detention of people who use drugs in CCDU. As a result, Cambodia's zero tolerance law enforcement approach to drugs seriously inhibits the ability of its harm reduction policy to advance the health and rights of people who use drugs.[31] Even in India, which has not systematically established CCDU and supports harm reduction programmes, drug consumption is a crime that may result in one year of imprisonment.[32]

Towards UNGASS 2016: calling on civil society reformers worldwide

In Asia, the underlying premise that the illicit supply and use of drugs must be met with a zero-tolerance drug policy approach needs to be seriously challenged. The UN General Assembly Special Session on the world drug problem (UNGASS), to be held in New York in April 2016, offers an important opportunity to do so. Advocates concerned with advancing the principles of human rights, rule of law, health, and development should use this moment to promote a meaningful review of drug control policies across the region. In order to encourage governments to consider humane and effective approaches to drugs, civil society organisations should seek to increase their expertise on drug policy, promote evidence-based recommendations for reform, and build alliances to amplify their capacity to influence policymakers. Civil society advocates should also pursue opportunities to constructively raise drug policy issues and discuss recommendations with policymakers as part of an open, objective dialogue. Such dialogue is urgently needed in the lead up to the UNGASS to ensure that it will deliver an honest assessment of drug policies implemented worldwide, and that Asia is not left behind in taking part in this key UN debate.[33]

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Received in June 2015.
Original in English.

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sur international journal on human rights - Aug/2015 -

issue 21

THE SUR FILE ON DRUGS AND HUMAN RIGHTS

WEST AFRICA: A NEW FRONTIER FOR DRUG POLICIES?

Adeolu Ogunrombi

• *West Africa's development as a centre for drug trafficking, production and consumption gives governments the opportunity to embark on more enlightened policy responses.* •

ABSTRACT

West Africa is recognised as a trafficking region in the global drug trade. However, increasingly it is also becoming a region of consumption and production. Here the author discusses how the region's governments typically employ repressive policies in response, despite increasing evidence to show that such policies are not only futile but result in gross human rights violations.

KEYWORDS

War on drugs | Human rights | West Africa | West Africa Commission on Drugs | Trafficking Consumption | Production | Policy

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This article explores why West Africa has traditionally been used as a drug trafficking route and how it is increasingly becoming a region for consumption and production. This is despite the continued use by West African governments of the repressive policies perpetuated by the concept of the "war on drugs." The article attempts to explain the continued reliance on these policies by examining both the international and local context. Finally, the disastrous impact that these policies have on human rights in the region is highlighted by focusing on the situation in Nigeria and Ghana.

The trafficking of illicit drugs through West Africa has continued to grow in volume over the past decades, mainly from the Latin American countries to the thriving European and North American markets.[1] This growing market is estimated to be worth billions of dollars annually[2] and there seems to be no sign of it abating.

The choice of West Africa by traffickers has been attributed to a number of factors such as its geographic vulnerability in terms of easy access and weak intra and inter-state surveillance systems.[3] Other factors include international counter-narcotics measures driving away traffickers from their usual routes such as direct shipment from Latin America to European countries[4] to a less resistant route such as through West Africa,[5] coupled with the availability and willingness of local collaborators. This growing challenge has also brought the enormous responsibility of how to address the issue. Many of the governments in the region have adopted the populist ideology of "war on drugs."

The ease with which this policy is adopted can be explained by various factors. Firstly, there is the prevailing societal perception that drugs are a social evil and governments need to do everything possible to eradicate them. This

is reflected in the mission statement of some of the drug control agencies in the region. A typical example is the Nigeria Drug Law Enforcement Agency (NDLEA) which has a mission statement promising to "deploy all resources at its disposal for the total eradication of illicit trafficking in narcotic drugs and psychotropic substances; suppression of demand for illicit drugs and other substances of abuse..."[6] During a public ceremonial burning of approximately 86,000 kg of seized cannabis in 2014, the chairman of the NDLEA said "it gladdens my heart that we are gathered here today to destroy what destroys lives and destinies."[7]

In addition, the European Union (EU) and the US have also played a major role in influencing drug policy direction within the region with a strong focus on interdiction, arrest and the criminal justice system. This influence can be seen by analysing the thematic focus of financial aid given to many African countries for counter-narcotics measures. Axel Klein (2014) in his paper titled "When Agendas Collide: Combating Drugs and Organised Crimes in West Africa" explicitly mentioned, for example, that much of the collaboration between the EU and West Africa in tackling cocaine trafficking is funded as development cooperation but directed at transnational organised crime operating in West Africa and that this approach equally reflects the external security policy of the EU.[8] After many years pursuing this policy approach it is obvious that it has not yielded the desired result. Rather, the policy's collateral damage of gross human rights violations such as mass incarceration and torturing of drug users, which are going unreported and unchecked, are of particular concern. It is therefore not an overstatement to say that these foreign-motivated drug policies have empowered the more corrupt and inhumane tendencies of law enforcement officers within the region. Neil Carrier and Gernot Klantshnig (2012) in their book "Africa and The War on Drugs" succinctly put it that the war on drugs in Africa has been counterproductive, just as it is in many other regions because it "sidelines discussions on human rights in drug policy, the provision of drug treatment facilities and a focus on more pressing drug issues for Africans."[9] Latin America shares considerable economic and development attributes with West Africa[10] and has experienced devastating consequences of the war on drugs, for example high levels of violence and use of herbicides that are toxic to humans.[11] It thus provides a good example for West Africa on how not to approach the drug challenge.[12] West Africa cannot afford to be the "new frontline of the failed war on drugs."[13]

Confronting the realities: from transit to consumption

With the growing threats of drug trafficking and consumption in West Africa, Kofi Annan, the Chair of the Kofi Annan Foundation and Former Secretary-General of the United Nations, convened the West Africa Commission on Drugs in January 2013. The commission is chaired by the former president of Nigeria Olusegun Obasanjo, and consists of other West Africans drawn from civil society, the judiciary, the health and security sector and politics. The principal objectives of the commission are to "mobilise public awareness and political commitment around the challenges posed by drug trafficking; develop evidence-based policy recommendations; and promote regional and local capacity and ownership to manage these challenges."[14] In June 2014, the Commission launched its maiden report "Not Just in Transit: Drugs, the State and Society in West Africa" which highlighted some pertinent realities of the illicit drug trade that are often missing in the usual narratives about narco-trafficking within the region. The report highlighted that the region is no longer just a transit route, as commonly referred, but also a region of consumption.[15] It is also becoming clearer that beyond the cultivation of cannabis in the region, synthetic drugs such as methamphetamine are being produced, not just for trafficking but also for local consumption. This is evident, for example, with the discovery of about six clandestine methamphetamine laboratories in Nigeria within a space of two years between 2011 and 2013.[16] In terms of consumption, the 2012 World Drug Report (WDR) published by United Nations Office on Drugs and Crime estimated that there are about 1.6 million cocaine users in West and Central Africa.[17] The 2013 report highlighted that the estimate of opiate users is at par with the global estimate and higher than that of the West and Central Europe.[18] In the same light, the 2015 WDR showed that cannabis users in West and Central Africa is three times higher than that of the global estimate.[19]

These realities, instead of providing a compelling justification towards public health and human rights-centred drug policies, have become a rallying cry for policy makers, both within the region and outside, advocating the war on drugs to respond with more policing and militarisation.[20] With a growing number of opiate users, only one

country (Senegal) out of sixteen West African countries has an explicit reference to harm reduction strategies in a national policy document.[21] Consequently, injecting drug users are driven underground where they are at risk of HIV transmission and other blood borne diseases which can be transmitted through sharing of needles and syringes. Furthermore, those who are opiate-dependent and should benefit from potentially life-saving therapy, such as methadone treatment, are denied access by not making such service available. This denial on its own constitutes a violation of the fundamental right to health which most West African countries' constitutions claim they respect. The pervasiveness of the situation and the harm on drug users is well captured in the words of a 55 year old heroin user in Lagos, Nigeria:

> *I have been hooked on heroin for many years and in my struggle to be free I have been to many rehabilitation centres which do not work for me. Because of this I have lost my family, could not keep a steady job. How I wish treatment such as methadone is available I know I will be giving a different story today.*[22]

Undocumented violations and increasingly repressive drug policies

Globally there is growing evidence to show the failure of the war on drugs and its inability to protect human rights.[23] Instead, it has increased violence and human right abuses. The major casualties of this failed approach are people who use drugs. They suffer indiscriminate arrest, torture, denial of access to justice, health and social services, among many other issues. In Africa, there is sparse documented evidence of drug-related human rights abuses caused by policies motivated by the war on drug. In fact, this is confirmed by the available reports which have shown that many human rights violations in Africa go unreported and are rarely documented.[24] However, this gap in documented evidence does not in any way indicate that there are few human rights violations against drug users in the region.

It is important to note that the concept of human rights in West Africa and Africa as a whole is yet to fully develop in terms of societal consciousness and available systems for enforcement of rights. Human rights are often considered a western ideology especially when being applied to issues that are considered not to be in tandem with cultural norms and values. Thus, the practice and implementation of human rights within the African context is largely influenced by the African human values which according to Rukooko are considered "incompatible with the Western conception of human rights on account of the Western individualistic basis."[25] That is, human rights are viewed from a communal perspective rather than what an individual should lay claim on. The implication of this is that the community frames what is acceptable and what is not. For an issue such as drug use which is still within the "moral debate,"[26] the promotion of human rights of drug users in Africa is indeed a huge task. This further explains why the ideology of the war on drugs is considered acceptable and easily implemented in many parts of the region. For example, the Ghana Narcotics Control Commission Bill (2014) is presently being reviewed by parliament. Section 26(2) of the draft bill stipulates that a person who, without lawful excuse, purchases a narcotic drug for personal use commits an offence and is liable on summary conviction to a term of imprisonment not less than five years and not more than ten years.[27] The existing law stipulates an imprisonment term of not less than five years.[28] It is disappointing that such a radical approach is taken despite increasing evidence of the failure of punitive drug policies. Another example is a country like the Gambia, where the minimum sentence of 10 years imprisonment for drug trafficking was amended in 2010 to the death penalty for any person found in possession of more than 250 grams of cocaine or heroin in the country. This was later changed to life imprisonment in 2011.[29] This reality confirms the manner in which many African governments are continuing to deal with their drug problems.

Lessons from Nigeria and Ghana: a series of violations regarding drug policy

This section will offer examples of how the human rights of drug users are violated, focussing on two major countries in the region, Nigeria and Ghana. The choice of these two countries is because both, especially Nigeria, have considerable hegemonic influence on policy direction within the region.[30]

Firstly, the use of excessive force and guns by the police and military to arrest drug users is endemic. This action is often taken with the view of ensuring a drug free society. For example, on 17 October 2013, the Modern Ghana – an online media publication – reported how a police officer shot to death a young man who was accused of smoking cannabis with his friend in his neighbourhood.[31] Earlier in the same year in May 2013, another mainstream newspaper in Ghana reported how three police officers killed another young man in an attempt to arrest him for smoking cannabis.[32] Situations such as these are not peculiar to Ghana. On the 13 October 2014, the military raided a community known as Dagba in Abuja, Nigeria in an operation aimed at flushing out drug dealers in the community. This led to the killing of two people and injuring many others.[33] More broadly, the 2015 report by YouthRISE Nigeria "We Are People: The Unintended Consequences of the Nigeria Drug Policy on the Human Rights of Young People Who Use Drugs"[34] chronicles the experiences of young people who use drugs and who come into contact with drug law enforcement agents.

Secondly, the police and drug enforcement agents often use the strength of the law against drugs to intimidate individuals. The 2010 human rights report on Ghana by the US Department of State reported the case of two police officers and three soldiers who were arrested for extorting money from two men whom they falsely accused of drug offences.[35] In Nigeria, there are reports suggesting police officers often go out to arrest female drug users in order to have sex with them or require them to perform sexual favours to negotiate their release. In a documented case, a young woman gave an account of how a police officer continuously sexually molested her and some of her friends after they were caught using narcotics. In her narrative, the policeman often threatened her with arrest if she refused to satisfy his sexual desires:

> *The man [policeman] often comes after me and my friends. He knows where I am staying and where we hangout. He will threaten me with arrest, collect money from me and still sleep with me…*[36]

Thirdly, other cases of human rights abuse include the inhumane conditions that drug users are subjected to in treatment and rehabilitation centres. Some rehabilitation centres in the region operate based on the ideology that the more severe the punishment the faster the person recovers.[37] They are therefore synonymous to a "house of torture" and are rarely monitored for human rights violations. Currently there are sparse reports on the experience of drug users within closed-settings in the region but the few available reports suggest a need for a deeper investigation into what drug users experience in treatment, and rehabilitation facilities and in detention and police custody. Human rights abuses against drug users have somewhat been normalised in the society and drug users are regarded as not deserving of any empathy, compassion, support or dignity.[38] To avoid stigma and discrimination, those whose rights are violated rarely make any attempt to report or seek justice. In many cases, the drug users themselves are ignorant of their rights as individuals.

The challenges presented above are not due to lack of human right instruments which exist both at the national and regional level. Nigeria, for instance, has a constitution which includes specific provisions protecting human rights and fundamental freedoms.[39] In particular, the Bill of Rights contained in Chapter IV of the Constitution (Articles 33-46) provides for the right to life; the prohibition of torture and other cruel, inhuman and degrading treatment; and, the right to an effective remedy and redress in instances where these rights have been violated. The country is also a signatory to various human rights instruments which include the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the African Charter on Human and Peoples' Rights.[40] In 1995, Nigeria established the National Human Rights Commission for the promotion and protection of Human Rights.[41] A similar institution, the Commission on Human Rights and Administrative Justice, also exists in Ghana and was established in 1993.[42] These institutions provide a platform to engage with the government to ensure holistic and inclusive actions that promote and protect the human rights of drug users.

Conclusion

The war on drugs in West Africa and Africa as a whole has indeed undermined human rights with so many violations going unreported and unchecked. This challenge is huge but surmountable. Africa in the 21st century must advance the human rights concept and consider it central in developing appropriate policy responses to the drug challenge facing the region. Some critical steps that need to be taken include a general public enlightenment or education on what human rights are and the need for them to be protected irrespective of who is involved. Specifically, drug users need to be well educated on their rights and how to protect them. However, it will also be necessary for countries in the region to establish and strengthen human rights institutions that are independent and empowered to carry out their functions. The ideology of the war on drugs has been counterproductive and West Africa has a lot to learn from Latin American countries such as Mexico including how repressive policies have not only failed to reduce the scale of the drug market but rather created insecurity in communities and a public health crisis. West Africa need not to go in this direction.

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Received in June 2015.
Original in English.

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sur international journal on human rights - Aug/2015 -

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THE SUR FILE ON DRUGS AND HUMAN RIGHTS

URUGUAY'S ADVANCES IN DRUG POLICY

Milton Romani Gerner

• One of the leading figures of Uruguay's drug policy presents • the reasons for and challenges of reforming the country's laws.

ABSTRACT

In December 2013, the government of Uruguay passed Law 19.172, which allows marijuana to be produced and sold in the country. The law is the result of the government's commitment to a comprehensive drug policy with a human rights and public health-based approach. Based on the author's experience, the article presents an overview of this policy in Uruguay.

KEYWORDS

Human rights | Uruguay | Drug policies | Public health | Regulated markets

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Uruguay is making news around the world for its decision to make the regulation – as opposed to strict prohibition and criminalization - of the cannabis market an integral part of its social policies. This decision is consistent with its broader drug policy, which is focused on human rights and public health and aims to strengthen the gender perspective. It is being proved and demonstrated that public health and rights-based approaches are more effective and humane than prohibitionist and punitive ones.

A consensus is forming on the international level that "the war on drugs" has not been successful, has increased violence and has ultimately caused more harm than the drugs it seeks to combat. The Summit of the Americas held in December 2012 in Cartagena de Indias gave the Organization of American States (OAS) the mandate to produce a report on drugs in the Americas. That report was presented by the Secretary General at the 43rd General Assembly of the OAS in Antigua, Guatemala and represents a fundamental step in progressing necessary debate about this issue in both the Americas and the world.

Over the past decade, Uruguay has defended a rights-based approach to drug policy in various international organisations and forums and especially as a Member State of the United Nations Commission on Narcotic Drugs (CND). We reiterated our position in our March 2015 intervention during the 58th session of the CND held in Vienna, Austria particularly in response to the unfounded accusations made by the then president of the International Narcotics Control Board (INCB).

In 2008, Uruguay became a full member of this CND. Composed of 52 countries, the CND is the political body that guides drug policies at the global level. That year, we promoted a draft declaration cosponsored by Argentina, Bolivia,

Switzerland and the European Union on the "effective integration of human rights instruments into drug control policies" (Resolution 51/12[1]). The political and diplomatic battle we waged at that time was of great importance, and our proposal was heavily debated.

Today, we are part of a very active Latin America bloc that acts together at the OAS, CELAC, MERCOSUR and UNASUR,[2] and which is calling on the international community to engage in an open and frank debate, that is all inclusive and without taboos, and which incorporates all views, supports diversity and unity of action, and integrates a health and social inclusion perspective into new approaches. The United Nations General Assembly Special Session, to be held in New York in April 2016 (UNGASS 2016), is currently drawing a great deal of attention. It will undoubtedly provide an opportunity for all UN agencies to contribute their point of view, and states and civil society will have the opportunity to discuss new approaches and potentially open the door to humanising drug policies.

Indeed, there is currently a global movement demanding such change. Uruguay is no stranger to it. On the contrary, in defending its sovereign right to make its own decisions, Uruguay is an example of a comprehensive and committed rights based approach in the area of drugs. Human rights violations committed in the name of the war on drugs are an issue that cannot be avoided. The only thing criminalisation of possession for personal use has produced is overcrowded prisons where conditions see the right to health of those detained, and who suffer from addiction, violated. The international community must ensure proportionality between sentences imposed for the use of drugs, and the harm caused by them. The death penalty should be abolished, especially for drug-related crimes. A debate with all of the relevant agencies – WHO, UNDP, High Commissioner for Human Rights, ILO[3] – is needed in order to have a broad vision and not a narrow one that limits action.

Uruguay is a pioneer in the regulation of the cannabis market, but experience in this area is also rapidly developing in other countries, states and cities. This development is founded on the belief that the current legal and regulatory framework - characterised by prohibition and criminal sanction – has perverse consequences and causes harm, forcing consumers to resort to the illicit market.

It is worth recalling that it was in 2006 that Uruguay began to move towards a different strategy focused on the regulation of the tobacco, cannabis and alcohol markets.

Strategic thinking about regulating markets exists well beyond drug control, yet it is in the area of substance control that a regulation approach is even more justified. The regulation of such markets constitutes a more efficient control system that respects human rights, protects public health and brings the state closer to vulnerable populations and problematic drug users.

Bolivia has experience in regulating the market of coca leaf production and the use of consensual drug eradication as efficient methods that are also consistent with human rights. The development of alternative crops in various countries in our region of South America is another way of curtailing the illegal market while using agricultural products to compete with it. This demonstrates it is a matter of intervening and regulating markets.

In 2006, during Dr. Tabaré Vázquez's first term in office as president, Uruguay led in the implementation of the Framework Convention on Tobacco Control and made progress in the regulation of tobacco. The benefits in terms of the decrease in consumption of the substance for the population's health clearly illustrate the virtues of the approach. We are also committed to acting decisively in order to regulate the production, distribution and sale of alcoholic beverages. Our focus is on reducing harm and sharing risk construction-management, once again using a public health and rights-based approach.

In May 2014 the José Mujica administration signed Law no. 19.172 which regulates the production, distribution and sale of cannabis, and sought to make advances in its regulation and implementation. Other regulatory decrees on hemp production and the use of cannabis for medical purposes have since been issued.

