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LETTER TO THE READERS

THIAGO AMPARO

Executive Editor

DANIEL MACK

Guest Editor for the Sur File

THE SUR FILE ON ARMS AND HUMAN RIGHTS

It is hard to imagine anything more tangible, more corporeal than the human cost of arms. Firearms used in police killings, bombs dropped in populated areas, killer drones that strike villages, or tear gas thrown inside houses. This violence demands our collective courage to confront its power. And so – in the following pages – we present the 22nd issue of Sur Journal. It features a Sur File focused on how human rights language, institutions and practitioners can defy the power of arms. A human rights perspective – in particular one embedded in the reality of the Global South – can be fruitfully used to tackle the proliferation, misuse and ensuing violence of many weapons. Furthermore, greater attention to arms-related political and legal dynamics can assist in reducing instances of human rights violations.

With this Sur File, the Journal helps to fill a gap in the global human rights debate. While the question of arms is indeed prominent in many conceptual, legal and diplomatic frameworks – such as armed violence, security (national, international and human), disarmament, and International Humanitarian Law – in the context of human rights, arms are often an afterthought or an asterisk. In fact, dealing with arms control and disarmament is far from the everyday work of most human rights organisations.

The Sur File unpacks some of those pressing issues in relation to arms and human rights. It starts by asking, “who sits at the negotiation table” in national and international forums where arms-related decisions are taken? In this section, composed of three articles, authors explore the politics that mold negotiations and decisions regarding international arms control. Brian Wood (UK) and Rasha Abdul-Rahim (Palestine) show how the unlikely dream by civil society actors and certain states of an international legally binding treaty on arms transfers led to the birth of the Arms

Trade Treaty (ATT). The launch of the 22nd issue of Sur marks the one-year anniversary of the entry into force of the ATT. This offers the perfect opportunity to take a closer look at the heart of the treaty by those who were directly involved in its making.

This first section also features the Nobel Peace Prize winner Jody Williams (US). With the unique experience of being one of the founders of the International Campaign to Ban Landmines, Williams shows how the international community has so far failed to fully include women as equals in negotiations on peace and security. Camila Asano and Jefferson Nascimento (Brazil) question the lack of transparency in arms-related foreign policy and demand that Brazilian authorities acknowledge the proper place of civil society at the negotiation table whenever arms are used as foreign policy instruments.

The second group of articles, “Everyday Harm”, takes a closer look at specific kinds of weapons often overlooked in this field. Daniel Mack (Brazil) and Maya Brehm (Switzerland) analyse the world’s two most common and impactful weapons (small arms and explosive weapons, respectively). Each argues that for both these weapons, urgent international attention and restraint is required, since both are major culprits in death and destruction worldwide, both in conflict and “peace”.

Recognising the prominent role that police and riot control agents play in relation to violating human rights, the third section, “Policing”, focuses on the technologies and institutions that are meant to diminish and prevent harm, but in reality often have the opposite effect. In addition to Guy Lamb’s (South Africa) piece on South Africa’s highly militarised police (which fights fire with an inferno in his words), Anna Feigenbaum (UK) makes the case for

the regulation of “less lethal weapons” offering a case study on the Brazilian company Condor, a giant in this industry.

Lastly, authors tackle the political, technological and moral battles being waged today and how they will define the impact and dynamics of armed violence in the coming decades. Kicking off “Designing the Future”, Thomas Nash (New Zealand) discusses the international community’s relative ineptitude in reviewing (and precluding) new technologies of violence, as well as the power asymmetries embedded in arms control processes—and their negative consequences.

By telling the stories of three drone attack victims Mirza Shahzad Akbar and Umer Gilani (Pakistan) demonstrate the human impact of drone warfare in Pakistan, reminding us of the horrible consequences to human rights when weaponry is used in a secret and cavalier fashion. Finally, Héctor Guerra (Mexico) and Maria Pia Devoto (Argentina) look forward and suggest the synergies between two recent diplomatic developments: the entry into force of the Arms Trade Treaty and the 2030 Agenda for Sustainable Development.

CONVERSATIONS

Complementing the Sur File on Arms and Human Rights, we are proud to feature an interview with the activist Maryam al-Khawaja (Bahrain), about how the Bahraini government makes deadly use of less lethal weapons to control protests. She recalls the successful #stoptheshipment campaign – a partnership between Bahraini and South Korean activists – which successfully halted a large scale shipment of tear gas destined for Bahrain. We hope that her interview will inspire activists from other countries to design similar initiatives in their own regions.

Words are not enough to capture the reality of the impact of arms on civilian populations. For this, Sur Journal is honoured to partner with The Magnum Foundation, the non-profit founded by members of Magnum Photos, home to some of the world's leading photographers. This section presents an inspiring photo essay by five of their human rights fellows. As noted in Magnum's introduction the 10 pictures presented here – along with phrases from the photographers themselves – demonstrate “the devastating effects of weapons and warfare on civilian populations through the eyes of documentary photographers for whom ‘out in the field’ means being home.” The photo essay includes pictures taken between 2008-2015 in conflict situations in places as diverse as Sri Lanka, Syria, Kenya, Ukraine and Egypt. Additionally, in this issue, we showcase for the first time a set of infographics which offer an overview of the impact of arms on civilians to help our readers navigate through this complex issue.

IMAGES

In this section, reserved for in-depth analyses on contemporary human rights issues, Sur Journal presents three contributions, all looking at traditional questions in the human rights debate from an often overlooked angle. By addressing the issue of responsibility of multinational corporations in promoting or impeding the fulfilment of economic, social and cultural rights, Bonita Meyersfeld (South Africa) and David Kinley (Australia) redirect our focus to the role of banks who finance the operations of such corporations. The authors take as a starting point the ground-breaking Draft Johannesburg Principles, adopted in 2011 as a new framework for understanding the relationship between financial institutions and human rights. Kathryn Sikkink (US), one of the leading voices in human rights academia, revisits the history of the origin of human rights norms at the international level. She takes a closer

ESSAYS

look at Latin America’s protagonism in defining the norms that founded our movement even before the Universal Declaration was adopted. Finally, this section concludes with the evidence-based account of maternity in women’s prisons in Brazil, by Bruna Angotti and Ana Gabriela Mendes Braga (Brazil). After spending months interviewing detainees, prison directors and employees, the researchers reflect upon the excess of discipline with regard to maternity and the harm of the dichotomy between the “excess of maternity” right after birth in prisons and the subsequent abrupt separation between mother and child.

INSTITUTIONAL OUTLOOK

The INGO Accountability Charter is the result of an ever expanding group of international NGOs that seek to instil greater “accountability, transparency and effectiveness” into the workings of the nonprofit sector. Karenina Schröder (Germany), the Executive Officer of the Charter’s Secretariat, spoke exclusively to Sur Journal to shed more light on the increasing importance of accountability for human rights organisations. She also explains the invaluable role of those Global South NGOs that are signatories to the Charter, particularly in terms of helping to establish international accountability standards.