Laboratories have already been set up to create and produce mechanisms to ensure traceability of products and to prevent their diversion into illegal markets. The Institute for the Regulation and Control of Cannabis (*Instituto de Regulación y Control del Cannabis, IRCCA*) has also been created. It is in charge of producing guidelines and exclusively controls the mandatory registration of home-growers and membership clubs.

Necessary steps are also currently being taken to award licences to the companies that will produce cannabis on state land and which will then distribute it to pharmacies. A special software is being designed to record users, which will respect identity and sensitive data.
A Scientific Advisory Committee made up of notable and distinguished scholars and former deans from various faculties has been formed and has begun to operate. It has organised a network of 119 national and international experts who are monitoring and evaluating the implementation of the law and the regulatory model. This group of experts is open to all those who are interested in following this initiative.

As we have invested the country's international reputation in this system, Uruguay remains determined to advance the implementation of the regulated cannabis market decisively, on schedule but without undue haste, and also with the guarantee of its efficiency.

We wish to be clear that we do not aim to serve as a model for everyone. This is a Uruguayan experience and we will assess its achievements in due course. However, we do reiterate our sovereign right to adopt this new approach, albeit that it is an approach that differs from the global model that has prevailed over the past few decades: a model that has only seen illegal activity and consumption increase exponentially.

Drug control conventions and policy guidelines must be at the service of integrated, sustained, just and equitable human development. This is the paradigm that governs the new global strategy.

Drug control conventions, the Single Convention on Narcotic Drugs (1961), the Convention on Psychotropic Substances (1971) and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) are not to be interpreted strictly. In fact, there are several flexible interpretations. Some adopt a more repressive interpretation, such as those who apply the death penalty to even minor drug-related offences. A more humane interpretation is possible and which is consistent with international human rights law: a legal framework which is just as important as the conventions themselves.

The purpose and spirit of the conventions, emphatically confirmed in their preambles, is to contribute to the health and well-being of mankind. Of course, they were designed to also guarantee the medicinal and scientific use of controlled substances and to combat the illegal trafficking of narcotics and organised crime. New examples of regulated markets are the result of sovereign decisions of states based on their own domestic laws. They pursue the same goals as the conventions and are consistent with international human rights obligations. They represent new approaches that must be incorporated into the international debate being conducted by all those who work in the broad and complex phenomenon of drugs.

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2. The Organisation of American States, the Community of Latin American and Caribbean States; the Common Market of the South and the Union of South American States, respectively.
3. The World Health Organisation, the United Nations Development Program, the High Commissioner for Human Rights and the International Labour Organisation respectively.

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Received in June 2015.

Original in Spanish. Translated by Karen Lang.
This is a revised and updated version of an article published in Intercambios Argentina in April 2015

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THE SUR FILE ON DRUGS AND HUMAN RIGHTS

THE UN IN 2016: A WATERSHED MOMENT

Anand Grover

• *How UN Member States can change the direction of international drug policy towards better human rights protection.* •

ABSTRACT

In light of the upcoming United Nations General Assembly Special Session on Drugs (UNGASS) in 2016, the author calls on country representatives attending UNGASS to consider a series of pathways to make the current global drug policy in line with human rights.

KEYWORDS

Health | Global Commission on Drug Policy | UN Special Session on Drugs | Prohibitionist approach

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The prevailing global approach to drug control has been - and continues to be - an unequivocal failure.

UN Member States now have an historic opportunity to change this ineffective system with the upcoming United Nations General Assembly Special Session on Drugs (UNGASS) in early 2016. UN special sessions provide a forum for high-level discussions on matters of global importance. UNGASS 2016 offers the chance to take decisive action against the objective set at the last special session on drugs in 1998, namely: to eliminate or significantly reduce demand and supply of drugs by 2008. This prohibitionist approach has now been shown to be entirely unrealistic.

The figures speak for themselves. An estimated $1.5 trillion has been spent globally on repressive drug policies in the last forty years. Yet between 2003 and 2012 law enforcement authorities worldwide reported an increase in personal drug use and drug trafficking. The net cultivation of opium poppy production in Afghanistan has more than tripled between 1994 and 2014. And in Mexico alone, an estimated 100,000 people have been killed since 2006 in connection with the "war on drugs".

Statistics such as these have prompted an increasing number of Member States to question the value of the existing policy – both in financial and practical terms. Originally planned for 2019, Mexico, Colombia and Guatemala requested, in a resolution that was co-sponsored by 95 other countries, that the UNGASS be brought forward to 2016. This illustrates how politicians at the highest level are determined to have an open debate on alternative approaches to drug control – and that it should be sooner, rather than later.

The Global Commission on Drugs has called upon country representatives attending UNGASS to consider the following pathways in their debates. These will enable the definition of workable alternatives to the current system – alternatives that must be in line with human rights, the post-2015 development agenda and which reflect a true paradigm shift.

Firstly, people's health and safety must be put ahead of any other policy consideration. This means investing in community protection, prevention, harm reduction, and treatment as cornerstones of drug policy. A prohibitionist policy forces drug use underground, which results in dangerous drug use. For example, up to 40 per cent of new cases of HIV and Hepatitis C come from unsafe injecting practices. This can be translated as almost 2 million years of life lost through premature death as a consequence of HIV infection.

Secondly, access to essential medicines and pain control must be ensured. Overly stringent limits on dosage and preparation methods as well as on prescribing and dispensing practices, ostensibly to prevent diversion and entry into the black market, must be removed. Not doing so leads to unnecessary pain and suffering, particularly in poorer countries. The World Health Organization estimates that 5.5 billion people lack access to opioid based medicines, including 5.5 million terminally ill patients.

Thirdly, the criminalisation and incarceration of people who use drugs must come to an end. This is critical to any genuinely health-centred policy. Criminalisation of drug use not only stigmatises people who use drugs as social outcasts but it also discourages them from seeking help and accessing treatment. In many countries, drug users fear being reported to the authorities and being placed on so-called drug registries or in forced rehabilitation. These measures can severely restrict rights in areas like health, employment and family life and are often counterproductive. Persons who become dependent on drugs respond to care; and criminalisation gets in the way of creating a compassionate response.

Fourthly, law enforcement policies should be focused on organised crime. A more targeted enforcement approach – deprioritising non-violent and minor participants in the market – will ensure peace and security. Currently, punitive policies focusing on, for example, drug growers and mules, disproportionally affect the poorest and most vulnerable. This results in prison overcrowding, encourages corruption of local officials and threatens the unity of the family and community without having any real effect on the availability of illegal drugs.

Finally, drug markets must be regulated to put governments in control. Doing so will reduce social and health harms and disempower organised crime. While the most effective methods for regulation is still a question to be debated, the choice between regulation itself or non-regulation is simple – there is either a drug market controlled by governments or by criminal gangs. There is no third option whereby the drug market can simply disappear.

While the overarching principle of the current global regime on drug control is the "health and welfare of mankind" in reality it has led to untold, albeit unintended, human rights violations. Underlining this issue is that the current international drug control treaties make no reference to human rights and their implementing bodies have repeatedly failed to prioritise human rights.

Previous international summits on drugs have merely reaffirmed this approach. UNGASS 2016 must mark a watershed by defining a new direction in international drug policy with a focus on human rights throughout.

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Received in June 2015.
Original in English.

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ESSAYS

STATE REGULATORY POWERS AND GLOBAL LEGAL PLURALISM

Víctor Abramovich

• *How international economic regimes impose obligations on states that are contradictory to human rights.* •

ABSTRACT

The article examines how global legal pluralism imposes conflicting mandates that use contradictory approaches and points of departure to address the same conflict on states. Three examples of the contradiction between economic regulation and the human rights regime will be presented: the foreign investment protection regime, the global regime on mining concessions and the international trade regime. Through these examples, the author shows how different actors, transnational corporations, affected local communities and their global activist networks seek out the most favourable forum amongst the constellation of international legal institutions to present their demands and protect their interests. There are, however, no rules or mechanisms available to resolve these legal contradictions.

KEYWORDS

Foreing investment | Economic regulation | Mining concessions | International tarde regime | Legal pluralism

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Th e autonomy and segmentation of the various international regimes[1] implies that aspects of the same legal problem are addressed by different regimes, each with its own approaches, principles and procedures. They are often isolated from each other's influence and there are considerable contradictions between them. This has direct consequences for the scope and the enforceability of rights, imposing divergent obligations on states, and often obligations that are in direct conflict with one another.

Even though the globalisation process tends to limit the exercise of Westphalian sovereignty which seeks to exclude external interference, national states still wield broad regulatory powers over the economy. Furthermore, in recent years, various South American states have begun to regulate economic issues that previously had been deregulated or that had never been regulated. This process is sustained legally by the development of more robust social legislation, which is greatly reinforced by international human rights law as well as a more open approach to state intervention in the economy and in the promotion of social policies.[2]

The new social constitutionalism in South America and the constitutionalisation of the international human rights regime throughout the region have considerably broadened the obligations of states to protect and guarantee fundamental rights. The duty to protect, according to the human rights regime, obliges national states to exercise

due diligence to prevent the violation of rights by *non-state actors*. States must also produce information on groups that are structurally discriminated against or excluded as well as adopt affirmative actions, preventative measures and adequate and transformative compensation measures to address widespread situations or systematic patterns that produce or reproduce inequality amongst citizens.

Moreover, reinterpreting civil rights within structural equality terms increases the positive obligations of states, including their indirect responsibility for the actions of individuals creating risks that a state could reasonably predict and prevent. Constitutional and legislative recognition of cultural, environmental and social rights (labour, social security, consumer, health, education, etc.) also requires states to expand their functions considerably.

A direct consequence of this process is the expansion of the *state's role in the provision of benefits* and the broadening of its *duties to regulate* economic relations, business activities and markets. Environmental law regulates, for example, companies' production processes, their development and use of extractive activities, risk assessments and frameworks for compensating collective damages. Consumer rights law obligates the state to regulate information production and consultation mechanisms, moderates freedom of contract and imposes compensation measures for damages based on objective risks and collective scope (or infringement of a series of homogenous individual interests). Indigenous peoples' cultural rights to their territories, land and natural resources impose regulatory regimes on mining and extractive operations, create frameworks and procedures for consultation and securing informed consent, ensure participation in the profits of the investing companies as well as directly prohibiting certain means of exploiting these resources.

Similarly, the emerging right to health imposes firm obligations to regulate, for example, private health care providers, minimum standards, provisions for private or semi-public systems, protections for sectors or groups who traditionally suffer discrimination, payments that are predefined by the state to avoid abuses of contract, and specific duties to provide compensation based on risk prevention. The emerging right to social communication generates obligations to produce public information and, at the same time, reinforces the state's duty to prevent undue media concentration and to guarantee the access of historically marginalised groups or sectors to expression in the public sphere. The principle of structural equality, or ensuring support for subordinated groups, implies that there is an obligation to regulate affirmative action measures (based on gender, race, social status or disabilities) in order to ensure access to private education systems or recruitment processes, or access to social or public services.

In many cases, these new areas of state regulation affect the interests of national and transnational private companies by imposing restrictions on property and freedom of contract and authorising state intervention in the market and economic activity. Furthermore, the expansion of regulatory obligations protecting rights introduces a conflict with the "deregulatory" mandates created by international economic regimes, which are designed to ensure market protection. In the following paper, we will present examples that illustrate this divergence.

This article seeks to present a general overview of some of the ongoing discussions regarding the emergence of a plurality of international regimes, and the relations, divergences and possible convergences between them. We will present examples of how the various international frameworks impose conflicting mandates on states in the area of economic regulation. We will also provide specific examples where efforts have been made to harmonise the different legal systems. In particular, we will consider the foreign investment protection regime, the global regime on mining concessions and the international trade regime as examples. Finally, we will describe how the different actors, transnational corporations, local affected communities and their global activist networks seek out the *most favourable forum* in the constellation of international legal institutions to present their demands and protect their interests.

The foreign investment protection regime

The South African political regime that succeeded in abolishing apartheid promoted a series of public policies which aimed at including sectors of society that had historically been excluded from commercial and productive activities. The logic behind these measures was to contribute in concrete terms to the dismantling of the consequences of

apartheid by adopting affirmative action in the economic sphere in much the same way as had occurred, for example, to ensure access to jobs in the public sector or to housing programmes in segregated cities. The racial integration measures implemented demanded that companies in certain strategic sectors hire a minimum proportion of their managers from, and incorporate as partners members of, the black majority population. Italians from the mining sector challenged the measures, arguing that they were forms of expropriation and invoking clauses on the right to fair and equitable treatment derived from the bilateral investment protection treaties (BITs).[3]

In 2010, the plaintiffs withdrew their complaint, as they felt that the South African government had adopted measures that resolved their claim. Many studies found that the case – brought before the International Centre for Settlement of Investment Disputes (ICSID) – had a chilling effect ("regulatory chill") on the national government's drive to promote this kind of affirmative action in the economic sphere in light of the possibility of new international claims being filed by foreign investors in strategic sectors of the economy, including mining.

Standardised BITs and certain multilateral norms (for example, those that regulate the World Bank's ICSID, or the ones incorporated into NAFTA[4] or MERCOSUR), together with the interpretations, principles and standards established by arbitration tribunals and panels form an international regime whose main objective is to protect foreign investors' private property rights and to preserve the integrity of transnational corporations' assets in emerging economies in general. This regime includes a general rule of *fair and equitable treatment*, which is presented as a principle of non-discrimination, or of formal equality, between foreign and national investors before the law.

The interpretation of this clause by arbitration tribunals has stretched the principle of formal equality and gradually established, in the investor's favour, an almost *guarantee of the absolute stability of the legal frameworks* which investors can consider were in place at the time when they made the decision to do business. It is therefore understood that the protection of investors' *legitimate expectations* about the host state's behaviour is included in the notion of fair treatment. This ambiguous and subjective notion goes beyond the clearer concept of "legitimate trust" that guides the concept of a state's "own acts" in public international law.[5] The concept of "the investor's legitimate expectations" serves as a benchmark for analysing the reasonableness of the policies and laws that result from the exercise of regulatory powers, and which allows investors to challenge measures that may alter the market conditions and returns that they anticipated would be in place at the time of their initial investment.

A policy or measure that affects profit expectations is treated as a form of indirect expropriation *(taking of property),* which empowers investors to file claims to demand compensation. This concept of indirect expropriation allows an investor to question a state's legal norms or general policies on environmental, social services and health issues which might affect the profit expectations that the company had at the time when it decided to invest in the host country.[6] This interpretation of the fair and equitable treatment clause and the concept of indirect expropriation place heavy restrictions on a state's regulatory powers, because states will never be able to foresee all of the social and economic impacts that could arise after receiving the investment or during the term of the investment, in order to guarantee that there will be no changes to the legal and economic environment in which the project was developed. Moreover, states have the duty to preserve imperative social interests in crisis or emergency situations, which often means that they must implement public policies or impose regulations that could modify the original context in which the investment was made.

According to the current broad interpretation, the fair and equitable treatment principle becomes a *stabilisation clause*, which seeks to set regulatory frameworks and even national public policies in stone. Such an interpretation goes considerably beyond public international law's basic principle of equality of nationals and foreigners before the law. The broad interpretation which arbitration awards have given this clause makes it much more similar to a rule providing for preferential treatment, shielding foreign investors from any change to public policy or the legal framework that is otherwise binding and obligatory for citizens and national companies. Instead of being a rule that provides equal protection, it becomes a special privilege.

The principles of *fair treatment and indirect expropriation* are founded on the idea of protecting the investing company from unreasonable or arbitrary regulations that, for example, abruptly and unjustifiably prohibit previously

authorised activities or disproportionately change existing taxation or environmental rules. As with the notion of fair and equitable treatment, the concept of indirect expropriation aims to prevent the state from arbitrarily altering the legal framework in place at the time of the signing of the deal, which is why an assessment of the reasonableness of the contested measures is always required. However, the interpretation of these principles by enforcement bodies, with their strong pro-business bias, ends up practically eliminating the requirement for arbitrariness and imposing almost a right to a sacred permanency of a pre-established legal framework. It does not take into account changes to the context, exceptional crises or states of emergency, nor the state's social functions.[7] Furthermore, the investment regime bodies are impervious to arguments based on human rights or constitutional obligation.[8]

The people and communities whose direct interests are affected by the disputes – such as the users of the services provided by investing companies or the beneficiaries of the regulations being challenged by investors – cannot participate in these procedures either, limited as they are to companies and states. The South African case illustrates the tension between pro-equality policies used as strategies to restructure relations based on economic and social segregation, and the investment regime's rules of *fair and equitable treatment and indirect expropriation*, which impose restrictions on the regulatory powers of the state.

One issue of particular importance is the tension between the investment regime and the rights of users of public services. An illustrative case can be found in Argentina after the 2001 crisis, when the transitional government froze tariffs on public services (such as water, sanitation, natural gas and electricity) provided to households. The stated objective of this measure was to ensure access to vital services in light of an abrupt increase in poverty and extreme poverty levels brought on by the economic and social crisis. Combined with the sharp devaluation of the local currency, this price freeze directly affected the concessionary companies' expected revenues in dollars, which they had been transferring to their headquarters. In practice, this introduced a change to the regulatory framework that had been taken into account at the time when these corporations had agreed to invest in the sector. The concession agreements presupposed that periodical rate adjustments would be made based on variations in the companies' costs. The Suez corporation, in charge of water and sewage services in the province of Buenos Aires, took its case to the World Bank ICSID arbitration centre by invoking Argentina's bilateral foreign investment protection agreement with France.

As a result, a legal dispute similar to the South African case arose. If the state wanted to guarantee that consumers had access to public services, especially those from sectors that require stronger state protection during crises, its actions would inevitably affect the financial situation of the investing company. It would therefore cause a violation of the company's property rights as interpreted by the investment regime in an almost absolute sense. This, in turn, would allow the company to use the pre-established mechanisms of the BIT to demand economic compensation for this violation. However, if the state were to neglect the consumers' right to have access to the service, it could be held liable for violating national legal or constitutional norms in local courts, and even be subject to complaints filed with the bodies of the international human right regime. The plurality of the regimes and their respective autonomy invariably leads companies to resort to the *most favourable forums* to influence the policies that affect them. Because they choose the forum, they determine the approach and legal framework that will be used to examine the dispute.

One important aspect of the Suez case is that a group of consumers and human rights organisations petitioned the ICSID – as a "friend of the court" (*amicus curiae*) – to defend the government's policy of freezing tariffs. They argued that the policy sought to protect the interests and rights of the users of the water services and, furthermore, that human rights and constitutional norms required the state to adopt concrete measures to alleviate the effects of economic crises on the population living in poverty and extreme poverty. The format of their presentation was necessarily *amicus curiae* brief because ICSID proceedings do not explicitly provide for the participation of persons other than the companies and the state, nor do they envisage a right to be heard.

The arbitration panel accepted the *amicus curiae* brief in this particular case. It affirmed that while the dispute referred mainly to impacts on corporate investment, the state had regulated in a certain way due to the public interest involved in providing water and sanitation services to a socially vulnerable population. This established a precedent, as it was the first time petitions from third parties had been admitted in a dispute at the ICSID. This

is no minor change to the traditionally opaque and closed nature of this arbitration mechanism, even though the final ruling did not take into account the third parties' arguments and considered the state regulation being challenged by the company as unlawful.[9]

A key point for analysing the social organisations' submission in relation to the problem of the autonomy of the *global private regimes*[10] identified by Teubner[11] is the fact that their petition uses the investment regime's language and legal concepts with the goal of linking one legal order to the other. The organisations made the effort to "translate" and "adapt" problems involving social rights to make them understandable in the language, approaches and conceptual frameworks of the investment regime. They questioned the scope that the ICSID panel, and the investment regime in general, confers upon the *fair and equitable treatment and indirect expropriation* concepts. They argued that the broad interpretation of these concepts reduces the margins for state regulation of public affairs in which rights are at risk.[12] In the end, they did not suggest that the investment regime should be subordinated to the human rights regime, but rather that certain concepts of the investment regimes should be adjusted according to a *harmonising interpretation* that incorporates the international obligations of states.