EXPERIENCES

In this section, Sur Journal brings a case study from the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai (Kenya), discussing his office’s innovative work supporting human rights litigation at national level. Born out of the belief that current processes of shrinking and even closure of civic space require more creativity and multiplicity of approaches, through this project the Rapporteur has already participated in litigation in Mexico and Bolivia, and now invites human rights defenders to suggest other potential legal battles in need of support.

We conclude the Journal with two provoking op-eds. Kavita Krishnan (India), one of the leading voices in her country's Communist Party and a feminist activist, details how politics, economics and caste ideology shape women's rights in India. Taking as a starting point the 2014 BBC documentary on a gang rape of a woman in Delhi, the author unpacks the complex contemporary forces in play that maintain women's subordinate role in society. In addition, the Journal features a contribution from one of the most outspoken UK civil liberties activists, Shami Chakrabarti (UK), on the British government's plans to abolish the Human Rights Act and withdraw from the European Convention on Human Rights. She points out how the government's arguments are a dangerous precedent not only in the UK but also abroad.

• • •

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This issue is the first one without the valuable work of Luz González as our assistant editor. On behalf of the entire staff, we thank her for the many years of dedication to making this Journal possible.

THE SURFILE

ON ARMS AND HUMAN RIGHTS



WHO SITS AT THE NEGOTIATION TABLE?

THE BIRTH AND THE HEART OF THE ARMS TRADE TREATY

Brian Wood & Rasha Abdul-Rahim

WOMEN, WEAPONS, PEACE AND SECURITY

Jody Williams

ARMS AS FOREIGN POLICY: THE CASE OF BRAZIL

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SMALL ARMS, BIG VIOLATIONS

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THE HUMAN COST OF BOMBING CITIES

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THE TECHNOLOGIES OF VIOLENCE AND GLOBAL INEQUALITY

Thomas Nash

FIRE FROM THE BLUE SKY

Mirza Shahzad Akbar & Umer Gilani

ARMS TRADE REGULATION AND SUSTAINABLE DEVELOPMENT: THE NEXT 15 YEARS

Héctor Guerra & María Pía Devoto

THE BIRTH AND THE HEART OF THE ARMS TRADE TREATY

Brian Wood & Rasha Abdul-Rahim

• *The ATT could advance the protection of human rights, if states robustly assess their arms' exports* •

ABSTRACT

The Arms Trade Treaty (ATT) represents a paradigm shift in international law on arms transfers. For the first time in history international human rights standards have been codified alongside other international benchmarks for assessing and preventing the authorisation of exports and other transfers of conventional arms. The treaty encompasses norms drawn from different bodies of international law and other instruments applicable to the transfer and use of conventional arms. In this article, the authors outline how key provisions in the ATT could advance the protection of human rights - if those provisions are implemented robustly by states.

KEYWORDS

ATT | Arms Trade Treaty | United Nations | International Law | Trade | Export

1 • How the Arms Trade Treaty (ATT) was won

The initial development of the modern arms trade treaty concept was as a result of efforts by civil society.¹ In the London offices of Amnesty International in late 1993, four NGO arms control advocates conceived the original idea that led to the ATT.² They drew up a draft legally binding Code of Conduct with common rules to restrict international arms transfers – for tactical reasons aimed initially at European Union (EU) member states.

A series of shocking crises in the late 1980s and 1990s – the first Gulf War, the Balkans conflicts, the 1994 Rwanda genocide and conflicts in Africa's Great Lakes region, West Africa, Afghanistan and in Central America amongst others – drove home the urgency of moving forward with attempts to control the global arms trade, NGOs and lawyers became increasingly concerned about the serious human rights and humanitarian impact of irresponsible arms transfers.³ The EU – shocked by the post-Gulf War revelations about transfers of weapons and munitions – had just agreed to a list of eight criteria for arms exports. This was followed by a set of principles on arms transfers agreed in the Organisation for Security and Cooperation in Europe (OSCE) in November 1993. The NGOs viewed the EU guidelines and OSCE principles as poorly drafted while the mechanisms were entirely voluntary. What NGOs proposed was a set of legally binding standards building on existing international law to strictly control all conventional arms transfers.

The NGOs attempted to build political support amongst large arms exporters in the EU and North America for the legally binding Code, revising it to overcome points of resistance.⁴ In 1995, former President of Costa Rica and Nobel Peace Laureate Oscar Arias convened a group of other Nobel Peace Laureates including as individuals Desmond Tutu, the Dalai Lama, and as organisations Amnesty International, the American Friends Service Committee and the International Physicians for Prevention of Nuclear War. They worked with a small group of NGOs to promote a proposal for a legally binding International Code of Conduct on Arms Transfers amongst foreign ministers, parliamentarians and officials with the help of the Costa Rican government. In May 1998 the European Council adopted the EU Code of Conduct on Arms Exports setting out human rights and other criteria for arms exports, but it was not legally binding. In the USA, then Senator John Kerry worked with others in Congress during 1997 and 1998 to achieve a law mandating the US President to negotiate an International Code to regulate arms transfers while respecting human rights principles, but President Clinton's administration made minimal efforts to begin such negotiations.

The NGOs decided to step up their campaigning efforts. Amnesty International, Oxfam and the International Action Network on Small Arms (IANSA - a network of hundreds of NGOs) launched the Control Arms Campaign in October 2003, generating publicity through events, publications and popular mobilisation.⁵ Hundreds of thousands of people worldwide called on all governments to agree an ATT with robust rules and by 2005 support had grown from a handful to over 50 governments. Emboldened

by the civil society advocacy and some champion governments, on 6 December 2006 in the UN General Assembly, 153 states voted in favour (with only the US against) of a resolution to begin a process of consultation for an ATT. A record number of Member States submitted their views to the UN Secretary General. The arms transfer parameters with the most support from States set up the criteria to prevent violations of human rights, international humanitarian law and treaties on terrorism. Following further UN expert meetings and working group consultations, in December 2009 the General Assembly approved a formal treaty negotiation process.

Four UN preparatory committee meetings developed a framework for the treaty and substantive proposals that formed the basis of the negotiations at the UN Conference on the ATT held throughout July 2012. Proposals from the chairperson of the process, Ambassador Moritán of Argentina, in 2011 reflected many views promoted by the Control Arms coalition but these were watered down before and during the July 2012 Conference to accommodate sceptical states. Stymied by opposition from Algeria, Egypt, Iran, North Korea and Syria, and facing unresolved questions from the US, Russia and China, the Conference was unable to agree a text by consensus. Nevertheless, following a further round of negotiations at the Final UN Conference on the ATT held from 18 to 28 March 2013 under the presidency of Ambassador Woolcott of Australia, the final amended treaty text was supported by the US and not opposed by Russia and China. To overcome the remaining objections to the text by Iran, North Korea and Syria, Ambassador Woolcott simply transferred the process to the UN General Assembly where the ATT was adopted on 2 April 2013 by 154 states in favour to 3 against (Iran, North Korea and Syria), with 23 abstentions (including by China, Russia, India and Gulf states).⁶

Under the ATT, national control systems and arms transfer decisions should conform to the highest possible common international standards and contribute to international peace and security; the main purpose of the arms transfer prohibitions and risk assessments of exports is to reduce human suffering; and States must take responsible action in the transfer and control of conventional arms. Thus the treaty ties together international security and human security in arms transfer decisions.