These few cases of "overlapping forums" have been developed by a minority group of social organisations that move between the various systems as "amphibian activists" who use a certain level of flexibility to adapt the language, description, and the factual and legal framing of problems as necessary in order to argue in a hostile territory. Although these experiences are not sufficiently advanced to constitute solid bridges between regimes that themselves function mainly in a refractory and autonomous manner, they have identified initial points of contact that could be explored or investigated in greater depth. De Sousa Santos' concept of "interlegality" would be particularly useful in this sense.

The global regime on mining concessions

One strategy for the internationalisation of conflicts – in the opposite direction of the one used by transnational corporations resorting to the investment regime – is the pursuit of collective lawsuits by local communities whose environmental, social and cultural rights have been violated in the bodies of the human rights regime. In our opinion, this strategy also entails a search for the *most favourable global forum* – that is, one that modifies local power relations in which corporate interests prevail. The appeal to the human rights regime in this type of case aims to strengthen the state's obligation to protect, which is reflected in its mandate to regulate and supervise the operations of private companies that develop extractive investment projects in the territories of affected communities. Several Latin American countries attracted investors in the oil and mining sector by creating regulatory frameworks and signing concession contracts based on standardised models tailored to the interests of transnational capital.

The development of this type of contract is part of what Teubner calls *global private regimes*. In our opinion, this is because the contract model contains elements that are common to several host countries and end up serving as a determinant of foreign investment. Generally accompanied by mining laws that have also been standardised, these contracts limit state control over operations and delegate the functions of environmental monitoring and managing conflicts with local affected communities to corporations. They also keep key aspects of the extractive process in secrecy, which makes it difficult to use consultation mechanisms and helps companies evade political and social control over their operations.

What is more, in many cases, the transnational corporations that engage in the exploitation of extractive projects in indigenous territories have the added bonus of the foreign investment protection regime, with its favourable forums for potential disputes and inhibiting effect on invasive regulations affecting corporate profit expectations. In parallel, the human rights regime establishes state obligations to consult and build consensus with the potentially affected communities, especially indigenous communities and peoples in their collective territories. It also aims to avoid measures that lead to the massive displacement of populations and it is in the early stages of developing principles focused on the precautionary or preventative protection of rights.[13]

The tension here is clear: in terms of overall direction, one regulatory regime leads to deregulation and the self-limitation of the functions of state control, and the other regime forcefully imposes obligations on the state to intervene in the regulation and control of companies' operations. In numerous conflicts, local indigenous, rural and black communities have turned to international human rights mechanisms, such as the Inter-American Human Rights System or UN committees, to demand that their collective rights be respected, to emphasise states' duty to regulate and, in political terms, to counteract the pressure that major transnational mining corporations exert on nation-states.[14] This is a controversial matter, as some governments have used nationalist arguments to defend mining concessions, while concealing conflicts between large corporations and local communities and accusing groups and activist networks of using international pressure to attack national development projects. They contend that some international standards relating to indigenous territories and environmental protection are excessive and are, in practice, imposed by developed countries to boycott the development strategies of emerging countries.[15] In the end, this argument is difficult to sustain, especially in the countries that are incorporating these standards into their own constitutional arrangements and as the result of recent political processes in which collective self-determination was exercised during exciting constituent assemblies.

The international trade regime

Major tensions also exist between the international trade regime and the human rights regime. The former is based on multilateral agreements signed by states within the framework of the World Trade Organisation (GATT/WTO), whose main objective is to eliminate tariff and non-tariff barriers to international trade. It covers three broad areas: trade of goods (GATT), trade of services (GATS) and intellectual property (TRIPS). One of its basic legal principles is the prohibition of treating foreign products differently from national products. This means that most of the legally contested trade disputes in this area must determine whether products are *like products* and compete for the same market or have the same utility for consumers (Article III of the GATT). States have some flexibility to adopt measures that are inconsistent with the treaty as *safeguards* (Article XX of the GATT) in order to protect public health, public morals or the environment. However, these measures are exceptional: strict criteria are used to review them and quantitative and qualitative proof must be provided to substantiate their proportionality. They may be invalidated if it is found that the same objective could be achieved by adopting alternative measures that do not hinder free trade and do not constitute an excessive or undue burden on the state.[16]

Among the main areas of dispute at the WTO is the treatment the WTO panels have given to the barriers that some states attempt to adopt as *safeguards* to protect *cultural goods or services*. While the human rights regime recognises the right to identity and to cultural diversity, which has been reinforced by the 2002 UNESCO Declaration and the 2005 UNESCO Convention on Cultural Diversity, the WTO is resistant to such an approach by states.

One relevant case for discussion is the matter of Audio-Visual Products in China. Here, the United States challenged a series of Chinese regulations on the importation and distribution of reading materials, products for home entertainment, DVDs and films for theatres. China used Article XX of the GATT to justify its measures, which allows a country to adopt measures that are inconsistent with the GATT to protect *public morals*. China explicitly invoked the 2001 UNESCO Declaration to highlight that cultural goods and services are of a special nature as they are carriers of identities, values and meanings. It also argued that not only are they meant to satisfy consumption or commercial needs, but they also play a critical role in influencing and defining various aspects of society. In the Appellate Body, China insisted once again on the need to consider these specific characteristics of cultural goods and services. Although the Appellate Body did not analyse this particular aspect of the goods involved in the case, it recognised that the *public morals* exception could be invoked to justify measures that are not consistent with the GATT in the area of cultural goods and services. When the panel analysed the measures imposed by China, it considered that they were not justified under the safeguard clause, as other measures that were less harmful to the free circulation of goods could be used, such as periodic revisions of imported materials, as the US had proposed.

For analysts of GATT jurisprudence, even though China lost its appeal, this decision opened the door for the moderate use of this exception (*public morals*) in the future in relation to cultural goods and services. It also illustrated how UNESCO regulations could potentially be used to defend cases in the WTO framework. The majority of critiques of the case, however, identify the WTO dispute settlement system's obvious limitations in showing greater flexibility and openness towards proposals on the treatment of cultural goods and services. They mainly highlight the difficulty of defining the cultural value or meaning of certain goods precisely and objectively and of using this mechanism's traditional quantitative and qualitative parameters to measure the potential effect or impact of the measures under dispute. If a state attempts to demonstrate the need to limit or establish conditions on the entry of certain goods in order to safeguard interests or values related to the reproduction of local culture, cultural identities or forms of cultural expression that are characteristic of a local community, it will face serious difficulties in producing empirical evidence that meets the mechanism's ordinary standards of proof.

Intellectual property laws (TRIPS) have also come into conflict with the public health policies of emerging countries that aim to reduce the cost of medication and ensure greater access to them at times of emergency. For example, with the support of core countries, large pharmaceutical companies wagered a battle at the WTO in the early 2000s against South Africa and Brazil to challenge their policies on generic drugs. The countries justified their policies by referring to the obligations imposed on them by not only their national laws but also the human rights regime, which enshrines the fundamental right to public health. The transnational pharmaceutical corporations argued that the local policies violated WTO regulations on patents and intellectual property rights. On one side, there were arguments based on social rights, and on the other, arguments based on the unlimited defence of property. As with the Suez case involving water and property, local and global social organisations and states formed a strong alliance in order to defend state regulatory powers and counter the pressure of the large pharmaceutical companies and core countries. Some authors have considered this example as the expression of new forms of global activism in non-traditional scenarios. They describe the potential of a set of complex relations between states and social organisations that are able to combine monitoring and reporting with acts of cooperation.[17]

Conclusion

From the examples described above, we can conclude that one of the most important consequences of global legal pluralism is the limits it imposes not only on Westphalian sovereignty, but also on the exercise of national sovereignty understood as the exercise of political power in the national sphere. We observed that these global regimes impose conflicting legal mandates on states, which use approaches and starting points that are diametrically opposed to one another to address the same dispute. Market-oriented international regimes act as forums for challenging social regulations and inhibiting and conditioning the development of social legislation rooted in the constitution in South American countries, as well as in other emerging countries. In this article, we have schematically showed how some of these conflicts present themselves: affirmative action vs. formal equality between national and foreign investors; legal certainty for investors vs. the right to water and access to public services; extractive activities vs. collective cultural rights; freedom of trade vs. protecting cultural diversity; access to medicines vs. ownership of patents.

This is, however, a much more complex and nuanced issue. Further legal investigation is required to describe disputes more precisely and to make visible the main points of contention and the possible connections and overlaps between the different regimes. In this article, we have briefly presented some efforts that have been made to introduce considerations on obligations to protect human rights into economic regimes and the incipient use of hermeneutics that seek to "harmonise" the different legal systems. Nonetheless, we understand that one almost insurmountable element of this contradiction is the difference in expectations on the state's regulatory role in economic relations. In general, the problem arising from autonomous and fragmented global legal pluralism could be presented as follows: some regimes – such as the human rights regime – broaden the public sphere, develop positive state obligations to protect and guarantee rights and demand greater state intervention in the economy and the markets. They also extend the scope of regulatory powers and, consequently, the indirect responsibility of the state for the actions of private actors, including large corporations. Meanwhile, due to their history, actors and logic of intervention, other

regimes – such as the investment regime and the international trade regime – place limitations on state control and regulatory powers, while they extend the freedom of contracts and deregulate markets and economic activity further.

In regards to this contradiction, there are neither agreed rules on the resolution of regulatory conflicts nor international institutions that have been officially assigned the power to settle them.

Various actors, transnational corporations, local affected communities and their global activist networks seek the *most favourable forum* in the constellation of international legal institutions to present their demands and protect their interests. They generally place states in the centre of the conflict – as either duty-bearers or guardians of property and legal certainty – placing them directly in the *crossfire*. In some cases, "amphibious" social and academic activists make the effort to *cross the different forums* and adapt legal interpretations to harmonising principles. Other global debates, such as the one revolving around the processes of sovereign debt restructuring and the abusive practices of investment funds, also bring to light the tension in defining the dominant international regime. Either the private capital market regime will be imposed on local spaces, defined by global economic actors according to the logic of promoting autonomy and denationalisation, or a multilateral regime subject to the norms of public international law will be established in the formal United Nations framework, in which states will recuperate their authority to set the rules of the game.

NOTES

1. According to Stephen Krasner's classic definition, an international regime is "a set of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations" (Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no. 2 (1982): 185). In short, international regimes constitute structures of the international system that govern international and national public policies in different areas, and summon state and non-governmental actors under universally accepted principles and norms.

2. Rodrigo Uprinmy, "Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos", en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 109-37; Raquel Z. Yrigoyen Fajardo, "Constitucionalismo pluralista y pueblos indígenas", en *El derecho en América Latina, Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 139-59; Víctor Abramovich y Laura Pautassi, "La Revisión Judicial de las Políticas Sociales. Estudio de casos" en *La revisión judicial de las políticas sociales.* Estudio de casos, comp. Víctor Abramovich y Laura Pautassi (Buenos Aires: Editorial Del Puerto, 2009): 279-340; Instituto de Políticas Públicas en Derechos Humanos del MERCOSUR (IPPDH), *Ganar Derechos: Lineamientos para la formulación de políticas públicas basadas en derechos* (Buenos Aires: IPPDH, 2014).

3. Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Piero Foresti, Laura de Carli y otros vs. Sudáfrica*, caso n. ARB(AF)/07/1.

4. NAFTA is the acronym for the North American Free Trade Agreement.

5. For a detailed critique of the broad interpretation of the fair and equitable treatment principle and the concept of legitimate expectations of investors in the arbitral precedents of the ICSID from a legal standpoint sustained by the principles of international law, see the Separate Opinion of Arbitrator Pedro Nikken in the decision on the responsibility of the case Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. Y*
La República Argentina, caso n. ARB/03/19, 22 de octubre de 2007.

6. David Schneiderman, "Investing in Democracy. Political process and international investment law", *University of Toronto Law Journal*, 60. no. 4 (2010): 909-940.

7. Pia Eberhardt, *Investment Protection at a Crossroads. The TTIP and the future of International Investment Law* (Berlin: Friedrich-Ebert-Stiftung, 2013), accessed July, 2015, http://library.fes.de/pdf-files/iez/global/10875.pdf.

8. In recent years, some studies have developed sound arguments based on international law and the legal obligation of the investment regime's arbitration panels to take into account the obligations of national states to protect human rights when examining the key principles of fair and equitable treatment and indirect expropriation. It is not a question of exempting states from complying with international obligations due to domestic laws, but rather of making the various international sources compatible with one another. This kind of analysis can also be seen as an exercise of interlegality that seeks to change aspects in the investment regime's approach to make it permeable to the principles of the human rights regime and safeguard the state's flexibility to exercise its sovereignty and regulatory powers so it can protect civil and social rights. For more on this, see: Juan Pablo Bohoslavsky and Juan Bautista Justo, *Protección del derecho humano al agua y arbitrajes de inversión* (Santiago: CEPAL, 2010).

9. In a later case, regarding the renationalisation of drinking water services in Tanzania, a group of organisations presented themselves as amicus curiae to explain the human rights implications of the case. The final ruling did not assess whether a relationship exists between the fundamental right of access to drinking water, the termination of the agreement and the investor's rights. See: Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Biwater Gauff vs. Tanzania*, caso n. ARB/05/22, laudo del 24 de julio de 2008.

10. Santos calls them "transnational trade regulation", which he sees as the expression of the rebirth of a new lex mercatoria as "global capitalism's own law". He describes this new law as a kind of non-state law, and an important field of private justice, which involves international trade arbitration systems, the WTO and other more or less concealed institutional process through which transnational trade relations are conducted. (Boaventura de Sousa Santos, *Toward a New Common Sense: Law Science and Politics in Paradigmatic Transition* (New York: Routledge, 1995)).
11. Gunther Teubner, "Regímenes Globales Privados: ¿Derecho Neoespontáneo y Constitución Dual de Sectores Autónomos?, en *Estado, Soberanía y Globalización*, de Gunther Teubner, Saskia Sassen y Stephen Krasner (Bogotá: Siglo del Hombre, 2010).
12. See: Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal*, S.A. Y La República Argentina, caso n. ARB/03/19, febrero 2007. Submission as a friend of the tribunal by the Center for Legal and Social Studies (CELS), the Civil Association for Equality and Justice (ACIJ), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria Unión de Usuarios y Consumidores, and the Center for International Environmental Law (CIEL). For a detailed critique of the broad interpretation of the fair and equitable treatment principle, a comprehensive interpretation of the right to the stability of the regulatory framework at the expense of state regulatory powers, and the inadequate use of the "legitimate expectation of investors" as a reasonableness standard, one can consult the Separate Opinion of Arbitrator Pedro Nikken on the Suez c. *Argentina* case.
13. See, for example, Corte IDH, *Caso del Pueblo Saramaka vs. Surinam* 2007; Corte IDH, *Cuatro Comunidades Indígenas Ngöbe y sus Miembros*, 2010; Corte IDH, *Caso Comunidad Indígena Sawhoyamaxa vs. Paraguay*, 2006, the IACHR considered, obiter dictum, that Paraguay could not invoke a BIT to justify an activity that violates the American Convention (which, in this case, violated cultural and economic rights to an indigenous collective territory). By doing so, it gave, to a certain extent, priority to human rights obligations over the foreign investment treaty.
14. The International Financial Institutions (IFIs) also have guidelines and operational policies on these issues: for example, World Bank guidelines on the projects it funds. A similar experience with overlapping forums was when social, trade union, indigenous and environmental organisations made submissions to the World Bank Inspection Panel, which is in charge of supervising the bank's own policies and norms, and the Compliance Advisor Ombudsman of the IFC. In this forum governed by the international financial institution's regime, the activists translated conflicts of rights into potential violations of the bank's operational policies and guidelines. They argued that the supervision of the entity's local agents during the implementation of programs and projects funded by the bank was flawed. In its tortuous way, the panel has examined cases on: population displacement and environmental damage caused by infrastructure projects; agrarian reform plans and problems of access to land; the underfunding of social programs guaranteed by structural adjustment loans; the inadequacy of state processes for the consultation and participation of local affected communities; lack of transparency of projects, among other issues (See: Dana Clark, Jonathan Fox y Kay Treackle, *Derecho a exigir respuestas. Reclamos de la sociedad civil ante el Panel de Inspección del Banco Mundial* (Buenos Aires: Siglo XXI Editores, 2005).
15. See: Víctor Abramovich, "Autonomía y Subsidiariedad: El Sistema Interamericano de Derechos Humanos frente a los sistemas de justicia nacionales," en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 211–230; César Rodríguez Garavito, "Navegando la Globalización: un mapamundi para el estudio y la práctica del derecho en América Latina," en *El Derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI*, ed. César Rodríguez Garavito (Buenos Aires: Siglo XXI Editores, 2011): 69–86; César Rodríguez Garavito, *Etnicidad.gov: Los recursos naturales, los pueblos indígenas y el derecho a la consulta previa en los campos sociales minados* (Bogotá: Editora Dejusticia, 2012).
16. See: John Jackson, William Davey, Alan O Sykes, *Legal Problems of International Economic Relations. Case, Materials and Text* (Minnesota: West Group, 1995).
17. Paul Nelson and Ellen Dorsey, "New Rights Advocacy in a Global Public Domain", *European Journal of International Relations*, 13, n. 2 (2007): 187-216.

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Received in March 2015.
Original in Spanish. Translated by Karen Lang.

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sur international journal on human rights
- Aug/2015 -
issue 21

ESSAYS

LIES ENGRAVED ON MARBLE AND TRUTHS LOST FOREVER[1]

Glenda Mezarobba

• *A reflection on the dialogue between the National Truth Commission, the Ministry of Defence and the Armed Forces in Brazil.* •

ABSTRACT

The National Truth Commission (NTC) was established in Brazil in 2012, with one of its goals being to clarify, in collaboration with other public entities, the facts and circumstances surrounding cases of severe human rights violations committed during the period 1946 - 1988. In this article the author reconstructs some of the dialogue developed by the NTC with the Ministry of Defence and the Armed Forces and, more specifically, the NTC's efforts to shed light on cases of deaths and forced disappearances. Having led part of this dialogue, Mezarobba explains in detail the exchange of official correspondence, the meetings and the documentary analysis conducted by these bodies. The author argues that although not a single case of forced disappearance or death was resolved, the dialogue that took place cannot be ignored.

KEYWORDS

Truth Commission | Armed Forces | Memory | Brazil | Military dictatorship

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In 2010, seeking to fulfil the duty of the Brazilian state to reveal the truth, the Presidency of the Republic created a working group to prepare a draft bill[2] to establish a body to investigate the severe human rights violations that took place during the military dictatorship (1964-1985). Formed by representatives of the Office of the Presidential Chief of Staff, the Ministry of Justice, the Ministry of Defence and the Special Secretariat for Human Rights, the president of the Special Commission on Political Deaths and Disappearances and one civil society representative, the group worked for three months drafting what would become, at the end of 2011, Law 12,528.[3] Supported by this legislation, the National Truth Commission (NTC) was established on 16 May 2012 to examine and shed light on the severe human rights violations perpetrated between 1946 and 1988, "in order to assure the right to memory and to historical truth, and to promote national reconciliation."[4]

One of the Commission's legally established goals was to clarify, in collaboration with other public entities, the facts and circumstances surrounding cases of severe human rights violations, namely cases of torture, death, forced disappearances, concealment of bodies, and their perpetrators, even when they happened abroad.[5] The purpose of this article is to reconstruct the dialogue developed by the NTC with the Ministry of Defence and the Armed Forces and, more specifically, the efforts that were made to shed light on cases of deaths and forced disappearances.

Exchange of official correspondence

To achieve its goals, the Commission was permitted to "solicit information, data and documents from governmental bodies and agencies, even when classified at any degree of secrecy" and to "solicit the assistance of public bodies and agencies."[6] The legislation also established the "duty of public sector employees and the military" to cooperate with the National Truth Commission.[7]

According to its final report,[8] published on 10 December 2014, "concerning the relationship of the NTC with bodies of the public administration, the most relevant dialogue enabling the Commission to conduct its legally established activities was held with the Ministry of Defence and the Armed Forces."[9] According to the document,

> *throughout the duration of its mandate, the NTC took steps to obtain information and documents concerning – directly or indirectly – the severe human rights violations that were under the responsibility or in the safeguard of the Armed Forces, and also to identify the structures, locations, institutions administratively controlled by or that were administratively controlled by the Armed Forces that were used to perpetrate severe human rights violations.*[10]

Also according to the final report, the first formal solicitation of the NTC was made on 27 June 2012. In an official correspondence addressed to the Ministry of Defence, it requested from the Armed Forces access to "relevant documentary information from the Army, the Navy and the Air Force related to severe human rights violations."[11] In 2013 the NTC began to make two different types of requests. The first contained questions on specific cases of severe human rights violations. The second set of requests, addressed to the Ministry of Defence and its military branches, referred to access to the service and personnel records of retired military personnel to clarify severe human rights violations and identify the structures, institutions, bodies and locations associated with these crimes.

Data from November 2014 indicate that, in total, the NTC sent 84 official correspondences to the Ministry of Defence and its respective military branches, distributed as follows: 76 to the Ministry itself; two to the Army; one to the Presidential Guard Battalion; one to the Navy; two to the Military Hospital; one to the Armed Services Hospital; and one to the health board of the Air Force. Most of the correspondences requested information or authorisation to make "technical visits." Three dealt with logistical support and only one was for a summons.

In 2014, responding to a request from the NTC, the Armed Forces conducted inquiries to investigate the practice of severe human rights violations in its own facilities. The inquiries began in February after the members of the Commission, in a meeting with the Minister of Defence, requested the establishment of these administrative procedures to investigate how seven military facilities located in the states of Rio de Janeiro, São Paulo, Minas Gerais and Pernambuco "were used continuously and systematically for the practice of torture and executions during the military regime."[12] The request was accompanied by a preliminary research report indicating that units of the Army, Navy and Air Force were used "as the locus of severe human rights violations."[13] In the document, prepared based on a brief by two administrative law professors from the University of São Paulo, the NTC considered it:

> *imperative to clarify all the administrative circumstances that led to the deviation from the public purpose established for these facilities, constituting the administrative offence of misapplication of purpose, since it is not permissible for public properties [...] to be officially used for illegal activities.*[14]

The meetings

The relationship between the Commission, the Ministry of Defence and the Armed Forces also included regular meetings with representatives of these institutions. In addition to the dialogue by the members of the NTC with the Minister of Defence and the chiefs of the three branches of the military, meetings were held with senior staff at the Ministry, high-ranking officers from the Armed Forces and consultants or advisers of the Commission. Two main topics were addressed at these meetings: shedding light on the cases of deaths and forced disappearances, established at the start of 2013, and accessing the service records of military personnel, as agreed in August 2014. The dialogue involving the first topic started to be definitively outlined at a meeting held on 8 January 2013 at the offices of the NTC in Brasília. Chaired by Claudio Fonteles, the coordinator of the Commission at the time, the meeting had been requested on 21 December 2012 by Antônio Thomaz Lessa Garcia Júnior, chief of staff to the Minister of Defence who, in a telephone conversation, had also offered the dates of 10 and 15 January 2013 for the first meetings with representatives of the Navy and the Air Force, respectively.

At this meeting the chief of staff to the Minister of Defence reiterated the offer, made a few months earlier, to establish dialogue with the military personnel responsible for developing the current policy for accessing information from the Armed Forces. He also announced the discovery of 60,000 catalogue cards in premises belonging to the Ministry.

Two meetings were held shortly afterwards: one in the Office of the Chief of Staff of the Navy (*Estado-Maior da Armada*) and the other in the Office of the Chief of Staff of the Air Force (*Estado-Maior da Aeronáutica*). In both meetings, on 10 January, it was decided that the collaboration between the National Truth Commission and the Armed Forces would begin with a type of exercise: the analysis of one or two cases of political deaths and disappearances involving each of these two Forces. The representative of the Navy and the two representatives of the Air Force deemed it possible, with the resources available in each of the branches of the military, to locate the missing pieces to solve the puzzle involving the fatal victims of the dictatorship. Therefore, proceeding with what was agreed previously in the meeting with the Ministry of Defence and the chiefs of the three Armed Forces, the NTC established a channel of dialogue with representatives of the Navy, the Air Force and the Army - whose first meeting occurred nearly a month later.

With the support of the Ministry of Defence, all the dialogue between the National Truth Commission and the Armed Forces was structured on a case-by-case basis, i.e. on the attempt to clarify the details surrounding the arrest and death of political opponents. In the cases of forced disappearances, the NTC also requested information referring to the location of the remains of the victims. Within this line of research, by the time the Commission had completed its work, eight meetings had been held with the Brazilian Navy; seven meetings with the Brazilian Air Force and six meetings with the Brazilian Army. The last round occurred in early July 2014.

Documentary analysis

IIt was assumed that none of the three branches of the Armed Forces had any of the documentary archives produced or accumulated in the period between 1964 and 1985, which was based on the Notice No. 261 of the Ministry of Defence, submitted to the Justice Minister in November 2012. Therefore, it was determined that for every case of death or forced disappearance, all the documents found in the National Archives15 (now digitised) would be sent by the NTC on digital media. These documents were produced during the military dictatorship by the intelligence and security agencies and were intended to serve as the starting point for shedding light on these crimes. The idea initially was for the three Armed Forces to receive all of the 456 cases that were the subject of this dialogue with the Commission, but difficulties resulting from the large volume of documents available in the National Archives meant that this triple analysis was not possible. Therefore although 151 cases were submitted for a multiple assessment, most of them were sent to a single branch of the Armed Forces. The Navy was sent 254 cases; the Army, 248; and the Air Force, 246. Each of the three Armed Services received the same 61 “blank” cases, about which nothing was found in the National Archives.

As an official document resulting from more than a decade's work by the Special Commission on Political Deaths and Disappearances, the book "Right to Memory and to Truth" (*"Direito à Memória e à Verdade"*), published in 2007 by the Special Secretariat for Human Rights, was suggested to the military as a reference for the development of case studies. A copy of the book, which is also available online,[16] was sent to each of the Armed Forces. In July 2014 the book "Dossier Dictatorship: Political Deaths and Disappearances in Brazil – 1964-1985" ("*Dossiê Ditadura: Mortos e Desaparecidos Políticos no Brasil – 1964-1985*") was also recommended as a reference book and delivered to the Armed Forces on DVD.

The analysis of the documents from the National Archives sent by the Commission was developed independently by the three Armed Forces according to their own methodology and based on the summary of each of the cases available in the book "Right to Memory and to Truth." The Navy, for example, conducted a "comparative analysis" to present the results of its assessment of the documents, with a focus on any contradictory information and/or conflicting versions. The Army, meanwhile, prepared tables showing the origin of the documents, the year they were produced, their classification in terms of secrecy, and the total number of pages analysed in each one of the cases. And the Air Force provided detailed information on official internal correspondences and orders relating to the analysis of each one of the cases. The Air Force also informed the Commission that in early 2004 it had conducted its own campaign "through its intranet and internet" to search for more information "that could lead to the location of the mortal remains of the people who disappeared in the conflict in Araguaia."[17]

Results of the dialogue between the Truth Commission, the Ministry of Defence and the Armed Forces

Although it was proposed by the representative of the NTC at the start of the dialogue with the Ministry of Defence and the Armed Forces in 2013, apparently none of the three branches of the Armed Services sought information or data from retired military personnel or searched in the administrative records of military organisations where crimes occurred, such as the Canoas Air Base in southern Brazil. The files resulting from the work of the three Armed Services were shared by the Ministry of Defence in official correspondence that was regularly sent to the NTC. This correspondence formed part of the body of documents that, according to the law that established the Commission, would be included in the files of the "Memories Revealed" (*"Memórias Reveladas"*) project by the National Archives[18] upon the completion of the Commission's work.

Among the specific discoveries and/or relevant information provided by the military based on its assessment of the material sent by NTC are, for example, three secret documents relating to the case of Eduardo Collier Filho.[19] Identified by the Army, one of them, dated 1975 by the Ministry of Justice, considers the information that Collier had been arrested on the date given for his disappearance to be false, and another document denies that he had been held in the premises of the Federal Police. Finally, a secret statement from the Military Public Prosecutor's Office to the Ministry of Justice cites the lack of proof of his arrest.[20] When analysing the case of the forced disappearance of David Capistrano da Costa,[21] the Navy, meanwhile, located a confidential document produced by the National Intelligence Service agency in the Mato Grosso do Sul state capital of Campo Grande, dated 5 July 1974, informing that Costa and another five people had been arrested in Aquidauana, in the neighboring state of Mato Grosso. Two days earlier, the agency itself had been informed, via telex, of the arrest of the group. Not long afterwards the information was denied, with new information from the Brazilian interstate police (*Polinter*) stating that "the initial communication had been mistaken." Concerning the case of Ângelo Cardoso da Silva,[22] documentation analysed by the Air Force brought forward the probable date of his death by one day. According to documents from the Porto Alegre agency, the central agency of the National Intelligence Service and the Ministry of Mining and Energy, the militant from the M3G group (Marx, Mao, Marighella and Guevara) died on 22 April 1970.[23]

Although not a single case of forced disappearance or death was resolved, the effort involving the NTC, the Ministry of Defence and the Armed Forces cannot be ignored. These small discoveries indicate that all kinds of documents

produced during the dictatorship were carefully read, despite the deluge of data they contained. In November 2014, for example, the Navy confirmed that it had analyzed 69,034 pages of documents in 1,203 hours of work involving five military personnel.[24] An official correspondence from the Air Force, sent to the Ministry of Defence in early December, revealed that over a period of 16 months, three military personnel had spent 3,972 hours working on examining more than 100,000 pages of documents[25] as part of the dialogue established with the NTC. At the same time, the Army confirmed that it had analysed 110 cases "whose records totalled 195,600 pages" involving a team of eight military personnel and 6,520 hours of work.[26]

Given its proportions, the innovative nature of the project also has to be recognised, since it is based exclusively on a practice that contrasts with the period under analysis, namely on dialogue and the joint clarification of the facts. As Michel Feher points out, instituting a democratic regime means substituting the reign of force for the rule of law and that implementing the principle of individual accountability means ensuring that no group of citizens will be held collectively responsible based on their group identity.[27] This is not an easy task, if we consider how often so-called "group recriminations" took place – including during the development of the Commission's work – in the form of reprisals of opposing factions against each other attributing to whole groups the actions of individual members. Such recurrent group recrimination has, in this process of revealing the truth, been challenged since the preparation of the draft bill by involving representatives of the Ministry of Defence in this process. Moreover, the different expectations of those who experienced or witnessed the facts themselves, and those who instead only know about the severe violations that occurred during the military dictatorship from current information, do not help calm the spirits of those involved in the mnemonic battle (an expression that gained notoriety with Eviatar Zerubavel, in the mid-1990s), often placing them in opposing camps. While the members of the Commission were sceptical about the confirmation of the non-existence of any military files, the Ministry of Defence was surprised by the NTC's lack of interest in accepting an invitation made by the Navy to visit its intelligence centre, CENIMAR.

Therefore, if the dialogue with the Armed Forces was not capable of "resolving the matter" as intended by the NTC, it clearly shows how, in the words of Onur Bakiner, *"commissions are firmly embedded in the social struggles over memory and history, which makes the reception of their findings and narratives dependent on larger political and societal processes. They produce one truth among others."*[28]

NOTES

1. *"The written word, the printed word, and so the possibility of a document withstanding time and ending up one day on the historian's desk does not bestow upon this particular relic a supplementary truth over all the other marks of the past: there are lies engraved on marble and truths lost forever."* Henry Rousso, "O arquivo ou o indício de uma falta" (The archive or the sign of an absence) Estudos Históricos 9, no. 17 (1996): 85–92.
2. Brasil, Congresso Nacional, "Projeto de Lei, Cria a Comissão Nacional da Verdade, no âmbito da Casa Civil da Presidência da República", EM n. 14 / 2010 – SDH-PR/MD/MJ/MP, last accessed in May 2015, http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=1C6ADF7AC42DEBBAED5C101E8E532978.proposicoesWeb1?codteor=771442&filename=PL+7376/2010.
3. Brasil, "Cria a Comissão Nacional da Verdade, no âmbito da Casa Civil da Presidência da República", Lei n. 12.528, *Diário Oficial da República Federativa do Brasil* (2011), accessed May, 2015 , http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12528.htm.
4. Brasil, Lei n. 12.528/2011, art. 1.
5. Besides these, the other goals of the Commission established by the law were: to identify and make public the structures, locations, institutions and circumstances in connection with the practice of human rights violations and any ramifications on the various different state institutions and on society; to forward all information that could help locate and identify victims of political disappearances to the proper authorities; to cooperate with all governmental agencies to investigate human rights violations; to recommend the adoption of public policies and measures to prevent new violations; to promote, based on the evidence obtained, the reconstruction of case histories of severe human rights violations; and to cooperate so assistance can be provided to the victims.
6. Brasil, Lei n. 12.528/2011, art. 4, II e VIII.

7. *Ibid.*, article 4, paragraph 3.
8. Brasil, Comissão Nacional da Verdade, *Relatório Final da Comissão Nacional da Verdade*, vol. 1 (Brasília: CNV, 2014), laccessed May, 2015, http://www.cnv.gov.br/index.php?option=com_content&view=article&id=571.
9. Brasil, *Relatório Final*, 63.
10. *Ibid.*, 63.
11. *Ibid.*, 63.
12. *Ibid.*, 64.
13. *Ibid.*, 64.
14. *Ibid.*, 65.
15. Body under the Ministry of Justice that stores, preserves, provides access to and discloses public documents, most of them produced by the Federal Executive Branch, but also by the Legislative and Judicial Branches, in addition to the private documents of individuals and companies. See more at: http://www.arquivonacional.gov.br/.
16. Brasil, Secretaria Especial dos *Direitos Humanos, Comissão Especial sobre Mortos e Desaparecidos Políticos*, Direito à memória e à verdade: Comissão Especial sobre Mortos e Desaparecidos Políticos (Brasília: SEDH, 2007), accessed May, 2015, http://pt.scribd.com/doc/55814712/livrodireitomemoriaeverdadeid.
17. Brasil, Força Aérea Brasileira, Ofício 15/CMT/473, 14 de março de 2006.
18. The Reference Centre for Political Struggles in Brazil (1964-1985), institutionalised by the Chief of Staff of the Presidency of the Republic and implemented in the National Archives in order to compile information on the facts of the country's recent political history: http://www.memoriasreveladas.gov.br/.
19. Militant from the APML (Marxist-Leninist Popular Action) group arrested in Rio de Janeiro by security agents on 23 February 1974, according to data from the book "Direito à memória e à verdade" (Brasil, Direito, 373).
20. Brasil, Ministério de Defesa, Ofício 3945/MD, 14 de abril de 2014.
21. Member of the PCB (Brazilian Communist Party) who disappeared on 16 March 1974 between the city of Uruguaiana, in the state of Rio Grande do Sul, and São Paulo, according to data from the book "Direito à memória e à verdade" (Brasil, *Direito*, 371).
22. Taxi driver associated with the organisation M3G who died on 23 April 1970 in the Central Prison of Porto Alegre, in the state of Rio Grande do Sul, according to data from the book "Direito à memória e à verdade" (Brasil, *Direito*, 124).
23. Brasil, Ministério de Defesa, Ofício 5034/Gabinete – MD, 12 de maio de 2012.
24. Brasil, Marinha do Brasil, Ofício 60-382/GCM-MB, 19 de novembro de 2014.
25. Brasil, Ministério de Defesa, Ofício 14119/Gabinete -MD, 4 de dezembro de 2014.
26. Brasil, Ministério de Defesa, Ofício 14524/Gabinete – MD, 11 de dezembro de 2014.
27. Michel Feher, "Terms of reconciliation," in *Human rights in political transitions: Gettysburg to Bosnia*, Carla Hesse and Robert Post (New York: Zone Books, 1999), 325.
28. Onur Bakiner, "One truth among others?: Truth commissions 'struggle for truth and memory," *Memory Studies,* February 2015, 2.

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Received in April 2015.
Original in Portuguese. Translated by Barney Whiteoak.

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sur international journal on human rights - Aug/2015 -

issue 21

ESSAYS

IS HUMANITARIAN ACTION INDEPENDENT FROM POLITICAL INTERESTS?

Jonathan Whittall

• *Why the humanitarian aid industry - still largely associated with hegemonic power - is facing a crisis of legitimacy.* •

ABSTRACT

he International humanitarian action should be about saving lives and alleviating suffering. This paper considers the impact that political influence has on humanitarianism and how this has polluted its work. The author examines the history of this influence since the Cold War until the 2007 financial crisis, noting its constant entanglement with Western political interests. Rarely seen in its pure altruistic form, this paper discusses the conflicts that arise from incorporating humanitarian aid into the wider political goals of state building, for example. Consequently, humanitarian NGOs face a crisis of legitimacy. In addition, the author asks whether humanitarian action will retreat with western power or be left exposed. With emerging powers playing an increasingly important role on a "three dimensional chessboard," he concludes with key suggestions for the sector to regain its legitimacy and not to repeat the mistakes of the past.

KEYWORDS

Humanitarian | Aid | Political interest | Doctors Without Borders | Emerging powers

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Institutional humanitarian action – represented most prominently by large NGOs from the Global North and the UN system – has significantly grown in the post-Cold War era of capitalism's political dominance. Humanitarian action for an organisation like *Médecins Sans Frontières* / Doctors without Borders (MSF) can most simply be defined as the act of saving lives and alleviating suffering. However, the practice of delivering humanitarian assistance is carried out by an increasing number of organisations and includes a growing range of objectives that mirror a liberal democratic agenda. This broader form of humanitarianism has become closely associated with hegemonic power, both in terms of how humanitarian concerns have been used as a justification for military intervention and in terms of how humanitarian aid has been used as a foreign policy or military tool by donor governments. NGOs have in many cases become extensions of Western foreign policy. This has most obviously been seen in contexts such as Afghanistan where many NGOs supported and formed an integral part of US led stabilisation activities following the US invasion in 2001.

However, power is changing. Western hegemonic power is arguably in decline and powers such as Brazil, India and China are taking increasing space on the geopolitical stage. In an analysis of the BRICS voting patterns at the UN, Ferdinand confirmed that the most prominent divide between the Global North and South is over issues of development.[1] Ferdinand notes that the BRICS never take opposing positions on such issues, though there is greater cohesion within the India/Brazil/South Africa (IBSA) group. Ferdinand concludes that "their growing self[-]confidence, will heighten the travails of an already diplomatically embattled US at the UN"[2] and "this grouping is both emblematic

of wider global change as well as a significant factor in bringing it about. It points to an enhanced role for middle powers in the post-unipolar world."

What has the relationship been between humanitarian action and Western power and how will changing power impact the future of humanitarian aid? This analysis offers an alternative narrative on the evolution of humanitarian aid and its current dilemmas.

Joseph Nye has developed a useful model for understanding current global power structures. He refers to current power dynamics as a "three dimensional chessboard." [3] According to Nye: "The world is neither unipolar, multipolar, nor chaotic – it is all three at the same time." [4] Drawing on the notion of this three dimensional chessboard, this analysis of the relationship between humanitarian aid and political power will refer to the three current power structures as: the uni-polar or the Western uni-pole; the messy multi-polarity of (re)emerging powers; and the diffusion of power.