The treaty takes the term “transfer” to encompass export, import, transit, trans-shipment and brokering (Article 2.2). The arms and other items covered by the treaty are the seven major conventional weapons defined at a minimum under the 1991 UN Register of Conventional Arms, plus small arms and light weapons defined at a minimum by relevant UN instruments (Article 2.1). The major weapons cover: battle tanks; armoured combat vehicles; large-calibre artillery systems; combat aircraft attack helicopters; warships; missiles and missile launchers.⁷ The treaty provisions also cover, but to a lesser extent, munitions and ammunition “fired, launched or delivered” by these types of arms (Article 3) and parts and components “in a form that provides the capability to assemble those arms” (Article 4). Despite opposition from the US and some other states to the inclusion of these related items, it was eventually agreed the items must fall under both the export

control provisions and the transfer prohibitions set out in the treaty. However, if these related items are not prohibited or subject to export regulation, they do not need to be covered by measures to prevent diversion or to regulate import, transit, trans-shipment and brokering, nor be included in national records or annual reports.⁸

Article 5 on General Implementation nevertheless encourages States Parties to cover the widest range of conventional arms and requires States Parties to maintain an effective and transparent national control system to regulate the transfer. As part of this, States Parties must establish a national control list, a system for detailed authorisations prior to export, and designated competent national authorities to regulate the transfer of the arms and related items.

2 • The ATT's Heart: Transfer Prohibitions and Export Regulation

The ATT represents a significant paradigm shift in the world of arms control, in particular through its prohibitions on certain arms transfers and the establishment of a detailed export assessment mechanism (Article 7). For the first time in history international human rights customary and treaty law as well as international humanitarian customary and treaty law must form benchmarks for assessing the authorisation of an export of a wide range of conventional arms and related ammunition/munitions and parts and components.

Article 6 on Prohibitions

Article 6 is one of the core articles of the ATT and is the key starting point for assessing the legality of a potential transfer of conventional arms, ammunition/munitions or parts and components as defined by the treaty.⁹ Article 6 places an obligation on States Parties to prohibit any transfer of conventional arms or related items in certain circumstances.¹⁰ All forms of transfer defined in Article 2(2) apply to the prohibitions, including not only the export of relevant arms and other items but also their import, transit, transshipment and brokering. States Parties are prohibited from authorising any such transfer that would violate UN Security Council Chapter VII measures (including arms embargoes), or a State Party's existing relevant obligations under international agreements to which it is a party. In particular this includes those relating to the transfer of, or illicit trafficking in, conventional arms (such as a prohibition on the transfer of landmines or cluster munitions if the state was party to the Landmines Convention or Cluster Munitions Convention, or the transfer of unauthorised or unmarked firearms if the state is a party to the United Nations Firearms Protocol). A number of regional treaties expressly prohibit unauthorised transfers, including unauthorised brokering, of conventional arms, in particular small arms and light weapons, so the ATT reinforces these agreements for states that are party to them.¹¹

In addition, transfers are prohibited where a State has knowledge at the time of authorisation that the arms being considered would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949,

attacks directed against civilian objects or civilians protected as such, or any other war crime as defined by international agreements to which the State is a party. Crimes against humanity are distinguished from genocide in that they do not require the specific intent to destroy a target population group.¹²

The wording in this article is extremely important. It has been suggested that the word “knowledge” invokes individual criminal responsibility for an international crime,¹³ but the international law of State responsibility does not yet make a distinction between criminal and civil wrongs by States. The term “would” places a level of probability of the breaches outlined in Article 6 akin to a reasonable basis or substantial grounds for believing the arms would be used for that illegal purpose. The ATT is predicated on due diligence and measures to establish the “highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms.” In this sense, a breach of Article 6 would include cases where a State Party should have known about the illegal use of the arms but there was a failure to follow up reasonable suspicions by seeking further information. Authorisation procedures required by the ATT oblige applicants to disclose all relevant information so it is almost inconceivable that a State which is properly implementing the ATT will neither have considered actual relevant knowledge nor knowledge of the circumstances which are widely known or are reasonably suspected.

Article 6 on prohibited transfers was a major accomplishment and could make a considerable difference in stopping arms transfers to those countries where Amnesty International and other organisations have documented the devastating effects of irresponsible and illegal arms transfers.

Article 7 on Export Assessments and Denial

If an export under consideration is not prohibited under Article 6, States Parties are required to conduct an objective and non-discriminatory assessment, taking into account relevant factors of whether an arms or related items “would” undermine or contribute to peace and security (Article 7.1 (a)).¹⁴ The concept of peace and security is expanded upon later in this article. A State is also required to assess the potential that these arms or related items “could” be used to commit or facilitate a serious violation of international human rights law or of international humanitarian law, or an act constituting an offence under the exporting state’s international conventions and protocols relating to terrorism or to transnational organised crime (Article 7.1 (b)). Measures to mitigate risk of any of the negative consequences outlined above are to be considered by the exporter. When it is determined that there is an overriding risk of any of the negative consequences outlined above, then no export authorisation can be granted by a State Party to the ATT.

States Parties must also ensure their assessment takes into account the risk that the arms or related items could be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children (Article 7.4). This is the first time that an assessment for the potential of gender-based violence appears in an

international treaty dealing with arms control. The inclusion of a criterion on gender-based violence is consistent with the broader UN practice of mainstreaming gender issues by paying attention to differing impacts on women and men in all frameworks, policies and programmes, and indeed, with international human rights treaties which include an article emphasising the requirement for men and women to have equal access to human rights. Article 7(4) of the ATT is demonstrative of this mainstreaming approach requiring States Parties to ensure they have conducted a gender analysis in their assessment of the risks of international human rights law violations in Article 7(1).¹⁵

In addition, under Article 11 an exporting State Party is also required to assess objectively the risk of diversion of the conventional arms covered by the Treaty's scope. However, the State Party is not specifically required to assess the risk of diversion of munitions/ammunition or parts and components, an omission that was created at the insistence of the US and some other negotiators (Article 11.2).

The significance of Article 7 cannot be overstated. Traditional efforts by states to address the international supply of conventional arms for use in serious violations of international human rights and humanitarian law focused on the imposition of belated arms embargoes. Now Article 7 of the ATT seeks to take a proactive and preventive approach by defining the mandatory assessment in terms of a threshold of risk, rather than states simply reacting to violations once they have occurred.

3 • How Article 7 should be applied to protect human rights

In its practical guide, *Applying the Arms Trade Treaty to Ensure the Protection of Human Rights*,¹⁶ Amnesty International has proposed a methodology for assessing the risk of an arms export being used to commit or facilitate serious violations of international human rights law and sets out a number of elements to consider when forming a judgment. This is a 3-step methodology.