In the Cold War, the provision of humanitarian aid by NGOs was confined to one side of a bi-polar political chessboard. It was rejected by a Soviet system on the one side that saw humanitarian aid as a tool of Western governments who sat on the other side of a geopolitical divide. A "*sans frontièrist*" element to humanitarian action emerged during this period, which rejected the ability of the nation state to deny access for humanitarian workers to conflict zones. However, this cross-border aid was often delivered in alliance with those groups resisting the Soviet system from the inside - such as the cross-border aid activities carried out into areas under the control of the Mujahadeen in Afghanistan following the 1979 Soviet invasion. MSF sought to extract itself from the influence of donor governments in conflict by rejecting to be funded by governments in politically sensitive contexts and chose to rely instead on private donations from individuals. However, other NGOs cemented their funding relationship with donor governments from the Global North.

At the end of the Cold War, and as the bi-polar chessboard was cleared, liberal democracy dominated and the white pieces of the chessboard controlled the playing field. Donors funded humanitarian aid in partnership with development activities. For NGO workers – whose sphere of influence grew exponentially - the combination of development and humanitarian activities was a way to "bridge the gap" and to "break the cycle" of emergencies by addressing the "root causes" of crises. This brought aid workers into a sphere of action whereby a political diagnosis and structural solution needed to be proposed. Liberal democracy was the political ideology that informed much of the individual aid worker politics in NGO headquarters. Duffield refers to this as the belief amongst some NGOs in the "'moral' cause of [W]estern governance." [5] For donors, the combination of relief and development was a way to ensure coherence among the different tools used to consolidate the establishment of the liberal-democratic order in what were then referred to as "failed states." An "unholy alliance" was consolidated between humanitarian organisations and western donors. [6] As MSF's private funding increased it actively resisted the trend in the aid sector to combine development and relief activities within this "unholy alliance." However, MSF still formed part of an overall aid system that it could not entirely extract itself from.

The provision of assistance has never been uncontested and attacks on the ability of humanitarian actors to operate in the uni-polar era were driven largely by what Kaldor described as the dynamic of "new wars." [7] What emerged was an interest-based acceptance or rejection of humanitarian aid in what were largely internal conflicts based on the notion of humanitarian aid as something that might be manipulated to serve national military tactics. Humanitarian access was negotiated based on compromises with these local interests. The services that humanitarian NGOs had to offer gave a level of leverage in the process of negotiating access. Dominant states – such as the US and countries in Europe, who were also the primary funders of humanitarian organisations – were able to bully weaker states in the Global South to accept the humanitarian organisations that they funded, even when they were suspicious of the organisation's influence, interests and motives. Although often not accepting funding from these states, MSF managed to benefit from the political leverage of the Global North during this period.

The exaggerated rise of a transnational "terrorist" threat following 9/11 saw the beginning of a new era for humanitarian aid. The foundations of securitised aid and mechanisms of delivery that had developed in the Cold War

world – and incorporated into liberal democracy with multi-mandated organisations delivering both humanitarian and development aid – were used in the new battle against terrorism.

A coherence agenda turned its attention to stabilisation approaches. This sought to build the legitimacy of certain groups such as the Afghan government through the provision of assistance in the areas under its control and to deny legitimacy to other groups such as the Taliban through the criminalisation of assistance that could benefit an opponent to western political interests. Humanitarian aid actors had to defend themselves from the risk of being associated with their Western donors. They re-asserted principles of independence, neutrality and impartiality in an attempt to create at least the illusion of a protected space of action outside of political interference. However, many armed actors such as the Al Shabaab in Somalia did not buy the distinction and aid organisations were targeted in Iraq, Somalia, Darfur and elsewhere. During this era, concerns were raised by humanitarian organisations about the "blurring of the lines" between humanitarian actors and military forces.

As a result of the overstretch of American power in the wars in Iraq and Afghanistan – combined with a financial crisis and a general loss in legitimacy of the West – the uni-polar chessboard became destabilised and American power began to decline. In its place, emerged a messy multi-polarity, a diffusion of power and, in some cases, pure chaos. This brought us to the current era of humanitarian aid delivery. The humanitarian aid system - still largely associated with hegemonic power - is facing a crisis of legitimacy. The question has now become whether humanitarian aid will retreat with the tide of western power or be left exposed?

Humanitarian action is still tied to the uni-polar chessboard where only the white pieces are wielding power. However, it is having to contend with a more complex power dynamic in which its identity is Western and its capacity is tied to Western political interests and institutions, but in which the white pieces of the chessboard are no longer the only players with power. The toolkit developed by humanitarian actors for defending their legitimacy to operate is coming into question as the currency of "humanitarian principles" have been eroded over time. In addition to this, the very effectiveness of humanitarian aid in delivering emergency assistance has been undermined by its incorporation into the liberal-democratic model (a model questioned and contested by an emerging multi-polarity defining itself with the rejection of Western models in general).

Indeed, the failures in humanitarian response are at least in part due to the political choices of many aid organisations to allow themselves to work with such a broad range of objectives - from promoting peace and stability to building state institutions to delivering life saving assistance. The reality however, as was seen in the case of South Sudan since the signing of the Comprehensive Peace Agreement in 2005, is that the political process of state building takes priority over the maintenance of an emergency response capacity - especially when all components of the international response to a crisis are merged under the umbrella of "resilience building." Organisations like MSF and the ICRC have managed to maintain their emergency response capacity largely because they have maintained an independence of action. However, the tendency of the majority of NGOs in the liberal humanitarian era to want to do more and therefore to attempt to "bridge the gap" between relief and development, giving rise to multi-mandated organisations, has now been replaced by a desire to be cost effective by "building resilience."

The way in which aid is conceptualised along the lines of integrating efforts toward a broader political agenda has resulted in a number of concrete implications for those actors who would normally be involved in the acute phase of emergency response. First, there is less direct action on the ground in emergencies due to a preference to rather build capacity or to work through local partners. Second, there is a tendency toward longer term heavy development programming that makes it difficult to switch quickly to light and quick emergency responses. Finally, there is a reduced logistical capacity due to reliance on UN integrated missions. This has resulted in a crisis of capacity in the aid world, leading *Médecins Sans Frontières* (MSF) to recently ask the question – when it comes to emergency response – "where is everyone?" [8] This is not a technical failure of the aid system but rather rooted in the political choices of some of the largest aid organizations.

However, the discourse of humanitarian action remains trapped by the legacy of both a uni-polar world and Cold War bi-polar contestation for power. Within this framework humanitarian organisations either play a role in advancing the political interests of the Global North such as in Afghanistan where NGOs are incorporated into stabilisation activities, or they look for ways to distance themselves from the power of the Global North through an assertion of principles. This is coupled with discussions on improving the effectiveness of humanitarian aid that usually focus on solutions that will further entrench humanitarian aid into hegemonic power – such as is seen through the resilience building agenda. However, this overlooks how humanitarian actors should navigate a political multi-polarity where power has become diffused and a proximity to core state hegemonic power is a constraint on both the access and effectiveness of humanitarian aid.

The history of humanitarian action – particularly the way it has been practiced in the pursuit of broader goals and objectives than those implied by its most narrow definition – clearly points to it being a tool in the exercise of power. Humanitarian actors have blown in the winds of the prevailing political discourses – be it anti-communism or liberal democracy – as a consequence of their relationship with hegemonic power. However, humanitarianism in its minimal definition – and its simple act of defiance against the arbitrary exclusion of the means of human survival – points to it being a counter-balance to dominant power. However, for this to be a reality, humanitarian actors need to reclaim their place as part of a global civil society that acts in the interests of the marginalised, rather than in the interests of the core state.

Although organisations like MSF have managed to maintain their emergency response capacities, they still have to address the fact that the identity of the humanitarian aid system is largely tainted by its relationship with the Global North. This requires these organisations, and those who wish to maintain those organisations' access and effectiveness, to further distinguish themselves from hegemonic foreign policy interests and to become a truly global movement. They must work in alliance not only with those organisations from the Global North that dominate the humanitarian system, but also better navigate different dimensions of power by finding alliances with progressive civil society - including social movements, grass roots organisations and people mobilized in a non-traditional way.

This also requires a process of meaningful internationalisation of the largely western humanitarian system that could bring a genuine universality to the humanitarian identity. On an operational level, this new political landscape requires the assertion of a global sans frontièrism through a radical impartiality that actively goes beyond operating in zones under the Global North's influence; and ensuring effectiveness by returning to the basics of saving lives for the sake of saving lives.

These steps will not entirely solve the dilemmas and challenges facing humanitarian aid actors, but they will allow humanitarian actors to regain their legitimacy and face with integrity the push-back from those in power who see the delivery of assistance as impinging on their political and military strategies.

For donors of humanitarian assistance such as Brazil, China and India, amongst others, it is necessary to ensure that the same approach is not taken as donors from the Global North who have largely co-opted institutional humanitarian aid into their political and military objectives. Of course, states are entitled to act with their own interests in mind. However, non aligned states have an opportunity to assist in extracting humanitarian aid from western political power and protecting the delivery of assistance based on solidarity for survival with the most marginalised as an end in and of itself. This will not be achieved by entrenching state control over humanitarian assistance through the assertion of sovereignty but rather by extracting it from hegemonic power and protecting its independence of action.

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Received in April 2015.
Original in English.

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sur international journal on human rights
- Aug/2015 -
issue 21
EXPERIENCES

OCCUPYING HONG KONG

Kin-man Chan

How deliberation, referendum and civil disobedience played out in the Umbrella Movement.

ABSTRACT

The Umbrella Movement was one of the key mass protests of 2014 – and one of the largest ever seen in Hong Kong, with a simple message: universal suffrage. In this article, the author provides a unique insider look at the challenges faced by Occupy Central with Love and Peace (OCLP). The organisation innovatively held a civil referendum, allowing Hong Kong citizens to choose the electoral reforms they wanted to put to Beijing. After the government refused the demands, OCLP facilitated the occupation of large parts of the city, together with other civil society organisations. The insightful reflections offer an honest examination of the different groups involved in the occupation, on what could have been done differently, and provide lessons for future civil society mobilisations.

KEYWORDS

Hong Kong | Civil society | China | Occupy Central with Love and Peace | Umbrella Movement | Protest Democracy

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The Umbrella Movement in Hong Kong, which lasted from September 28 to December 15, 2014, was triggered by a student strike in late September 2014 objecting to Beijing's decision to impose restrictions on the election of the Chief Executive (CE)[1] of Hong Kong. However, preparations for the demonstration had been in the works since March 2013, when Occupy Central with Love and Peace (OCLP) announced its plan to occupy a main road in the city's most important commercial district if the government refused to implement universal suffrage in the 2017 CE election, as promised by Beijing in 2007. In order to exert pressure on Beijing in the electoral reform process, what followed was a series of public deliberations, an unofficial but widely popular referendum, episodes of civil disobedience and what became one of the largest mass protest movements Hong Kong has ever seen. This paper discusses how so-called "deliberation days" and a civil referendum were used to deal with a split within the opposition and the need to develop a more coherent pan-democratic camp after the eventual occupation.

Split between moderate and radical democrats

Before OCLP was jointly launched by Prof. Benny Tai, Rev. Yiu-ming Chu and the author of this paper, the opposition forces in Hong Kong were seriously split due to the controversy over the reform of the 2012 Legislative Council (Legco) [2] election. Moderate democrats, such as the Democratic Party, were fiercely attacked by radicals for cutting a deal with Beijing to expand the franchise for some of Legco's functional seats (primarily those with a very limited

franchise such as members of business and professional associations) rather than eliminating the seats entirely. Unlike their radical counterparts, such as the League of Social Democrats, the moderates accepted the timeline set by Beijing for the implementation of universal suffrage in the 2017 CE election and 2020 Legco election. Any meaningful improvement within the existing constitutional framework could only be considered before these dates. The moderate Democratic Party (DP), the largest opposition party in Hong Kong, had held secret negotiations with Beijing, after which the DP's reform proposal for expanding the franchise was accepted. Although a survey suggested that the proposal enjoyed support from 60 per cent of the community,[3] radicals saw it as a betrayal of democratic values because it appeared to justify the existence of functional seats. The negotiating process was also criticized as lacking in transparency and accountability. The DP subsequently suffered a blow in the 2012 Legco election, and the split among democrats reduced people's trust in the opposition parties. Civil society organisations became more hesitant than ever to work with them.

In view of these circumstances, the founders of OCLP believed that it was of the utmost importance to build a new platform for the opposition parties and civil society organisations to work together to tackle the most important constitutional reform in Hong Kong's history. OCLP argued that negotiation with the authorities should not be demonized as long as a mandate from the public was sought. Deliberation and a civil referendum would be the procedures adopted to resolve conflicts among the opposition parties and to solicit consent from the community.

D-Days: from consensus building to split

As moderate and radical democrats held differing views concerning the CE election process, particularly regarding the role of "civil nomination" of candidates, OCLP relied on a civil referendum to select a reform proposal for the movement. Deeply influenced by the German philosopher Jürgen Habermas's theory of the public sphere[4] and deliberative democracy, plus the concept of a "deliberation day" advocated by the US scholars Bruce Ackerman and James S. Fishkin,[5] the OCLP founders initiated a series of deliberation days (D-Days) to allow citizens to discuss matters related to constitutional reform in a rational manner before casting their vote in a referendum. The subjects discussed included the relevance of democracy, OCLP strategies, and a specific reform proposal.

The first D-Day was held on June 9, 2013, when 700 people gathered at the University of Hong Kong (HKU) to participate in this historic assembly. Most participants were members of the opposition parties and civil society organisations. Before attending D-Day, they could go to a website to view articles expressing divergent views concerning OCLP's demand for an election method that met international standards of universal suffrage. For instance, other than one-person-one-vote, there should be no unreasonable restrictions blocking people from different political backgrounds from standing for election. This discussion of what constitutes "genuine universal suffrage" was pertinent because the Basic Law (the mini constitution of the Hong Kong Special Administrative Region) stipulates the establishment of a "nominating committee" to screen candidates for CE elections. OCLP argued that unless the constitution of the nominating committee was truly broadly representative or the threshold for nomination was sufficiently low, the committee would become an obstacle to free elections.

D-Day 1 began with an open session allowing participants to express their views. It was then followed by a breakout session in which randomly formed groups of a dozen or more participants, led by a moderator responsible for maintaining fair discussion procedures, discussed the various issues concerned. All group members, regardless of position, were given equal time to express their views. The results of the breakout session were then reported during a closing session.

The first D-Day was deemed successful not just because of the satisfactory turn-out but also because moderate and radical democrats discussed political issues in a rational manner. One of the suggestions made during D-Day 1 was to bridge the idea of democracy with the concerns of different sectors of civil society. Therefore, D-Day 2 was organized from October 2013 to January 2014 as a series of discussions by different community groups, such as university students, social workers, women, labourers, church members and the chronically ill. People often feel more relaxed in expressing their views in such "subaltern counterpublics,"[6] reflected by the increase in the number of participants to 3000.

D-Day 3 was held in five different locations simultaneously on May 6, 2014. More than 2500 citizens deliberated on the 15 reform proposals selected by a group of international experts invited by the HKU School of Law. At the end of the day, participants selected three proposals to be considered by the public in the upcoming civil referendum. The selection process was controversial, with some of the radical opposition parties mobilizing D-Day participants to select only those proposals with a provision for "public nomination," i.e., those specifying that a certain number of registered voters could nominate candidates. Moderate democrats criticised this provision as a violation of the Basic Law and a measure that would be difficult for Beijing to accept. They also complained that the OCLP movement had been hijacked by radicals and that the selection process on D-Day 3 was exactly the kind of political screening that people opposed. The democracy movement was split yet again.

Securing a consensus through a referendum

The moderates, particularly Hongkong 2020 led by former senior government official Mrs. Anson Chan, were dissatisfied with the poll results. Mrs. Chan criticised the upcoming civil referendum, stating that it could not offer people a genuine choice if proposals without a provision for public nomination were excluded. Students and radicals counter-attacked, accusing her of being out of touch with the masses. When the movement was on the verge of collapse, Cardinal Joseph Zen played a critical role in rebuilding solidarity. He urged both sides to stop attacking the other while OCLP worked on a remedial solution. Finally, OCLP added an additional motion to the referendum to encourage those who did not support public nomination to take part: "The Legislative Council should veto any proposed election method violating international standards of universal suffrage that fails to provide voters genuine choice."

Consensus then started to be built. The three OCLP founders pledged to step down from leadership of the movement if they failed to draw 100,000 votes in the referendum. Cardinal Zen, together with OCLP and other political groups, immediately organised a Democracy March to take place for seven consecutive days and nights to promote the referendum across Hong Kong. The march was successful in conveying a strong image of solidarity, with Mrs. Chan and other leaders of the democratic camp urging people to vote in the referendum while marching through various communities. The Chinese central government issued a white paper on the implementation of "One Country, Two Systems" immediately before the Democracy March, proclaiming China's "overall jurisdiction" over Hong Kong. In Chinese, the term was written as "overall administrative power," and was understood as a move undermining the high degree of autonomy that Hong Kong enjoys. Furthermore, since the white paper also referred to judges in Hong Kong as "administrators," a number of lawyers joined a "silent march" to express their worries over the continued independence of the judiciary.

The referendum is described as "civil" because it was purely a civil society initiative without official status. OCLP commissioned the HKU Public Opinion Programme to administer the referendum. All Hong Kong citizens aged 18 or above were eligible to vote via an electronic platform or at one of the polling stations set up in various communities. The Hong Kong government accused the referendum of "having no constitutional status," even though OCLP had never made such a claim.

Before the civil referendum was held from June 20-22, 2014, the electronic voting system suffered unprecedented attacks by hackers. The scale of these attacks was so large that local network security maintenance companies decided to withdraw from the project, claiming that they lacked the capacity to handle such large-scale attacks. At the same time, however, the attacks sparked an overwhelming reaction from the community, since it was widely believed that the hackers had been hired by the Beijing authorities to deprive the Hong Kong people of their right to free expression. Fortunately, US-based CloudFlare was determined to defend the voting system. Working day and night, the CloudFlare team finally managed to fix the system. In the first few minutes after the referendum started, thousands of citizens scrambled to vote. Hearing this exciting news, many people burst into tears while they were finishing the last leg of the Democracy March. On June 22, citizens who did not use the internet lined up in front of the polling stations set up in community churches and social service centres.

In the end, around 800,000 of Hong Kong's 7 million population voted in the civil referendum. The proposal of a "three-track system" (nomination from the public, political parties, and the nominating committee), made by the Alliance for True Democracy, received the most votes. Some 88 per cent of voters also agreed that Legco should veto any government proposal that did not meet international standards of universal suffrage. The massive turnout for the referendum brought the movement to a satisfying climax, as people felt that they had overcome tremendous obstacles to make their voices heard.

Beijing's backlash

Armed with the mandate granted by the referendum, OCLP immediately contacted the Hong Kong government, hoping that a meeting could be held to kick-start the negotiation process. The government's response was lukewarm at best, whereas the people of Hong Kong were more eager than ever to express their demand for democracy. Around 500,000 people joined the annual July 1 rally organized by the Civil Human Rights Front to demand genuine universal suffrage. Despite OCLP's objections, more than 500 college students and other citizens stayed behind after the rally to "trial-run" Occupy Central by sitting down on a main road in Central district of Hong Kong. It constituted a sign of young protestors' impatience with OCLP's plan to treat occupation as a last resort. They argued that only by occupying the city as soon as possible would sufficient pressure be placed on Beijing when it considered the reform proposal.

The government then released a consultation report on constitutional reform[7] depicting the demand for public nomination as a view held by "some people" and pro-government views as "mainstream." When representatives of the Hong Kong government finally met with the three OCLP founders on July 29, they condemned the Occupy Movement as a violation of the law and reiterated that Beijing would not yield to threats of this kind. On August 31, 2014, the Standing Committee of the National People's Congress in Beijing made a decision (known as the "831 decision") that basically ruled out the implementation of free elections in Hong Kong. The decision laid down three significant hurdles to democracy: the constitution of the nominating committee would be modelled on the existing election committee, i.e., comprise 1200 representatives from four sectors of society; support from 50 per cent of nominating committee members would be required for a candidate to qualify for election; and the number of candidates would be restricted to two to three persons. As Beijing has been able to control the results of past CE elections, its stipulation that the CE nomination system be modelled on the existing election committee naturally led to the conclusion that the proposed election would be a restricted one.

Umbrella Movement, civil disobedience and resistance

After Beijing announced the 831 decision, effectively blocking democracy, OCLP hinted that the Occupy Movement would start on October 1, China's National Day. We expected thousands of protestors to block a major road in Central, among them lawmakers, prestigious barristers, religious leaders, and scholars. Deeply affected by the tradition of civil disobedience embraced by Henry D. Thoreau, Mahatma Gandhi, Martin Luther King and John Rawls, we were committed to the principle of non-violence and preservation of the rule of law in the course of fighting for justice. OCLP then announced a set of rules for protestors to follow, such as not to insult the police or become involved in any physical confrontation with police officers or counter-protestors. Should they be arrested, protestors were advised not to resist but to lie down and let the police carry them away. To a limited extent, civil disobedience does break the law but it was thought that protestors should shoulder the related legal responsibilities. OCLP repeatedly explained to the public that the aim of civil disobedience was not to challenge the rule of law but to strengthen it by establishing a more responsive government and legislature.

Many young people, however, adopted a more proactive mode of civil disobedience. At the end of the student strike in late September, led by Joshua Wong of Scholarism and Alex Chow and Lester Shum of the Federation of Students (FS), more than 100 students jumped into the forbidden Civic Square, where fences had been erected to prevent people from holding political assemblies in front of government headquarters in Admiralty. Shortly after

this direct action was taken, around 50,000 people gathered outside the square in support of the students. In the early morning of September 28, the three founders of OCLP together with representatives of FS announced that Occupy Central would begin immediately in the area around government headquarters. All of the pickets and other resources prepared for the original October 1 Occupy Movement were deployed to Admiralty.

Some student activists disagreed with FS's decision to allow OCLP to "take over" the leadership, and many protestors left immediately. Witnessing these negative reactions, the OCLP founders agreed to step back and serve only as assistants to the student protestors. A few hours later, tens of thousands of people from all over Hong Kong flocked to Admiralty to show support for the protest. When police blocked their way to government headquarters, furious supporters blocked a boulevard and spontaneously started the occupy action. The police used pepper spray to disperse the crowd, which refused to leave, prompting protestors to try to protect themselves with umbrellas (the umbrella subsequently became a symbol of non-violent protest). Just before 6pm, when OCLP and student leaders were about to hold a press conference, riot police fired tear gas shells into the crowd. Although the attack led to a moment of panic, not a single protestor fought back or retaliated. Shortly afterwards, protestors gathered again in Admiralty. Others occupied traffic junctions in two other commercial districts of Hong Kong: Mong Kok and Causeway Bay. The protestors' courage in fighting for democracy and their firm belief in non-violence captured the imagination of many Hong Kong people.

Immediately after the occupation was launched, internal conflicts emerged among the protestors. Students and other young protestors regarded OCLP's original plan as too passive and weak. They preferred civil disobedience with a more active, if not offensive, character, building barricades and blocking police deployment. When confronting the police, they raised their hands as a gesture of non-violence. Another group of more radical protestors, however, regarded the Umbrella Movement, as it was now called, as a resistance movement that should not be restricted by the idea of civil disobedience or its principle of non-violence. These radicals attacked the leadership formed by FS, Scholarism, and OCLP and promoted a decentralized movement structure. Their motto was "You don't represent me." They called on their supporters to destroy OCLP pickets and even the stage from which movement leaders made speeches, as the former represented rules and discipline, and the latter symbolised a leadership alienated from the masses.

A lack of rigid rules gave protestors a greater sense of autonomy. It opened up a space in which they could construct a movement of their own. All protestors were treated equally in terms of control over barricades and setting up forums, and the sharing of food, medicine, and skills was very common. The protestors established and managed a recycling system, and numerous art creations appeared across the Occupy sites. Lacking tight leadership, however, the movement also lost direction, particularly after the student leaders finished their debate with top government officials. Student leaders performed remarkably in the debate and won tremendous respect from the community. OCLP, however, suggested that either the dialogue with the government be continued or protestors should consider retreating as the message had already been stated, loud and clear. Student leaders refused both suggestions and continued the occupation regardless of a later court injunction. The standoff between the protestors and the government was the result of Beijing's objection to further escalating repressive force by the police while the student leaders were torn between OCLP and the more radical protestors. As the occupation inevitably caused disturbances to people's daily lives, including traffic jams, the government decided to adopt a wait-and-see strategy rather than make any substantial concessions.

The movement was the largest in Hong Kong's history but it also prompted a severe backlash from the community. Surveys found that the community was seriously split, with each side having more than 30 per cent support.[8] The majority of young people supported the movement, whereas most of their parents opposed it. When Occupy moved toward the two-month mark, even many democracy supporters came to believe that the occupation should end at some point. Probably under pressure from more radical protestors, the student leaders decided to storm government headquarters on November 30. That action led to a number of casualties as police responded with batons. On December 3, the OCLP founders openly expressed their disapproval of the protesters' action and urged all protestors to retreat from the occupation. Together with more than 60 protestors, the OCLP founders turned themselves in to the police to show their determination to shoulder their legal responsibilities and further explain their cause during an

eventual trial. The government finally cleared the occupation in Admiralty on December 11 and in the Causeway Bay site on December 15. In the eyes of the protestors, the occupation was over but the movement continued. "We will be back" was found written on the ground of the Admiralty site after the protestors had retreated.

China's reform and the future of Hong Kong human rights

The Hong Kong government submitted a reform proposal to Legco for approval on 17 June 2015. The proposal was made according to a rigid framework laid down by Beijing. Although it would have offered the opportunity for Hong Kong voters to directly elect their own leaders, those on the ballot would have been vetted by a pro-Beijing Committee in advance. The proposal was therefore vetoed by democratic legislators as expected. 9 Even without democracy, Hong Kong can still operate because it is a very institutionalised society. We have an efficient civil service working according to rules and regulations and an independent judiciary protecting basic human rights. That said, the government will find it difficult to implement any substantial reforms or controversial policies, as the present system does not provide it with sufficient legitimacy. When many deep-rooted problems such as housing and monopolies are not duly addressed, more social conflict will arise.

There are also signs that the authorities will step up their control over the ideological arena. In the wake of the occupation, a number of scholars and officials in Beijing concluded that the younger generation had been negatively influenced by liberal intellectuals in Hong Kong. Pro-Beijing newspapers in Hong Kong then attacked HKU for playing too prominent a role in the Occupy Movement. Numerous scholars including the author of this paper have been accused of spreading harmful ideas. They also criticised HKU for considering the promotion of Prof. Johannes Chan, former Dean of HKU Law School and longstanding supporter of democracy, to pro-Vice Chancellor of the university. At the secondary school level, pressure has been exerted on Liberal Studies, a subject designed to nurture students' critical-thinking abilities. Finally, a number of Hong Kong's largest bookstore chains, including Commercial Press, have refused to stock books supportive of the movement.

A more imminent threat is the enactment of a national security law (Article 23). Many pro-Beijing politicians resurrected the issue in the wake of the protests, reflecting their view that the Umbrella Movement was an act of subversion or even treason that only a national security law could prevent from happening again. Some even suggested the direct application of China's national security laws in Hong Kong. As the government has already secured enough votes in Legco to support the passage of Article 23, Hong Kong people can only rely on civil society to stop it from happening. To face this challenge, civil society organisations must learn the lesson from the Occupy Movement by overcoming its internal split and building a more coherent leadership together with the opposition parties.

China is now the world's second superpower, and relies less on Hong Kong than it did in the past. It is confident enough to say NO to Hong Kong but not confident enough to afford it democracy. China's paramount leader, Xi Jinping, is still in the process of consolidating his power. Giving Hong Kong democracy would contradict his current approach to managing the country. However, as China has yet to find a sustainable model of development, and the effectiveness of Xi's top-down approach to control corruption is questionable, the Chinese Community Party will have to find more institutionalised means of tackling its pressing social problems. Otherwise it will not be able to prevent the factional conflicts within the party and societal conflicts in different regions accumulating to the point of the "crackup," recently predicted by Shambaugh. 10 Once China recognizes the importance of transparency, accountability, public participation, procedural justice, and good governance, Hong Kong may have a better chance of attaining democracy. In order to make this possible, the pan-democrats need to build a more coherent opposition and stronger leadership within the community. Their role is particularly crucial when the rivalry among different wings of the student movement has brought Federation of Students to the brink of disintegration. Regardless of these challenges, however, there is the sign that the fight for democracy in Hong Kong will continue. In a recent survey jointly conducted by three universities in Hong Kong regarding the political reform made by the government, it was found that around 47 per cent of people supported the proposal while 38 per cent opposed it. Furthermore, among respondents aged 18 to 29, some 63 per cent were against the proposal and amongst university degree

holders, 55 per cent opposed it. The young and educated have been enlightened and refuse to accept a restricted universal suffrage. 11 In light of this, even though the Umbrella Movement did not make an immediate change to the system, it has successfully sowed the seeds of democracy among the next generation.

NOTES

1. The Chief Executive is the head of the Hong Kong Special Administrative Region.
2. The Legislative Council is the law-making body in Hong Kong with half of the seats directly elected by people from different regional constituencies and the other half elected by functional constituencies such as chambers of commerce, professional associations and trade unions.
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Received in April 2015.
Original in English.

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sur international journal on human rights - Aug/2015 -

issue 21

INSTITUTIONAL OUTLOOK

FAMILY PHILANTHROPY IN BRAZIL

Inês Mindlin Lafer

• *Based on her experience as director of the Instituto Betty e Jacob Lafer, the author reflects upon the funding situation in the country.* •

ABSTRACT

Since 2013, the Instituto Betty e Jacob Lafer has funded projects by civil society organisations in two priority areas: management and innovation in public policies, and reducing inequalities in the justice system. In this article, the author, who is one of the Institute's directors, discusses the social investment scene in Brazil and the reasons that led her family to concentrate their efforts in these two areas.

KEYWORDS

Social participation | Funding | Justice system

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In 2011 our family made the decision to set up a social investment initiative that honours the values and legacy of my grandparents, Betty and Jacob Lafer. In 2013 we founded an organisation that bears their name and is the vehicle for implementing the strategies that we have designed over the years. Since then, the Instituto Betty e Jacob Lafer has been funding the projects of civil society organisations in two priority areas: management and innovation in public policies, and reducing inequalities in the justice system.

The choice of these two programme areas was based on the family members' interests as well as an analysis of both the investment needs of the country and the spaces that could be occupied by a non-profit actor from the private sector. In 2011 we conducted a study to help structure our programme. It indicated that there was demand for investment on the issues we were interested in and that few funders were supporting them, especially in the area of justice. This confirmed that what we were planning was pertinent.

We also pondered the funds we had available in light of the expectations for our activities' impacts. As we did not have sufficient resources to provide assistance to reach large groups of the population directly, we searched for intervention strategies that would strengthen our investments' potential. Thus, we do not support direct assistance, as it is our understanding that the one with the resources and the responsibility to do so on a large scale is the state. Therefore, we want the projects that we support to urge public agents to improve their role in the two aforementioned programme areas.

The social investment scenario in Brazil

Non-governmental organisations as we know them today began to be formed and consolidated in the 1960s and 1970s during the years of the military dictatorship and gained strength and visibility in the two decades that followed. In 1990 the social investment movement started to grow stronger in Brazil due to the increase in investments from local actors. It was in the second half of the 1990s that corporate investment in social programmes and projects came on the scene in an organised manner, primarily via institutions and foundations.[1] In parallel, in the early 2000s, we began to see a downward trend in, or at least a reconfiguration of, international social investment in Brazil.

Due to economic growth and stability in the country and changes in the strategies of international cooperation agencies that expanded their operations to Asia, Africa and Eastern Europe,[2] some stopped investing here. Funds of international origin that were important for the consolidation of a series of Brazilian initiatives and NGOs – such as the MacArthur Foundation or the W. K. Kellogg Foundation – have closed their Brazilian offices in recent years. It is true, however, that in their place, others have increased their operations in the country, such as the Open Society Foundations, who chose to host their Latin America regional office in Brazil.

There is little disaggregated data available on social investment from private national funders. The most widely used data comes from the survey conducted periodically on the members of the Grupo de Institutos Fundações e Empresas - (GIFE) [Institutions, Foundations and Companies Group]. This study showed a constant increase in the amount invested,[3] which was close to 2.35 billion Brazilian reais [approximately US$ 1.15 billion] in 2012. The majority of the associates are of corporate origin (71%) and only 8% are family groups.[4] Education appears as the priority of the programmes for 86% of the study's participants.[5]

It was noted, however, that in 2012 only 15% of the members dedicated themselves to funding projects by civil society organisations, 52% combined funding with the execution of their own projects, and one third carried out their own projects.[6] What can be seen, then, is that even though there had been a significant influx of private resources from national sources (from families or businesses), donating exclusively to third parties' projects (grant making) is not common practice.

In a context where there has been a change in international donors' activities and straight grant making (with no prospects of financial return) is not the main strategy of social investors, ensuring the financial sustainability of the non-profit sector becomes an enormous challenge. Nonetheless, if we want to deepen democracy, broaden civil and political engagement, and improve access to and quality of public services and social participation, especially in urban environments (an enormous challenge), a strong civil society funded by independent and non-governmental private resources is needed. Such resources will ensure that opposition to certain proposals exists, public officials are monitored and controlled, ideas are formulated and new practices in a wide range of human rights and public policies are developed and tested.

The process of defining areas of operation

To structure our programme and define strategies for action, we interviewed 12 people, including directors and employees of non-governmental organisations, national and international donors, judges and researchers involved in the public defender's office. Visits to organisations were also made and bibliographies of interest were consulted. One conversation led to another and one reading reference to another. Our challenge was to structure a funding programme with limited resources that strives to make an effective contribution to transforming the current situation in the area of justice and the public policy field.

It is worth mentioning that while the Instituto Betty e Jacob Lafer's programmes were not designed based on the human rights theoretical framework, they are very closely related to this field. We were not guided by the logic of the principles that, to me, appear to be very present in the programmes that have "human rights" in their name. Our

programmes are not structured around a convention, pact, law or specific right. On the contrary, our starting point was a situation that troubled us, or concrete problems that we wanted to minimise. Based on that, we analysed the situations, opportunities and niches in which we could operate. The result is, however, a programme that looks just like a human rights programme. The justice programme speaks the language of activism in favour of broadening access to justice and the public policies programme strongly intersects with economic, social, cultural and environmental rights – the very terrain of the obligations of the state.

The majority of our partners aim to directly or incidentally promote systemic changes, either to legislation, the direction of public policies or the way the judiciary and legal practitioners work. However, these changes will be gradual and there will surely be setbacks. We see the projects as a set of actions that will generate impacts gradually. Since 2011 we have invested nearly 3.6 million Brazilian reais [approximately US$ 1.1 million] in 27 projects and our total budget for 2015 is 1.5 million Brazilian reais [approximately US$ 470,000]. We hope to offer continuity and to improve our work, and that other national donors join us in our efforts.

The public policies programme

The public policies programme takes into consideration a broad array of historical and institutional challenges that permeate the current notion of the state and the way policies are elaborated and implemented in Brazil. At the Instituto, we have engaged in actions ranging from a rapid historical review of explanations on the so-called patrimonialist and clientelist culture of the Brazilian state to an analysis on how public policies in Brazil have been structured since the promulgation of the Federal Constitution of 1988. From this vast scenario, I will briefly cite some of the aspects we took into consideration while prioritising what we have supported in this programme area.

First, since the return to democracy, there is increasing demand for the expansion of the universality of and access to rights for all people, decentralisation and social participation. As a result, there is a growing need for municipalities to have the capacity to implement public policies and for social control and accountability at the local level. While institutional mechanisms for social participation do exist, such as the councils of rights or conferences with civil society, they do not necessarily function in a satisfactory manner. Therefore, there is still space for the development of new mechanisms to broaden the culture of social participation in Brazil.

Secondly, part of the challenge of truly guaranteeing the rights set out in the Brazilian Constitution of 1988, and implementing the policies it provides for, comes from the lack of training in government bureaucracy. Furthermore, the public sector lacks agility: Brazilian legislation is complex and the hiring of services and products via the law on public tenders focuses on the hiring process, not the product acquired. The same thing happens with human resources in the public sector. It would be difficult to implement a merit-based system that takes into account, for the purpose of career advancement, the results obtained due to the principle of isonomy in the public service.

Finally, in addition to all of the attention paid to the implementation of public policies by the executive branch, the population in general and in particular social groups with fewer economic resources have little access to the legislature and decision-making bodies. This often means that public policies are elaborated without taking into consideration part of the population that is affected by them. Therefore there is a need to increase the permeability and transparency of the legislative houses.

Clearly our public policies programme is not prepared to take on all of these challenges at the same time. The projects work on a small portion of them to produce some changes that together, over time, can lead to systemic change. Our programme is open to supporting projects that seek to contribute to increasing accountability, participation and social control; improving the quality of and fostering innovation in public policies; training public officials; and monitoring legislative bodies and parliamentarians. A large proportion of our projects combine research on specific policies with advocacy strategies based on the research's results.

We have worked on a wide range of issues, all very different from one another: policies on drugs, public safety, children with rheumatism and the recovery of the Pinheiros River in São Paulo. The logic behind this is that our resources are to help strengthen civil society and catalyse change wherever they are being employed.

In the thirty years since the transition to a democratic regime, the country has sought alternatives to improve mechanisms for social participation and representation. The participatory councils and infinite discussions on models for the reform of the political system are some indicators of this yearning. While on one hand alternatives can come from academia or government bodies, on the other, it is important for alternatives to come from organised civil society and for there to be room for different practices.

The justice programme

Our programme in the area of justice aims to contribute to making the judiciary system less unjust – that is, to reducing inequalities in law enforcement while paying special attention to the effective implementation of current legislation, regardless of one's social class. We have done more work in the field of criminal justice, as the inequalities in this field are perhaps more evident because they involve the deprivation of liberty.

As with public policies, the challenges in the area of justice in the Brazilian context are well known. Even so, I will mention some that were important to the programme's design.

From an institutional point of view, an imbalance exists between the public institutions of defence, prosecution and trial. While the situation has changed due to salary increases and the rise in the number public defenders, this disparity can be noted, for example, in the continued existence of agreements on the provision of legal assistance by ad hoc private attorneys. These lawyers do not have an employment relationship with the state and therefore they are not governed by the civil service law. There is no orientation, quality control or assessment of their work. As they do not dedicate themselves exclusively to this function, they are unlikely to have adequate time to prepare the defence. All this compromises the quality of the legal assistance they provide. The duties of a judge or a prosecutor, on the other hand, are always performed by permanent staff, which illustrates the disparity between the parties involved in the legal process. In 2011, the year in which we set up our funding programme in the area of justice, only 20% of the budget of the State of São Paulo Public Defender's Office was spent on permanent public defenders, whereas all prosecution and trial related activities were carried out by civil servants.

To this disparity one must add unequal access to justice in economic terms. Just to give an idea, in 2013 in the city of São Paulo, for every 40,000 potential recipients of public defence, there was one public defender. This reveals that the system is still insufficient to meet the demand. In Brazil, a person who has been temporarily detained and has no access to a private lawyer may spend months in prison and have his or her first contact with the defender only a short time before the hearing.