Step 1: An Assessment of the Risks

“Objective and non-discriminatory”

In order to be objective and non-discriminatory, each State Party to every potential export of arms and/or related items must apply consistently assessments of the risks, as set out in Article 7. The risk assessment must be applied to a potential export to any country, without distinction, using verifiable and detailed information from credible and reliable sources on the arms and/or related items, the intended recipients, the likely uses, the route and all those stakeholders involved in the export (e.g. licencing officials, transport officials, brokers, etc.). Up-to-date information on international human rights and international humanitarian law standards and on the incidence and nature of relevant violations should be used to ensure that proper assessments are made. Complete and accurate documentation should be a regular component of all assessment processes.

Potential for contributing to or undermining international peace and security

Article 7 acknowledges that arms exports have the potential to either contribute to or undermine international peace and security. If conventional arms and related items are used to violate relevant international law referred to in the principles set out in the Preamble of the treaty and international legal obligations reflected in Article 6, then clearly they cannot be seen to be contributing to peace and security.

However, certain types of conventional arms and related items can be legitimately acquired by States to exercise the lawful use of force consistent with international standards on law enforcement,¹⁷ in order to protect and safeguard all persons and institutions under its jurisdiction. UN Member States, in their international relations, also have an inherent right to collective or individual self-defence under the UN Charter.¹⁸ Therefore, the ability to legitimately acquire certain conventional arms and related items is key in exercising that right as long as the arms are not used for acts that would otherwise violate the UN Charter regarding the use of force, and the prohibition on acts of aggression.¹⁹ It should also be noted that national security considerations are not mentioned in the treaty, thus only international peace and security concerns form the basis for assessment.

To make this assessment States should consider various factors, including whether the recipient State is involved in an international or non-international conflict, if it is under preliminary examination by the Office of the Prosecutor of the International Criminal Court or if the proposed export is compatible with the technical and economic capacity of the recipient country and its military, security and police forces.

A “serious violation” of international human rights or humanitarian law

According to the International Committee of the Red Cross (ICRC), “serious violations of international humanitarian law” are “war crimes” and the two terms are interchangeable. War crimes are perpetrated in situations of armed conflict and can include conduct that endangers protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian buildings such as hospitals or infrastructure). The majority of war crimes involve death, injury, destruction or unlawful taking of property.²⁰

Although there is no formal definition of what constitutes a serious violation of international human rights law, for the purpose of the ATT, such violations should be assessed against the nature of the right violated and harm suffered, and the scale or pervasiveness of the violation.

This means that States Parties should be required to consider a possible serious violation of any human right (be it civil, cultural, economic, political or social), as well as the severity of the impact of the violation(s) on the affected individual(s). In addition to this, States Parties should consider both the severity and gravity of a singular violation of human rights using conventional arms or munitions, as well as recurring and foreseeable patterns of violations, or in the institutional nature of violations that are condoned by the authorities. In this case, States Parties should examine whether the violations in question occur on a widespread or systematic basis.²¹

Assessing the risk of a serious violation of international human rights or humanitarian law

The starting point for assessing if a serious violation of such law could occur is to examine the recipient State's respect for international human rights law. The exporting State assessment must include whether the recipient State is a State Party to the key human rights instruments (e.g. ICCPR, ICESCR, UNCAT, etc.) and international humanitarian law treaties (e.g. not only the Geneva Conventions but also their Additional Protocols, the ICC Statute and other instruments); if there is an ordinary civilian, independent, impartial and functioning judicial system in the recipient country, capable of investigating and prosecuting serious human rights violations; and whether the recipient State educates and trains key sectors such as its security forces and police officers in the content and application of international human rights and humanitarian law.

It should also be borne in mind that “serious acts of gender-based violence” and “serious acts of violence against women and children” are serious violations of international human rights law when committed by State agents or by persons acting with the authorisation, support or acquiescence of the State or when the State fails to act with due diligence to prevent violence by non-state actors and/or fails to effectively investigate and prosecute cases and provide reparations to victims.

States then must determine whether there have been previous serious violations or abuses of human rights or international humanitarian law using arms or related items and the risk that such violations are likely to be facilitated or committed by the particular export of conventional arms or related items under review. This requires an assessment of the end-users, in particular, their propensity for abuse and violations of international human rights law or humanitarian law and/or their capacity to use arms lawfully, as well as to what extent they effectively control their arms and munitions (e.g. stockpile management capacity and security procedures). A crucial question is whether there exists a state of impunity with regard to those suspected of criminal responsibility for violations of international human rights or humanitarian law. For example, the following questions could be asked: does the recipient state have an established mechanism for independent monitoring and investigations into alleged serious international humanitarian law and serious violations of human rights and abuses?; Are crimes under international law properly defined in national legislation?; Is there an effective, independent and impartial complaint mechanism capable of investigating and prosecuting cases of allegations against law enforcement officials?

Step 2: Mitigation Measures

Under Article 7(2), the States Parties must consider whether there are measures that could be undertaken to mitigate the risk of any serious violations of international human rights or humanitarian law (as well as of offences under treaties on terrorism and transnational organised crime). Confidence-building measures or jointly developed and agreed programmes by the exporting and importing States are suggested as possible measures.

Some mitigation measures could include requiring specific assurances on the use and re-transfer of the arms or other items; requiring a valid import licence as part of the arms export license application; applying a “new for old” principle that as a condition of sale requires that the end-user destroys small arms that are to be replaced by the new consignment; and requiring a delivery verification certificate to confirm the arrival of arms at the customs territory of the recipient State or a specific location in that State.

To assist in the accountability of the use of conventional arms and related items, exporting States could enhance the effectiveness of the systems in place for the use, storage and registration of weapons and ammunition by law enforcement officers, security forces and other security personnel and ensure that all small arms and light weapons are uniquely marked in compliance with the UN Firearms Protocol (2001) and the International Tracing Instrument (2005).

An assessment of to what extent the relevant international human rights and IHL standards have been effectively integrated in doctrines, policy, manuals, instructions and training is also crucial in increasing the levels of compliance with international human rights law and IHL.

Step 3: Making a Decision on Overriding Risk

At the end of the July 2012 UN Conference, the draft treaty text introduced the concept of “overriding risk” to define the threshold whereby a State Party would be bound to refuse an export authorisation for arms and related items. This appeared to be an attempt to reach a compromise between those States, such as the US, Russia, China, India and others who opposed the concept of “substantial risk” and the many other States opposed to the concept of a “presumption against authorisation” or “overriding presumption against authorisation” previously proposed by the Conference President. The concept of “overriding risk” is not well defined under international law. Thus, in the ATT, the perceived benefit of tangible peace and security must be weighed against the potential risks of an arms export having any of the five negative consequences set out in Article 7.

The introduction of the “overriding risk” threshold to govern export decisions was viewed by States as an effort to capture the complexity of decision making in the real world whereas civil society saw it as a way that states could continue to export arms despite significant risks that the arms would be used for serious violations or offences. Amnesty International and the Control Arms coalition had been proposing the term “substantial risk” to determine the threshold for an arms export, meaning more likely than not, however, there was an attempt to water down the language.

No significant change was made to the text regarding “overriding risk” until the end of the 2013 UN Conference when on 27 March the President introduced the word “negative” to the operative provision on “overriding risk” so it reads: “If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk *of any of the negative consequences* in paragraph

1, the exporting State Party shall not authorize the export” (Article 7(3)). The reference to “any of the negative consequences” was seen as strengthening the provision.

States Parties have an obligation to implement the treaty in good faith, in line with its object and purpose. According to Article 7, the analysis of “overriding risk” should be carried out by competent national authorities based on an objective and non-discriminatory consideration of all available evidence of the past and present circumstances in the recipient country regarding the proposed end-use and end-user. It should include an assessment of the levels of existing peace and security across various contexts, for example, post-conflict situations or those where military, security and police forces operate under the rule of law.

It has been suggested, for example, that “if a potential export ‘would’ undermine peace and security, then that would be an overriding risk. If, in a given circumstance, there is a risk that one or more of the five negative consequences in Article 7(1) ‘could’ occur despite consideration of available mitigating measures, then this real danger must take precedence over any potential contribution to peace and security. If the assessment concludes there is a reasonable and credible risk that the export of items under consideration could be used for or facilitate any of the negative consequences set out in Article 7(1), thereby also undermining peace and security, then the authorisation must be refused. It is also possible in some circumstances that the exporting State knows at the time that the potential exports will be used specifically for one or more of the negative consequences, in which case the authorisation of the export must be refused. Equally, if the contribution to peace and security clearly outweighs the risk of negative consequences, and none of the risks are reasonable and credible, then the export should be approved.”²²

The likelihood of overriding risk becomes greater where there is evidence of a pattern of serious violations, or where the recipient has not taken appropriate steps to end systematic violations, ensure accountability for those violations and prevent their recurrence.

4 • Prospects for future compliance

With 78 States Parties and 130 signatories so far in a short period since it was adopted by the General Assembly in April 2013, it is clear the ATT is an emerging arms control regime that has the potential to save countless lives and prevent serious violations of human rights. Whether it will achieve a significant and lasting impact depends upon political commitment to bring the international arms trade truly under the rule of law. Five of the top ten arms exporters – France, Germany, Italy, Spain and the UK – have already ratified the ATT. The remaining major arms producers should be pressed to join the treaty. Although the US has signed the treaty, its Senate seems unlikely to approve the ratification of the treaty in the foreseeable future. There has been resistance to signing the treaty from other major arms producers such as Russia, while China has recently been giving indications through a statement

it delivered during the UN First Committee in 2015 that it is considering joining the treaty. Major importers such as India and Saudi Arabia have also been resistant to join the treaty.

As States Parties move towards implementation of the ATT, they must not lose sight of the object and purpose of the treaty, namely to promote control, restraint, and transparency in the international arms trade, and to reduce human suffering and contribute to peace, security and stability. Pursuant to Article 13 of the ATT, States Parties must submit an initial report to the newly established ATT Secretariat by 23 December 2015 on measures they have taken to implement the treaty. By 31 May 2016 States Parties must submit their first annual report for the preceding calendar year concerning their authorised or actual exports and imports of conventional arms.

It is yet to be seen whether and how soon all States Parties will make their reports publicly available but global civil society believes public reporting is a key means by which the ATT will be effectively implemented. Fully transparent reporting would build confidence amongst States, allowing them to demonstrate that they are indeed implementing the treaty, and would provide a basis for States and civil society to assess how the ATT is being applied in practice.

As Article 20 of the ATT states, “Six years after the entry into force of this Treaty, any State Party may propose an amendment to this Treaty. Thereafter, proposed amendments may only be considered by the Conference of States Parties every three years.” This means that in 2020 and every three years thereafter, States Parties can consider amending the treaty provisions by consensus, but if consensus fails then amendments may be adopted by a three-quarters majority of State Parties present and voting at the meeting. This will be very important for future proofing and strengthening of the treaty. Potential areas for improvement could include expanding the scope of equipment that must be covered by the treaty to include a wider range of munitions as well as law enforcement weapons; requiring States Parties to adopt specific means of regulation for imports, transit and transshipments and brokering; introducing criminal sanctions for violating the treaty’s provisions; and making it mandatory for States Parties to publish annual reports on exports and imports.

Accountability for arms transfer decisions will be crucial for the effective implementation of the treaty and will act as an important check for those who continue to suffer as a result of irresponsible arms transfers and the illicit trade. The suffering of those people must remain at the forefront of the decision-making process regarding arms transfers. A lesson learned during the “birth” of the ATT is that only strong, ongoing global pressure from civil society will provide the context to improve the treaty, and key to the substantial improvement of the treaty will be to strengthen the provisions and implementation of Articles 6 and 7 - the “heart” of the treaty.

NOTES

1 • Efforts in the 1920s and 1930s by the imperial powers under the auspices of the League of Nations to develop a convention to limit arms transfers, initially to Africa, Turkey and the Middle East, floundered. This was because of the failure to devise universal rules to limit excessive arms production or to agree objective and non-discriminatory legal criteria to stop the likely misuse and harm of an arms transfer. Following the Second World War almost nothing was done between 1945 and 1990 at the United Nations to establish international conventional arms trade control systems or standards as the world was plunged into politics of the Cold War and the proxy wars during the 1950s, 60s, 70s and 80s. The voluntary “rules of restraint” agreed in 1991 by Permanent Members of the Security Council who had supplied most of the arms used in the Gulf War were left vague, as were the “Guidelines for international arms transfers” agreed by the UN General Assembly in 1996.

2 • The four NGOs were Amnesty International, the Campaign Against the Arms Trade (CAAT), Saferworld and the World Development Movement. By 1994, CAAT had dropped out of the initiative and been replaced by the British American Security Information Council.

3 • For a more detailed account on how the ATT was won, see “The long journey towards an Arms Trade Treaty,” *Amnesty International*, March 27, 2013, accessed October 3, 2015, <http://www.amnestyusa.org/news/news-item/the-long-journey-towards-an-arms-trade-treaty>.

4 • EU Common Criteria for arms exports agreed at the Luxembourg and Lisbon European Councils in 1991 and 1992; Organization for Security and Co-operation in Europe (OSCE), *Criteria for Conventional Arms Transfers*, November 1993.

5 • For a resume of the Control Arms campaign see Brian Wood and Daniel Mack, *Civil society and the*

drive towards an Arms Trade Treaty (Geneva: United Nations Institute for Disarmament Research, February 2009 to August 2010).

6 • <http://www.un.org/disarmament/update/2013/0402/ATTVotingChart.pdf>.

7 • United Nations Conference on the Arms Trade Treaty, “President’s Non-Paper,” New York, March 27, 2013, 4 (Article 2: Scope), accessed October 3, 2015, [http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_\(ATT_Final_Conference\).pdf](http://www.un.org/disarmament/ATT/docs/Presidents_Non_Paper_of_27_March_2013_(ATT_Final_Conference).pdf).

8 • Brian Wood, “IPIS Insights: The Arms Trade Treaty - Prospects and Challenges as it ‘Enters Into Force’”, *International Peace Information Service – IPIS*, December 23, 2014, accessed October 3, 2015, <http://ipisresearch.be/publication/ipis-insights-arms-trade-treaty-prospects-challenges-enters-force/>.