To make the situation even worse, there is also the problem of prison overcrowding, which more than tripled in the past fifteen years. In 2013 there were 574,000 prisoners, of which nearly 40% were in pre-trial custody. According to the National Penitentiary Department (Departamento Penitenciário Nacional or DEPEN), there was a deficit of over 220,000 cell spaces in prison establishments in 2013.[7] Prison overcrowding also adds to the inefficiency of the justice system: for example, people remain in prison even after they have served their sentence, which costs public coffers a lot of money. There is limited information and unreliable data on this, even from government sources. However, it is estimated that it costs close to 1,800 Brazilian reais [approximately US$ 570] per month to keep one prisoner in a public state penitentiary.[8]

The structural problems of the prison system mentioned above, combined with difficulties in gaining access to public defenders, result in innocent people or ones who commit minor offences being held in prison. It is well known that prisons rarely lead to rehabilitation. On the contrary, people who have been imprisoned often end up getting involved in criminal organisations or experience major difficulties in reintegrating into society once they obtain their freedom, hence the importance of avoiding unnecessary imprisonment.

Moreover, Brazilian legislation is not able to resolve these problems in a satisfactory way either. Existing legal norms are not always enforced: there are laws that "stick" and others that do not. Legal practitioners frequently interpret laws without taking human rights duly into consideration (for example, sentencing someone to prison for theft of objects of little value). Some court rulings are incongruous with the existing legal framework and impose much harsher sentences than those foreseen by law, anchoring their decision in arguments based on popular opinion that appeal to sectors of society that are favourable towards more severe punishment. As options in this field, alternative sentencing, out-of-court conflict resolution procedures and restorative justice could be interesting tools to use in the current context of the Brazilian justice system.

There is yet another institutional problem affecting the Brazilian justice system. Similar to the problem mentioned above, we have noted that the institutions of the justice system are not very open to popular participation and accountability is limited. Civil society has made advances in relation to the executive branches at various levels of the federal system and, to a lesser extent, the legislature, where they have found some space for pressuring and gaining access to politicians. However, this has not been the case in regard to the judiciary and the Public Prosecutor's Offices, which are less open to social participation. Despite the existence of specially-designated Public Prosecutor's Offices with the mandate to safeguard public and collective interests, as well as the establishment of the National Council of Justice and the National Council of the Public Ministry, which were created to exercise external control over these bodies, and do so with some professionals who are not civil servants, there is still considerable space for increasing the participation of society in the institutions of the justice system.

Again it is worth noting that none of the projects we support addresses all of these challenges together. The same logic applies here: we create a wide array of possibilities and understand that it is the actions of various projects over the years that will generate impact. We have sought, then, to fund actions that contribute to improving the quality and efficiency of the justice system; bringing defenders, prosecutors and judges closer to applying human rights principles to criminal cases; and building a more informed public opinion that defends policies to eliminate injustices in the area of criminal justice. Several projects include information gathering and dissemination and draw on research data for their advocacy work with members of Congress, legal practitioners or the population in general.

The projects use advocacy strategies, media work and communication materials that translate data, statistics and human rights arguments into everyday language as a way of influencing legislators, governments, judges, prosecutors and public opinion to take on a more favourable approach to the human rights legal framework and the implementation of a more just and rational justice system.

Even though there is a limited amount of resources for this programme, the organisations we support have pointed out the importance of our funding on the national scene, given that the bulk of the funding for this issue comes from international donors. This enables us to grasp the dimension of the responsibility of our operations and of the already mentioned need for a growing amount of resources to fund an independent civil society.

Conclusion

Family-based social investment initiatives can play a fundamental role in the scenario we have presented here. Often these initiatives are no longer linked to one specific industry and therefore they have more freedom to contribute to sensitive issues, such as the justice system, or others that lack investments and are a matter of concern and of interest to the family's members.

It appears to us that the choice we made on the focus of our operations and strategies for action as a funder was the best option, given our past and our interests. It is aligned with the understanding that providing resources to non-governmental organisations so they can develop their projects in the areas of justice or public policies strengthens a democratic society. While it is clear to us that our support alone is not enough, we hope to make our contribution.

NOTES

1. BNDES, *Terceiro setor e desenvolvimento social – Relatório setorial N-3* (Rio de Janeiro: BNDES, Jul. 2001), accessed May 18, 2015, http://www.bndes.gov.br/SiteBNDES/export/sites/default/bndes_pt/Galerias/Arquivos/conhecimento/relato/tsetor.pdf.
2. Associação Brasileira de ONGs (ABONG), *Sustentabilidade das ONGs no Brasil: acesso a recursos privados* (Rio de Janeiro: Associação Brasileira de ONGs, 2010).
3. 2009 was the exception: that year, there was a 5.03% decline due to the impacts of the 2008 economic crisis.
4. Grupo de Institutos Fundações e Empresas (GIFE), *Censo GIFE 2011-2012* (São Paulo, GIFE, 2013), 16, accessed May 18, 2015, http://www.gife.org.br/arquivos/publicacoes/28/Censo%20GIFE%202011-2012.pdf.
5. GIFE, *Censo*, 36.
6. *Ibid.*, 35.
7. This data was cited from: *Anuário Brasileiro de Segurança Pública 2014*: Fórum Brasileiro de Segurança Pública, *Anuário Brasileiro de Segurança Pública 2014*, Year 8 (São Paulo: Fórum Brasileiro de Segurança Pública, 2014).
8. João Mendes, "A política de drogas no Brasil e as novas ameaças," *Le Monde Diplomatique Brasil*, September 2, 2013, accessed May 18, 2015, https://www.diplomatique.org.br/print.php?tipo=ar&id=1498. The estimates of the costs of keeping someone in custody in prisons in Brazil vary and there is no official figure.

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Received in April 2015.
Original in Portuguese. Translated by Karen Lang.

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sur international journal on human rights - Aug/2015 - issue 21

CONVERSATIONS

EVERY VOICE MATTERS

Kasha Jacqueline Nabagesera

• *Interview with Kasha Jacqueline Nabagesera, the most prominent lesbian activist in Uganda.* •

In a country where homosexuals often have to hide to stay alive, it takes a lot of courage for an LGBTI activist to take the nickname "Bombastic." In Uganda, the heartland of activist Kasha Nabagesera Jacqueline, just loving someone can get you killed. However, the rape, persecution, imprisonment and death of countless Ugandan homosexuals have not prevented the embattled activist from founding – and naming after herself - the first magazine that is written by and tells the story of her fellow LGBTI community.

Bombastic Magazine, as well as referring to Kasha's nickname, is also a reference to the popular song in Uganda, *Mr. Lover Lover, Mr Bombastic!* by the Jamaican-American singer Shaggy. Its title reveals how communication and popular culture have been fundamental in fighting hatred and prejudice in Uganda. Kasha founded and was president of FARUG (Freedom and Roam Uganda) for ten years, the foremost LGBTI rights organisation in Uganda. Since then she has combined a legal and political struggle with a cultural struggle for the right of the LGBTI community to exist, and to express themselves publically. The 35 year old, who was born in Kampala, has described how "changing the law in Uganda would be a big step but more important is changing the mindset of people."

Since her school days, when some of her friends committed suicide as result of bullying, she has continued to fight for LGBTI rights in parliament, the UN, the European Union and the African Commission. She has pursued a mixture of actively challenging the law as well as popular culture to change both formal structures and the everyday behaviour of people towards homosexuals in Uganda. Whether she is debating in high-level forums or founding the first LGBTI bar in the country, Kasha knows that it takes more than mere political lobbying to change the reality on the ground.

The LGBTI bar was eventually closed. However, even more worryingly, further defeats could also happen in the legal arena. The Constitutional Court finally overturned an anti-homosexuality bill that was approved in 2014 and which imposed life sentences for the "offence of homosexuality." However, the ruling was not based on merit but on procedural grounds; judges found that a lack of quorum in parliament determined it invalid. Text of a new draft bill, not yet formally tabled, was leaked to the media in December 2014. It is considered even more far reaching than its predecessor since it also includes legislation against transsexual persons.

These setbacks have not deterred Kasha. In an exclusive interview with Sur 21, she spoke about the Bombastic Magazine, the bar, the laws, the Gay Parade and the broader LGBTI fight in Uganda.

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Conectas Human Rights • Kasha, the first question is about your beginnings. Can you tell us what has driven you to be one of the most outspoken LGBTI activists in Uganda, and, indeed, the world?

Kasha Jacqueline Nabagesera • That's a kind question and introduction. When I started the movement in Uganda I was really young but because I had really suffered a lot in school. I was already openly gay back then. So when I found that it was illegal to be openly gay in our common law I decided that I needed to make a change. And most of my gay friends were expelled from school, others had been disowned by their families. So I saw an opportunity to speak out for those who could not because I had nothing to lose.

Conectas • You said once that changing the law in Uganda would be a big step but more important is changing the mindset of people. Why do you think this is the case?

K.J.N. • Changing the law is a big step in regulating people's behaviour but it will not change the minds of everyone, those who beat us, who rebuke us, who rape us, who threaten to burn our houses. Even if the law is changed, these people may still take the law into their own hands. But if we change the mindset of the people, in terms of how they regard homosexuality, so they stop thinking, for example, that homosexuals are there to get their children and that homosexuals are going to infect them with diseases. If we can get people out of that thinking and to see LGBTI people as humans, as their brothers, as their sisters, then this will be a very big step.

Conectas • What have been the greatest challenges you have faced in promoting mindset and cultural change in Uganda over the last few years?

K.J.N. • The biggest challenge that we have is that we do not have the platforms to create awareness. The media is censored from reporting LGBTI issues in a positive or unbiased manner. Reporting is very biased and is one of the biggest inciters of hatred in the community. Without these platforms it is difficult to send our message to the people that we live with, to offer health information to people and to let the government know that even we need to be included in national policies. Even people who want to give us platforms are often scared that they will be regarded as promoters of homosexuality. So it is really a big challenge.

Conectas • And regarding your greatest achievements as an activist, what are you most proud of?

K.J.N. • I must say that I am proud of building the movement because at least now there are more people willing to speak out, willing to share their stories, and not everything is falling onto a few people like in the past. So the movement is stronger. I look forward to welcoming new challenges but the mere fact that many people are willing to represent and speak out, for me I think that is my biggest achievement, building a movement and seeing that even if I am not here today other people can continue the movement.

Conectas • If you had the opportunity to explain to someone with no background or understanding about LGBTI rights in Uganda, how would you explain to them the situation today?

K.J.N. • Firstly, I would tell them that there really are LGBTI people in Uganda. Many Ugandans think that there are no gay people here. In the past our leaders used to deny the existence of homosexuals. We were not persecuted until the British colonials arrived in 1886 and made it illegal. Because of that, homosexuals continue to be persecuted and humiliated. Now new colonials from America have arrived - American Evangelicals. They have been coming to Uganda since the early 2000s and have exported all their homophobia into Ugandan politicians and religion. Now, nearly all our leaders attack the LGBTI community with impunity. In addition, because this is the generation of technology there is a lot of false information that is being spread by social media to the community in Uganda. If we try to send a message it is deemed to be pornographic or promoting homosexuality. In contrast, and by way of example, extreme sadomasochist pornography was shown in a church yet no repercussions were taken against those who organised it.

Conectas • How were you able to found, build and grow Freedom and Roam Uganda (FARUG) in a climate of such hostility, taking into account difficulties of funding, for example?

K.J.N. • When I was starting my organisation with two of my friends I was suspended in the first two weeks of forming it because I was very outspoken and very radical, I did not want the organisation to just be a social group. This caused a lot of challenges in the very initial stages of the organisation because people were scared that they were going to be exposed and outed. But I convinced them that my family was there to help us. My mum was very supportive. I told them that I would not expose anyone, I just needed them to give me their support. We also had challenges of communicating our message to the outside world. The Internet had just been introduced in Uganda, so it was quite expensive. When we introduced ourselves to human rights organisations here in Uganda many of them rejected us because they did not feel that the rights of LGBTI people were human rights. We also lost people - we lost people to rape, we lost people to suicide after being exposed in front of their school. The media itself outed and put spies into our organisation and exposed everything to the media. In addition, not being a registered organisation has also hindered us from accessing larger funders. Those are the challenges that we have been faced with.

Conectas • Now can you tell us please about your involvement with establishing the first gay bar in Uganda? It had a lot to do with the changing mindset you mentioned, right?

K.J.N. • Oh yes, Sappho Islands bar. Yes, the thing is, we like to party. We go out to very many bars but we end up being beaten, not being allowed to use the washrooms because the owners feel that your gender or your way of dressing does not conform to the bathroom [which you are using]. It had become a routine that every Monday I would receive a lot of emails from people who had been beaten during the weekend for simply dancing together or holding hands in public bars. So I decided to open up a bar, not to make profit, because I did not make any profit, but to make a bar that is openly gay, and whoever comes into the bar and doesn't like what they see, it is their time to leave. The [LGBTI] community welcomed it. We had so many parties there, engagement parties, weddings. Unfortunately, it closed down after just a year because the neighbours complained that the people who were coming to the bar were weird, that they had seen me so much on TV and they wanted to burn the place down, so we had to close it. But I am going to open up another one. I am not giving up.

Conectas • Can you tell us a little bit about the Gay Pride march and the role it played in the fight against LGBTI discrimination in Uganda?

K.J.N. • Yes, when I introduced Pride to Uganda it was in 2012. I realised that I had attended so many Pride parades around the world but had never attended one on the [African] continent. And so I thought that maybe we could have a Pride! We do not have to have a traditional Pride of going on the street - they would definitely kill us, so I said we can organise Pride in different ways. I introduced it to the community to see how they would feel and of course there were mixed feelings. Some were calling me crazy asking "how can I be in Pride when I am in court suing the government." Others were excited because they had never heard of Pride, they did not even know what Pride meant. Others were curious. And so we began having fundraising parties every month when I would show people what Pride means, how people dress for Pride, what happens at Pride, what we can do at Pride to free ourselves. So we decided to have our first Pride - a week full of activities, parties and a film festival. Eventually, when we had finished marching and were getting ready for entertainment, the police came and arrested us.

Conectas • Now we would like to talk a little bit about Bombastic Magazine. Could you tell us how it started?

K.J.N. • I started Bombastic Magazine because my nickname is "Bombastic." Also, Ugandans love an American musician called "Shaggy" who sang the song "Mr Lover Lover, Mr Bombastic!" He comes to Uganda every year, and I wanted to use something that is catchy but that could also resonate with many Ugandans - people were fighting for the magazine simply because they saw the word "bombastic." The real idea was that because we have no platform to raise awareness, to change the mindsets of the people, why do not we come up with our own, unbiased magazine, share our stories, and give it out, free of charge, and review the reaction?

I wrote on my Facebook and introduced it to the community and told people to send in their stories. It was amazing. We received over 500 articles even before I put the team together to work with me. I was so overwhelmed. I began talking to people about it and everyone said that's a good idea. But of course, some people were so scared asking "how are we going to distribute it?

Conectas • And how was it distributed? Can you tell us about the audience of Bombastic?

K.J.N. • Yes, we printed the magazine and went to different parts of the country, giving it out. We focused on four main groups. One was to just give it randomly to people on the street because these are the people who just go with the flow – if they hear there is someone being beaten they will join the fight.

Then we distributed it to policy makers. Actually, the reason we launched it when we did [December 2014] was because the parliament was very angry because of the ruling [which declared the Anti-Homosexuality Act unconstitutional on procedural grounds in August 2014] so they were promising to bring a new bill as a "Christmas present." And so we said "okay then let's also give them a Christmas present."

It was really interesting because I personally went to the police, I had dialogues with ministers, I went to the President's office, I even went to the Minister of Ethics. He has wanted to arrest me for many years and he was also threatening me at this time, making false allegations in the media that I am promoting homosexuality and pornography, but he could not do anything because there was no legal basis. So he ordered the police to burn all the copies they find on the street, but people really liked the magazine, it was beautiful, no one left it on the street. Everyone took it - we even ran out of copies! It was a really very exciting and emotional experience for me.

Then there was the young generation, the students in the higher institutions of learning. These are the future leaders and these are the people who are going to rallies against homosexuals. We do not want them to get corrupted because they are still young. We need them to stop bullying their own colleagues, to stop exposing them on social media - which is happening a lot.

The fourth group was our own community – not the community that we know but more the people that we do not know. We know that there are people out there who are being told that they have demons - I was told that I had demons when I was young. There are people who are committing suicide because they think that they are alone. We want to reach these people because we do not know them and we hope that when they read the magazine they will know that they are not alone and they can call on us.

Conectas • Can you explain to our readers a little more about the financing of the magazine and how you hope to continue to fundraise?

K.J.N. • In terms of financing the idea, I decided on crowdfunding because I approached many funders and many investors here. They were all reluctant. Everyone thought it was a good idea but they were all afraid for their security. It was the time the bill had been signed, so there was a lot of reluctance from so many people to fund us. I told them we have to just continue to create ways of how we can reach the people who are always attacking us.
However, after the first edition in 2014, I said "we cannot continue with the magazine because it is not sustainable, we cannot continue printing copies. I am stopping it, primarily because the security of the volunteers in the field." So we created a website, TV and radio station so that we can continue to put Bombastic out there while ensuring that we keep safe. However, not everyone can afford Internet. So we are really stuck, overwhelmed, but at the same time, excited because people are still willing to be involved. If we ever manage to raise more funds we shall make another issue, there is no doubt about that.

Conectas • Great, and how did you choose the stories published in the first edition? Will the content be the same in any future editions?

K.J.N. • I chose these stories because some of them I have known for a long time and I have never published them. Others I republished because they never got the audience they were supposed to. I published stories on HIV because few people really come out about their status, so if we have these stories we hope that more people speak out and get treatment instead of feeling stigmatised and discriminated. Some stories I could not keep because they were not aligned with the objective of the magazine, for example, outing government officials. I also gave people who were already out an opportunity as people want to know why they are out - here there is a notion that they are gay because they are being paid. Therefore, we used these stories, of people who were known gays, so people can really know their stories instead of judging them. And lastly I gave a platform to those who had never had the opportunity to speak out because they are in closet. These are the people that the world needs to hear from. It becomes so monotonous when it is always the same voices. More voices need to be heard and so I gave them the opportunity.

Conectas • What have been the responses from within Uganda following the publication of Bombastic?

K.J.N. • People's responses have been really touching. People have called saying "this is the first time I am hearing from you, all the time I have been hearing from anti-gay pastors or ministers, but here I am reading stories of real life, I am sorry." Others have said "I am part of the community, I do not know where to find you" or "my daughter is gay," "my son is gay," "now I know why my daughter likes to dress like this" or "Now I know why my son is behaving like a woman." So it was really, really overwhelming.

Some government agencies have requested more copies, including the police, the Minister of Public Service and the Minister of Health. This shows the positive impact of the magazine when even these organisations are reaching out and saying "we need more copies because we want to send them to different departments and give ones away." So it is really positive.

Of course, we also got very hateful responses; people saying they want to cut off my head when they meet me or that they are going to shoot me. Others though said "we have a friend who wants to really talk to you and understand." For me that is exactly what we are driving, to change the attitudes of people, the mindsets, because, at the moment, people are only getting one side of the story. The threats from the head of a diocese in Runkugiri were hilarious. He threatened to sue me for trespassing because he wondered how the magazines had reached the church premises. He said he needed to call me on 31 December because he did not want to enter the New Year with a curse because of something he had read on a particular page in the magazine. Bearing in mind that I had edited the magazine, I did not even know what was on that particular page - but he knew! So in my heart I thought, "cool, then you read the magazine." I laughed and he got so angry he hang up on me. It really was hilarious.

Conectas • As an activist in promoting LGBTI rights in Uganda, how important, and in what way, is social media such as Twitter and Facebook for you?

K.J.N. • For me, social media is my office. It is my office because that is where I manage to get in touch with so many people from the community. We have secret groups where we strategise as a community. We have public pages for our organisations where we also interact with the whole world, where we get friends from around the world who give us solidarity messages. It has been really helpful in our struggle. But it has also had its downfalls because social media has resulted in the exposure of so many people in the media here. However, it has helped us build a very strong movement. For people in the closet, they are able to talk freely on social media. We have seen many people coming out because they have seen there is a vibrant group on social media so they also finally feel comfortable about who they are.