9 • For a detailed analysis of Article 6 of the ATT, see Clare da Silva and Penelope Nevill, “Article 6 Prohibitions,” in *Weapons and International Law The Arms Trade Treaty*, ed. Clare da Silva and Brian Wood, Ghent: Larcier Group, August 2015), 88–115.

10 • Article 6 Prohibitions reads as follows (United Nations Conference, “President’s”, 5–6):

1 – A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular arms embargoes.

2 – A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.

3 – A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or

of items covered under Article 3 or Article 4, if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

11 • These include, for example, the 2004 Nairobi Protocol for the Prevention, Control and Reduction of Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa, the 2006 ECOWAS Convention on Small Arms and Light Weapons in the Great Lakes Region and the Horn of Africa and the EU 2008 Common Position on arms exports and 2003 EU Common Position on arms brokering.

12 • See for example Geneva Academy of International Humanitarian Law and Human Rights, “The Arms Trade Treaty,” *Academic Briefing* 3, June 2013, accessed October 3, 2015, http://www.snis.ch/system/files/academy_briefing_3_2013_arms_trade_treaty.pdf; which cites Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC Statute).

13 • As in Article 30(3) of the ICC Statute and the general comments included in the Elements of Crimes adopted by the States Parties to the ICC Statute.

14 • Article 7 Export and Export Assessment (United Nations Conference, “President’s”, 6–7):

1 – If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

- (a) would contribute to or undermine peace and security;
- (b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(ii) commit or facilitate a serious violation of international human rights law;

(iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or

(iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2 – The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

3 – If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

4 – The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender based violence or serious acts of violence against women and children.

5 – Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

6 – Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

7 – If, after an authorization has been granted,

an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

15 • *Amnesty International*, "The long journey", 13–14.

16 • See: "Applying the Arms Trade Treaty to Ensure the Protection of Human Rights," *Amnesty International*, February 01, 2015, accessed October 3, 2015, <https://www.amnesty.org/en/documents/act30/0003/2015/en/>.

17 • See: United Nations Office of the High Commissioner for Human Rights (OHCHR), *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Havana, Cuba: OHCHR, 27 August to 7 September 1990), accessed October 3, 2015, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UseOfForceAndFirearms.aspx>; United Nations Office of the High Commissioner for Human Rights (OHCHR), *Code of Conduct for Law Enforcement Officials* (Geneva: OHCHR, December 17, 1979), accessed October 3, 2015, <http://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf>; and the United Nations, Standard Minimum Rules

for the Treatment of Prisoners (Geneva: UN, 1955), accessed October 3, 2015, https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

18 • United Nations, *Charter of the United Nations* (New York, 1945), Article 51.

19 • United Nations, *Charter of the United Nations* (New York, 1945), Article 2.

20 • International Committee of the Red Cross (ICRC), *What are 'serious violations of international humanitarian law'? Explanatory Note*, accessed October 3, 2015, <https://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

21 • If these violations involve widespread or systematic attacks that target a particular population they would constitute crimes against humanity and thereby fall under the prohibition described above in Article 6.

22 • Clare da Silva and Brian Wood, 'Article 7: Export and Export Assessment', in *Weapons and International Law The Arms Trade Treaty*, ed. Clare da Silva and Brian Wood (Ghent: Larcier Group, August 2015), 131.

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WOMEN, WEAPONS, PEACE AND SECURITY

Jody Williams

• *The Nobel Peace Prize winner argues why it is about time for women to get full inclusion in debates on peace and security* •

ABSTRACT

Women have for too long been excluded from the disarmament and arms control debate, despite being disproportionately affected by weapons. In order for women to partake as equals, the author emphasises how it is crucial for women to be portrayed as positive agents of change rather than weak and powerless victims. Williams sets out how civil society is responding to this imbalance while highlighting that there is still a long way to go until full gender equality is reached in the debate at the national and international levels.

KEYWORDS

Arms control | Disarmament | Gender | Women | Security | Peace

1 • Introduction

“It is now more dangerous to be a woman than to be a soldier in modern wars.” When Major General Patrick Cammaert said these words in 2008,¹ he was the Deputy Force Commander of the United Nations Mission² to the Democratic Republic of Congo (DRC). For decades that country has been seen as an epicentre of violations against women’s human rights during war. Rape as a tactic of war has increased dramatically in the DRC over the past twenty years, leading to the country becoming known as the “rape capital of the world.”³ But violations of women’s rights are not specific to the DRC, nor to war, they are a global problem which former US President Jimmy Carter has called “the number one human rights abuse.”⁴

Whether the weapons are small arms or explosive weapons used in populated areas, anywhere where there is conflict women, and children, are especially vulnerable. And while rape has always been recognised as part of the horror of war, it is only recently that it has been recognised as a war crime and crime against humanity. That classification was a monumental legal breakthrough but impunity for the perpetrators while the victims bear the burden of shame and ostracism their communities remains the norm.

Even if women manage to escape the direct impact of the weapons of war, they continue to be plagued with violations of their rights. Whether in refugee camps or on the move to refuge, they are vulnerable to rape and other forms of gender violence as well as becoming victims of human trafficking.

UN peacekeepers themselves, instead of protecting people, often are the perpetrators of violence against women and children. Yet despite ongoing revelations about abuse by peacekeepers, more often than not impunity remains the norm.

In recognition of the impact of war on women, 15 years ago, in October 2000, the UN Security Council passed Resolution 1325⁵ which, coupled with several resolutions that followed in its wake, make up the framework for the UN’s “women, peace and security agenda”. The Women’s International League for Peace & Freedom’s (WILPF) “peacewomen” website summarises the rhetorical, at least, importance of that resolution:

*SCR1325 marked the first time the Security Council addressed the disproportionate and unique impact of armed conflict on women; recognized the under-valued and under-utilized contributions women make to conflict prevention, peacekeeping, conflict resolution and peace-building. It also stressed the importance of women’s equal and full participation as active agents in peace and security.*⁶

Despite the challenges facing women and the defence of their rights, many women refuse to be identified as victims but choose to see themselves as survivors who are willing to stand up and take action to defend and promote their rights, even during conflict and its aftermath.

Women also refuse to continue to be ignored in disarmament, arms control and security issues and often play a lead role in global disarmament and arms control efforts by civil society.

2 • Women & Weapons

While it is more dangerous to be a woman than a soldier during today's conflicts, as Cammaert said, it is not women who are generally involved in the design, production, sale and use of the weapons that disproportionately affect them. And until recently, women's voices have not been listened to with regard to disarmament and arms control. Women have always been seen as advocates for "peace" in the general sense of the word but when it comes to the "complexities" of dealing with weapons, we had largely been ignored. That is changing but it still is a challenge that has been best met by civil society efforts on disarmament and arms control as the below examples demonstrate.

In 1981, women from a Welsh group, "Women for Life on Earth," established the Greenham Common Women's Peace Camp outside the British air force base at Greenham Common to protest the placement of US nuclear missiles there. As *The Guardian* newspaper wrote in 2013 - thirteen years after the peace camp closed, "Greenham was one of the west's most intoxicating theatres of political protest in the 1980s." ⁷ Margaret Thatcher was staunchly opposed to the women's camp and called it an "eccentricity" in her efforts to mute the voices of the women demonstrating against the weapons. But as *The Guardian* pointed out the legacy of the women of Greenham Common continues to inspire women to be involved in efforts to get rid of weapons despite Thatcher's efforts to delegitimise them.