Conectas • In other interviews you have referred to how we operate in a global village and how the anti-homosexuality bill was probably delayed at least in part because of various countries expressed their condemnation of the bill. How important do you think international pressure from other governments and NGOs is in fighting LGBTI discrimination in Uganda?

K.J.N. • It is, and it is not. It has limits because the signing of the bill still happened, despite pressure, yet eventually the bill was also stalled at least in part because of international pressure. However, it is also important for those on the ground to make noise and put lots of pressure on because we know the situation best. This international pressure can often be a very silent diplomacy and sometimes we feel we want the whole world to go up in arms against the bill. So it helps, but only in consultation with us. Different situations call for different actions – that is why it is always important to consult those on the ground first.

Conectas • Conectas – Is international pressure more relevant when it comes from Global South countries like Brazil?

K.J.N. • Every country, every voice matters. It does not matter which country the voice is coming from, every voice matters.

Conectas • Can you tell us a little bit about your engagement with international organisations, especially in light of the Coalition of African Lesbians recently achieving observer status at the African Commission?

K.J.N. • It is important for us to engage with the African Commission, and other international bodies such as the United Nations and the European Union. Even if we get something to the United Nations and it is rejected at the African Commission, it will not really make a big difference. So it is very important to be engaged with all of them. Also, we cannot only deal with local remedies because our countries are not pariah states. We are in a global village - what happens in Uganda affects those in Kenya, which affects those in Egypt, which affects those in Gambia.

Achieving observer status at the African Commission for the Coalition of African Lesbians recently [on 25th April 2015] was a big milestone for us. Now the dialogue is starting, now the doors are being opened and soon they will start realising that these are our own children, our own brothers and sisters that we are killing, that we are putting in jail. In particular, it is very symbolic because if you read the denial of the application for observer status at the African Commission in 2010 it was just a paragraph, very vague that we did not even understand. It shows that there is a change in attitudes, a change in the mindsets of the people at the Commission. It sends a message that we deserve to be there just like any other NGO. Of course, there is going to be a backlash, but we are ready for it because that is our life, we just have to strategise safely. At the next commission we are going to be there, ready to engage and ready to take our stories to share with the governments of African countries. I am so excited!

Conectas • What did you take away from your visit to Brazil regarding LGBTI life here?

K.J.N. • Yes, when I was in Brazil, first of all I liked the people, they were really warm. But also the stories I heard when I was there were not really nice. There was a lot of homophobia, but also racism. When I went to Rio there was a big protest and they killed two black boys who were on the street next to where I was staying with my friend. I could not go out on my own to just walk around and enjoy the air. Here [in Uganda] I rarely walk on the street and normally I enjoy when I am out of Uganda to walk freely on the street because I am not known. But there [in Brazil] it was scary because while my sexuality is not on my face, my skin colour was, so it was really scary for me.

Conectas • Finally, how can our readers best support efforts to combat LGBTI discrimination in Uganda?

K.J.N. • When we send out calls for support respond to our calls, read our news so that you can know what is really happening, give us kind donations to help us achieve our objectives to do this work - our Paypal goes straight to us. Use social media, come and say Kasha "I send you peace, I send you love," that will put a smile on our face when we go out to work to know that at least we have friends who care about us, even if they are far away. It gives us the morale to continue what we are doing because we know we are not alone in this.

Interview conducted in April 2015 by Laura Daudén and Thiago Amparo (Conectas Human Rights). Oliver Hudson and Josefina Cicconetti, also from Conectas, assisted with background research.

KASHA NABAGESERA JACQUELINE - *Uganda*
Kasha Jacqueline Nabagesera is Uganda's leading lesbian activist. Most recently she founded the LGBTI magazine Bombasitc. Prior to this she led Freedom and Roam Uganda (FARUG) for ten years, Uganda's foremost LGBTI rights organisation, which she established in 2003.

Received in April 2015.
Original in English.

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sur international journal on human rights - Aug/2015 -

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CONVERSATIONS

"THEY HAVE TO GIVE US BACK OUR COMRADES ALIVE"

Gerardo Torres Pérez, María Luisa Aguilar

• *Interview with Mexican activists Gerardo Torres Pérez & María Luisa Aguilar* •
on forced disappearances in the country and the case of the 43 students from Ayotzinapa.

More than 26,000 people are – according to official data – missing in Mexico today. This number is 600 times greater than the 43 students from Ayotzinapa. This group of youths became the symbol of human rights violations after they were ambushed by security forces on 26 September 2014 and forcibly disappeared at the hands of state agents associated with organised crime. The circumstances of the crime have still not been entirely clarified, nor are their whereabouts known. For the government, the investigation was closed following the claim that the students had been incinerated in a rubbish dump in the municipality of Cocula.

The disappearance of the young students from a rural teacher training school in the state of Guerrero, in south-west Mexico immediately triggered massive solidarity campaigns all over the world. For months, a search for the students from the "Raúl Isidro Burgos" Rural Normal School in Ayotzinapa was conducted while relatives, press and citizens, shocked by the brutality of the crime, watched in distress. Thousands of people took to the streets in various protests to demand justice and to express solidarity. On social media, numerous posts that expressed outrage maintained the hope, for a long time, of one day finding the group alive.

But now, the public spotlight has been switched off and darkness has descended on not only the destiny of the 43 young students from Ayotzinapa, but also on the fate of thousands of other Mexicans like them, whose whereabouts are still unknown.

What appeared at first to be an isolated tragedy in a small municipality in the state of Guerrero slowly turned out to be the tip of the iceberg connecting the Mexican state to organised crime in a web of various interests, the full extent of which remains unknown. Throughout Mexico there is an increasing number of cases about people who vanished forever under a dark cloak of violence and silence. They are people who, contrary to the students from the small rural school, do not arouse the interest of international solidarity campaigns.

Gerardo Torres Pérez, 22, was a classmate of the 43 disappeared persons. His younger brother was with the group that was ambushed that night, but was able to escape. IIn 2011, three years prior to the Ayotzinapa tragedy, Gerardo explained how he was involved in a similar case. Police officers captured, tortured and forced him to shoot a firearm in an attempt to get him to produce evidence against himself. The police wanted to make the Mexican justice system believe that Gerardo had fired a weapon during a peaceful student protest, where state agents executed two of his colleagues.

With the support of local and international human rights organizations, stories such as Gerardo's and the 43 missing students from state of Guerrero are beginning to surface. The activist and coordinator of the international area of the NGO Tlachinollan, María Luisa Aguilar, says she expects that the Ayotzinapa case "will be a turning point" in the disappearances in Mexico. She has closely followed the work of the group of forensic anthropologists from Argentina who, as independent experts of families, are helping to shed light on the case.

At the same time, Aguilar tries to make sure that the precautionary measures and recommendations made by the Inter-American Commission on Human Rights (IACHR), are accepted by the Mexican state. One of these recommendations resulted in the appointment of an Interdisciplinary Group of Independent Experts. Since March this year it has prepared reports[1] with recommendations for the state focusing on four fronts: the search process, research to determine criminal responsibility, attention to victims and public policies against forced disappearance.

Aguilar and Pérez were both in São Paulo in May 2015 to take part in the International Human Rights Colloquium organised by Conectas, in which more than 130 activists from 40 countries participated. During the meeting, Gerardo and María Luisa spoke with Sur Journal about the Ayotzinapa case, the overall situation of missing people in Mexico and the connection between state forces and organised crime.

Various efforts – from protests to international campaigns – are aiming to keep the cry of resistance of the victims of violence and forced disappearances in Mexico alive. Between March and June this year, a "caravan" of the 43 students' mothers and fathers, along with other students, travelled across the US, Argentina, Brazil and Uruguay. Its goal was to expose the situation at the teacher training college, advance the investigation and to ask the people of South America not to forget the struggle in Ayotzinapa.

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Conectas Human Rights • What has been done to clarify what happened to the 43 students from Ayotzinapa?

Gerardo Torres Pérez • From the time of the students' disappearance on 26 September 2014 until now, we have not received a clear and satisfactory response from the Mexican authorities. What they did eventually was to conduct investigations and apprehend several people who, according to them, are members of organised crime. They made these people declare that our comrades were dead. However, according to the forensic specialists who went there to carry out investigations, our friends cannot be considered dead merely based on the declarations of some arrested individuals. We, as students of Ayotzinapa, continue to say that they have to give us back our comrades alive. It was the state that tore them from us and who took charge of their disappearance, and that is why we continue to defend the same position. They have to give us back our comrades.

Conectas • Who committed this crime?

G.T.P. • According to the statements that our friends have given several times, it was mainly the municipal police that detained the students and put all of them in the vehicles that transported them. We do not know where they were taken. Some police officers who were arrested said that they handed the students over to organised crime. In other words, they work together with organised crime. That is why we say that it was a joint effort between the state and organised crime. In Mexico, there is a very clear notion of how organised crime works. It simply does the state's dirty work – it takes care of making people disappear, killing people, violating human rights, etc. Thus, by attributing violations to organised crime, the state itself remains free from all blame.

Conectas • How much of this have you experienced personally?

G.T.P. • I am a student from Ayotzinapa. I was not there when the events happened on 26 September, but my younger brother witnessed everything. Luckily, he escaped from the massacre unharmed.

Conectas • Have you had similar experiences with violence perpetrated by the State or organised crime?

G.T.P. • G.T.P. • In 2011, there was another case of state repression in the college, in which two comrades were killed by state agents. Since then, no physical or intellectual perpetrator of the crime has been arrested. It is something that

has gone unpunished. They tried accusing me, saying that I had killed my own friends. They forced me to fire a gun, took me away and tortured me, as they wanted to force a false declaration saying that I had shot them. They were not able to incriminate me this way, but I was a victim of acts like this one committed by the state.

Conectas • We are talking about specific cases, but these are far from being isolated incidents in Mexico, right?

María Luisa Aguilar • The Ayotzinapa case is very symbolic because it involves a large group of very active students who succeeded in drawing public attention both in Mexico and abroad. The students’ parents mobilised themselves and civil society accompanied the process, but this is not an isolated case. Situations like this, involving security forces and their connection with organised crime, are something that happen all over the country. Officially, there are more than 26,000 missing persons in Mexico. No one knows where they are and the state does not have the capacity to search to find them alive, nor to say if they are forced disappearances, disappearances committed by organised crime or if they are people who are simply not in their homes. Obviously, organisations register much higher and alarming numbers of missing persons. Within this context, there are also disappearances of immigrants from Central America. This whole situation is set in a context of poverty: the population of the state of Guerrero is very poor. This is also the state with the highest proportional homicide rate. There is also a lot of violence and militarisation.

Conectas • How do human rights organisations deal with a context as difficult as the one you describe?

M.L.A • The first step that organisations like ours, which are assisting the students in Guerrero, took was to talk with an Argentine team of forensic anthropologists, in coordination with other organisations operating in Mexico so that we could address the different levels of authorities involved. The Argentine team of experts came to help the families because more than three weeks after the incident, authorities tried to tell the families that they had found clandestine graves that contained their family members. What is more, due to the families’ lack of trust, we brought in this group of specialists to work together on different parts of the investigation. We also took the case to the Inter-American Commission on Human Rights. Precautionary measures were requested for the missing students and the students who were injured – one of them is still in a vegetative state, while another two are in recovery. The process relating to precautionary measures also requested that the state provide technical assistance, which led to the Interdisciplinary Group of Independent Experts being brought over. This is an independent group that is reviewing the investigation and proposing recommendations on what the state needs to do and what is not being done. The initial recommendation, made since day one, is that as long as there is no certainty on the youths’ whereabouts, the search must continue. And it must seek to find them alive. Furthermore, this group will make recommendations on the relations between the state and organised crime, criminal investigations and, in a broader framework, how the state can confront a crisis of disappearances such as the one that Mexico is currently facing.

Conectas Human Rights • In crises such as this one, the attention of the press and public opinion lasts for a certain amount of time and then fades away, while the local reality continues to be terrible. Now that many people have stopped talking about the case, what is life for you and your comrades like?

G.T.P. • It continues to be the same, the way it was before all of this began. Assassinations and other human rights violations are still occurring. The state has taken it upon itself not to provide security. Even with police presence, people continue to be assassinated left and right. Lifeless bodies appear at dawn. We are very worried because we are the main ones involved in this situation. We feel that we could be arrested or even disappear at any moment.

Conectas Human Rights • Why is this violence directed at you? Is it politically motivated?

G.T.P. • Our school has always been our struggle. We always support peasants and the poor – people without resources. The simple fact of providing education to people who have scarce resources is what gives us our political awareness. The state is the one who takes care of ensuring that we are increasingly submissive, increasingly poor. That is why they want the school to disappear. Luckily, we have a lot of support from the people of Mexico because

they see our school as an incubator of professors, teachers and activists; it is a school that will never surrender. And that is precisely why the state wants it to disappear.

Conectas Human Rights • What do you hope to happen going forward?

M.L.A. • TThat the international community will stop seeing Mexico as a reformed and progressive country in the area of international human rights and grasps the scale of what is happening there. The international community should continue to demand accountability from Mexico. We also expect something from Mexican society. This case has created a lot of awareness. We saw this in the streets and the different protests that took place. We hope that this will help to bring changes within Mexico – a country that has been so strongly marked by impunity in relation to human rights issues.

NOTES

1. More information about the latest report released by GIEI, – dated June 29, 2015 – is available at: http://www.tlachinollan.org/comunicado-giei-ayotzinapa-avances-y-pendientes/

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Interview conducted in May 2015 by Conectas Human Rights.

GERARDO TORRES PÉREZ - *Mexico*
Lorem ipsum dolor sit amet, consectetur adipiscing elit. Morbi nec tincidunt lacus. Etiam et consequat metus, et pellentesque sapien. Duis est lectus, feugiat sed mi vitae.

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Received in: May 2015
Original in Portuguese. Translated by Karen Lang.

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Received in: May 2015
Original in Portuguese. Translated by Karen Lang

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sur international journal on human rights - Aug/2015 -

issue 21

VOICES

MASS E-MAIL SURVEILLANCE: THE NEXT BATTLE

Anthony D. Romero

• *How – despite recent legal changes in the US -* •
oemail mass surveillance remains widespread, and what to do about it.

The enactment of the USA Freedom Act in June 2015 was an historic moment in that it was the first time that the US government's surveillance powers had been curtailed since 9/11. However, the author argues that this is just the beginning of what is fast becoming an Internet human rights movement. He explains the legislation that has been left untouched by the USA Freedom Act. This legislation enables the US government to continue to spy on both US and non-US citizens by collecting the content of their emails and other online messages. Finally the author sets out specific groups that must put pressure on the US government to end such discriminate surveillance.

KEYWORDS

Internet | Privacy | Mass surveillance | Emails | USA Freedom Act | Patriot Act | ACLU | Snowden | Executive Order 12333 | Section 702 | Spying

• • •

P People's understanding of the concept of privacy has changed enormously since Edward Snowden's 2013 revelations about the United States' indiscriminate global spying programmes. Before Snowden, few in the human rights field even knew what metadata was. Privacy of electronic communication was nearly a non-subject in human rights circles. Since then, things have changed rapidly. Once the US government's growing surveillance powers came into the spotlight, it became increasingly clear that something had to be done to swing the pendulum back in the other direction, curbing abuses in surveillance and building up real accountability mechanisms.

From a historical perspective, the USA Freedom Act, enacted on 2 June 2015, marks the first time since 9/11 that the surveillance powers of the US government have been curtailed. It is a milestone in that it ended the bulk collection of US – and many non-US – citizens' telephone records which had been taking place by the National Security Agency (NSA) since 2001. Furthermore, it provides for some semblance of oversight. The Acts foresees representation of privacy concerns in the Foreign Intelligence Surveillance Court. Ultimately, it limits the ability for the government to warehouse phone metadata information of US citizens.

Yet, the Act does not go far enough. We at the American Civil Liberties Union (ACLU) call attention to what will be the next big battle against mass surveillance: to challenge the equally widespread collection of emails of US citizens, including their correspondence with foreigners. This mass email collection – left untouched by the USA Freedom Act – proves we still have a long way to go before privacy is fully respected. Recent media reports show the magnitude

of this problem. In August 2015, New York Times and ProPublica revealed that, between 2003 to 2013, AT&T has provided NSA access to billions of emails crossing its US network system.

There are two pieces of legislation that remain in force which allow this kind of mass email surveillance – Section 702 of the Foreign Intelligence Surveillance Act (FISA) from 1978 and the Executive Order 12333 from 1981. They are even more invasive than Section 215 of the Patriot Act, which the USA Freedom Act put an end to. Section 215 recorded metadata – lists of incoming and outgoing phone records – but not the audio content of telephone calls themselves. In contrast, these two sister provisions permit the collection of actual communications content – including emails, instant messages and messages on social media – without individual warrants.

Section 702 of FISA provides for the collection of content, within the US, of a person located outside the US. In 2013 there were approximately 90,000 such targets. To the extent US citizens' correspondence is incidentally included in such an investigation, this content is also retained by the NSA. In 2011 approximately 250 million messages were collected on the basis of Section 702, mostly from service providers such as Google, Microsoft and Yahoo.

Meanwhile Executive Order 12333 focuses on bulk collection of content from data centres located outside the US. Although the provision again is theoretically aimed at foreigners, US citizens' communications are incidentally collected if they form part of communication with a foreigner who is under investigation.

How can we pressure the US government to change such alarming practices of email surveillance? First of all, engaging with the tech companies is critical – the top five US tech companies have a combined revenue of over half a trillion US dollars and therefore pack a lot of weight in the corridors of Washington. And the government is only able to access such data with the acquiescence of these companies. Increasingly, we are seeing the private sector taking affirmative steps in order to close the surveillance "back doors" created by the NSA. Additionally, tech leaders are beginning to engage with civil liberties organisations such as the ACLU and with government on the privacy debate. Certainly, the tech lobby was an important engine of reform that contributed to the passage of the USA Freedom Act, including forming the so-called Reform Government Surveillance coalition.

Companies recognise that not doing anything about the government accessing their customers' data will hurt their bottom line. They recognise that it is a misapprehension to think that just because the millennial generation is happy to share their personal lives – photos, opinions and stories – online, that they are also happy for the government to access their data without their permission. On the contrary: this generation is demanding that the tech companies respect their privacy and stop handing over data to the government. And the tech companies are beginning to listen.

Pressure also needs to come from outside the US. It must come from the leaders of countries who were spied on, such as Brazil, France and many others. And it must come from non-US citizens who refuse to accept that they are offered a lower standard of privacy than their US counterparts. It is illogical – especially in the context of the World Wide Web – that the US offers greater privacy rights to its own citizens than to foreigners. In the virtual world, such division does not make much practical sense. For instance, when I email another American citizen on American soil, if our email traverses a data centre overseas, it becomes more open to government surveillance and interception. By not challenging this differing standard of privacy protection we risk betraying the very power of the World Wide Web and the concept that it is indeed a worldwide – and not a country by country – resource. Similarly offering higher privacy protections to only US citizens would suggest that tech companies would need to treat customers differently based on nationality. Together, we must reframe privacy rights not as a domestic civil rights issue but within the broader struggle for international human rights.

The USA Freedom Act therefore marks a pivotal moment in the birth of a new movement for human rights on the Internet, of which Snowden might be considered the founding father. Except perhaps for China, the US government has the greatest ability to conduct surveillance. The Internet generation, together with civil society groups and the private sector must demand continued review of the US's surveillance legislation, in particular the repeal of section 702 and Executive Order 12333. Failure to do so will result in the US becoming a global standard setter for surveillance

initiatives and allow it to continue to undermine privacy on the Internet. As Snowden recently said, "Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say."

ANTHONY D. ROMERO - *US*
Anthony D. Romero is the executive director of the American Civil Liberties Union. Born in New York City to parents from Puerto Rico, Romero is a graduate of both Stanford and Princeton. He is a member of the New York Bar Association and has sat on numerous non-profit boards. (Photo by Richard Corman/ACLU)

Received in July 2015
Original in English.

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