All four of the coordinators of the International Campaign to Ban Landmines have been women. Women from that civil society campaign as well as women diplomats involved in the ban movement played significant roles in achieving the 1997 Mine Ban Treaty prohibiting the use, production, trade and stockpiling of antipersonnel landmines. The head of the vibrant International Campaign to Abolish Nuclear Weapons is also a woman. Also, a precedent was set in the negotiations of the Arms Trade Treaty, adopted in 2013 by the UN General Assembly, in that for the first time an international arms control treaty included language on the impact of weapons on women and required states parties to take that impact into account in their decisions about where they would trade weapons.

Most recently, the Campaign to Stop Killer Robots, launched in early 2013, is coordinated by a woman. Despite the role of women in all aspects of the campaign, sexism remains an issue. When, just one year after the launch of the campaign, the first multilateral meeting on the development of lethal autonomous weapons systems (LAWS), as governments prefer to call them, was convened at the U.N. in Geneva in May 2014, not one woman was called to speak on the expert panels that informed the discussions.

It seems that governments could not manage to find any “qualified” women for the 18 purported expert presentations that the French president of the session on killer robots invited to give their views on the implications these weapons have for ethics, laws of war, and technical and operational issues. Behind the scenes, several men from the campaign were quietly told that the reason that all of the “expert presenters” were men was because “there were no *suitable* women to fill the slots.” What is a suitable woman?

The Campaign to Stop Killer Robots refused to sit quietly in the face of the exclusion of women experts and pressured governments to include women on any such future expert panels.⁸ The efforts bore fruit with women being included on the panels at the diplomatic discussions on killer robots in 2015. In contrast, in both the 2014 and 2015 Geneva sessions, all of the side events held by civil society were gender balanced.

Finally, another example of women’s leadership in tackling head on the impact of war on women and girls, is the International Campaign to Stop Rape & Gender Violence in Conflict, launched in early 2012 under the leadership of the Nobel Women’s Initiative. When women in conflict are continuously viewed and portrayed as victims, the response consciously or not so consciously evoked is that they – and it goes without saying, their children – need protection and it is expected that it will be “their” men who protect them.

As long as women are portrayed as weak and powerless, how can they possibly be taken seriously as individuals capable of contributing to conflict resolution, peace negotiations and post-conflict reconstruction of society? As long as the spotlight continues to be shined on the victims of conflict violence and not the depravities of the perpetrators, women will be seen as easy targets in war and impunity for the crimes against them will reign.

The Campaign to Stop Rape and Gender Violence in Conflict works to address all of these issues. Following the organising model of the International Campaign to Ban Landmines, the Stop Rape Campaign brings together women’s organisations around the world working to stop rape as a weapon of war. This campaign also works with governments that actively share the same goal.

3 • Women, Peace & Security: Rhetoric vs. Reality

UN Resolution 1325, as noted previously, is seen as landmark resolution recognising the disparate impact of war on women, their under-recognised contributions to peace, and the need for women’s full inclusion in actions on peace and security. Just two months ago, in October, the 15th anniversary of the resolution was recognised amid much fanfare. But the question remains about how much serious work needs to be done to finally see its full and meaningful implementation to empower women and recognise as the norm their role in peacemaking, peacekeeping and security.

The gaps between rhetoric and reality abound and continue to overshadow progress and challenge the UN and governments to act on the promise of the words they put to paper. The UN itself, which should lead by example, has a rather dismal record for including women in positions of influence throughout its bureaucracy and its various agencies.

The UN's Secretary General himself, not that long ago, gave a glaring – and ultimately embarrassing – example of the fundamental disconnect between words and action. In October of 2014 Secretary General Ban was singing the praises of Resolution 1325 and the impact it was having in women's lives, their political empowerment and inclusion in all aspects of peace and security. But about one week later on 31 October, when he officially announced the members of a new expert panel on peacekeeping operations, 12 of the 14 people he named to the panel were men. So much for empowerment and inclusion.

People were stunned and called for the dissolution of that panel and its reconstitution based on gender parity. After digging in his heels against the cries of blatant sexism, Mr. Ban ultimately responded, weakly, to the pressure. Ban did not name a new panel, he merely added two more women to the male-dominated group, also naming one of the women vice-chair of the panel. When UN leadership itself will not implement 1325 by empowering and including women, the message it continues to send to the world is very clear.

While governments and international bodies continue to resist gender balance, nongovernmental organisations and activists continue to press for change. In fact, as a result of the blatant sexism in the first round of Geneva talks on killer robots, members of the Campaign to Stop Killer Robots have taken an even more active stance to end gender discrimination in global policymaking.

One of the founding members of that campaign, a British organisation known as Article 36 — referring to a Geneva Convention protocol regarding new weapons and methods of warfare — began compiling a list of men working in the field of peace and security who have made a commitment not to speak on panels concerned with peace, disarmament and security issues that include only men.

Within days of opening the list, more than three-dozen men had already signed on and it was being shared beyond members of the Campaign to Stop Killer Robots. Other campaign members have begun compiling lists of women working in these areas to facilitate the ability of governments to find “suitable” women experts.

Others are also refusing to just keep politely asking that women be recognised as equals and are taking action to press governments and international bodies to do what they should be doing anyway – protecting and promoting women's human rights by actions and not simply words. In September of this year, a new campaign, spearheaded by the Center for Justice and International Law, was launched: Campaign for gender parity in international representation (GQUAL). In its own words:

The under-representation of women affects virtually all international tribunals and monitoring or adjudicating bodies that play key roles in developing international law, human rights, international relations, and cooperation [...] International bodies make important decisions for societies, including issues of security and peace, international boundaries, environmental protection, and the scope of human rights [...] The under-representation of women, who make up more than half of humanity, and a lack of diversity diminishes the legitimacy of international human rights tribunals and monitoring bodies and limits their potential and impact. We also believe that a critical mass of women can add different perspectives and experiences to make visible and help address issues that may otherwise be absent or overlooked. Above all, GQUAL promotes parity in these spaces as a measure of equality.⁹

Government and UN bodies need to recognise the critical role women play in helping shape disarmament, peace, and security discussions, and to recognise, solicit, and promote women's expertise in contributing to our own security in an insecure world. That time is well past due — and the reaction to the UN's failure to enforce its own rhetorical standards shows that women, and men, are not willing to wait any longer.

Women don't need to be protected/made secure. Women need to be empowered and listened to regarding their own sense of what makes them secure and given their rightful place in all aspects of creating sustainable peace with justice and equality.

4 • Conclusion

While Cammaert's words about it being more dangerous to be a woman than a soldier in modern wars remains true, women – and men who truly share their goals – are increasingly refusing to sit back and be talked about instead of included in all aspects of building sustainable peace, international security, and deliberations about disarmament and arms control.

Sitting back and waiting for change is not an effective strategy for making change happen. While governments and international bodies continue to resist the full recognition of women's human rights, nongovernmental organisations and activists have increased efforts to ensure that such change occurs in years not decades.

“Nothing about us without us” rings as true for the achievement of the full recognition of women's human rights as it did during the global efforts to achieve the international treaty on the rights of persons with disabilities. Women make up more than half of the world. It is way beyond time that “women” and “women's issues” no longer be treated as but one element of broader discussions – by men – about sustainable peace and global security.

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ARMS AS FOREIGN POLICY: THE CASE OF BRAZIL

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How can civil society in Brazil influence the control of arms exports?

ABSTRACT

How can civil society organisations influence the control of arms exports by states through the democratisation of foreign policy? In this article the authors explore ways of promoting the establishment of effective and transparent mechanisms in this area that take human rights seriously. Two case studies are analysed: first Brazil's tentative participation in the process of establishing multilateral rules to control arms transfers; and second, the use of military hardware donations as a tool in bilateral relations between Brazil and Mozambique and its implications for arms control.

KEYWORDS

Foreign Policy | Arms Control | Brazil | Arms Trade Treaty | Civil Society

In 2012 Brazil exported an average of US\$ 1.024 million per day in small arms.¹ In the same period, nearly 116 people were killed per day in the country by firearms.² How can civil society organisations pressure states to establish effective and transparent mechanisms to control arms exports that take human rights seriously?

In this article we accept the premise that working with foreign policy and human rights can be an effective means of implementing and improving arms control. This can be seen both on the global stage – through the establishment of regulations – and on the national level – by strengthening domestic mechanisms that are often based excessively on the idea of national security. To illustrate the challenges at the multilateral and bilateral levels, we will draw on two case studies: first, Brazil's tentative participation in the process of establishing multilateral rules to control conventional weapons; and second, the transparency of bilateral relations between Brazil and Mozambique and the implications for arms control. Finally, we will present strategy and action proposals intended primarily for civil society organisations. These proposals will be based on the strategies already developed by Conectas Human Rights.³

1 • Brazil: major producer and victim of small arms and munitions

Brazil is a peculiar country⁴ that simultaneously has high rates of armed violence and a sizable small arms manufacturing industry – particularly revolvers and pistols. According to data from UNESCO,⁵ Brazil registered more than 42,000 deaths caused by firearms in 2012. The same study reports an increase of 387% in the number of firearm deaths between 1980 and 2012, a figure that rises to 463% if only young people aged between 15 and 29 are considered.

Brazil is also the world's fourth largest exporter of small arms,⁶ the direct result of the existence of a prosperous and influential small arms industry that grew out of the development policies of the 1970s,⁷ during the period of military dictatorship in the country (1964-1985). Moreover, the economic crisis currently facing Brazil has prompted the government to introduce new incentives for the national defence industry, based on the justification of technological development and the supposed high added value of arms exports.⁸ The influence and importance of this industry in Brazil are made clear by initiatives such as the development of armored personnel carriers,⁹ medium-range missile artillery systems (300 kilometers)¹⁰ and, primarily, a large-scale multi-mission aircraft (Embraer KC-390)¹¹ and the purchase, via technology transfer agreements, of supersonic aircraft.¹²

This dual status – as a major player on the global conventional weapons market but with high rates of armed violence – puts Brazil in a privileged position to reflect on the role of foreign policy as a tool to improve respect for human rights in the field of arms control, whether on the national or international level.

This article considers foreign policy as public policy, in line with the academic production of the past 10 years in the field of Foreign Policy Analysis (FPA).¹³ In practical terms viewing

foreign policy as public policy means addressing a multi-stage process – formulation, decision-making, implementation and assessment – that is based on democratic control, social participation, transparency and accountability.¹⁴

From our work in Brazil, where there is a constitutional provision establishing that the country's international relations must be governed by the “prevalence of human rights”,¹⁵ we assume as a principle that civil society has the responsibility to insist on transparency from the government in the formulation and implementation of policies in this sector. In other words, demanding respect for human rights in all foreign policy decisions is not an abstract issue in Brazil; it constitutes a constitutional commitment. The lack of transparency in the control of arms exports by Brazil is another element that makes analysis of the local context important, as we shall see next.

Below, we analyse the challenges of working with foreign policy, human rights and arms control in Brazil based on two concrete situations: the first involving the establishment of multilateral rules to control conventional weapons (and Brazil's tentative participation in this process); and the second referring directly to bilateral relations and their implications on the control of arms between Brazil and Mozambique, within the framework of South-South cooperation.

2 • Arms Trade Treaty: impact of international standards on the improvement of national processes

The Arms Trade Treaty (ATT) is the first global agreement to establish rules for international transfers of conventional weapons, a market worth nearly US\$80 billion¹⁶ that today is poorly regulated. The result of over two decades of mobilisation by governments and more than a hundred civil society organisations, the ATT covers the seven weapons categories identified in the United Nations Register of Conventional Arms (UNROCA) – tanks, armored combat vehicles, large-caliber artillery, combat aircraft, attack helicopters, warships, and missiles and missile launchers – as well as small arms, the main weapons used to commit homicide in the world. The ATT was approved at the United Nations General Assembly on April 2, 2013, by 154 votes in favour,¹⁷ and it was opened for formal signature in June of the same year.

Brazil was tentative in its support for the Arms Trade Treaty during the negotiating process.¹⁸ In a region marked by high rates of armed violence, as a result of the large number of guns in circulation and the inadequate control in urban areas, Brazil was not one of the Latin American countries to take the lead in the preparatory discussions on the Arms Trade Treaty. Instead, during the negotiations leading roles were played in the region by Argentina, Costa Rica and Mexico.¹⁹ Nevertheless, Brazil was quick to sign the ATT in June 2013, just two months after its adoption by the UN, indicating its willingness to collaborate with the responsible regulation of the international arms trade.

In December 2015, more than two years after signing the ATT, Brazil is still not a full member of the agreement on account of the delays in the ratification process. The text of the Arms Trade Treaty is still in the ratification process, a stage that involves analysis by the Executive and Legislative branches. The treaty took seventeen months to be forwarded by the Executive branch to the Brazilian Congress,²⁰ where it continues to make slow progress.

The failure to ratify the ATT has meant that Brazil has only played a supporting role in the construction of the global system to control the transfer of arms: as merely a signatory country, Brazil lost the chance to participate in key decisions on the agreement, in particular the rules of procedure for the new instrument. In the First Conference of States Parties, which took place in Cancun, Mexico, in August 2015, Brazil was unable to participate in the choice of the headquarters for the ATT Secretariat, in setting rules for funding the treaty and in determining the model for national reports on arms transfers.²¹

For now, Brazil's non-ratification of the treaty has left the country outside the group of States with the "ATT seal" of responsible exporters. These countries, by agreeing to be part of the international system created by the treaty, undertake to not transfer arms to states that are suspected of using them to commit genocide, war crimes, crimes against humanity and attacks against civilian targets or protected civilians, among others.²² Implementing the ATT also implies that arms transfers will be assessed individually, considering criteria such as respect for human rights and international humanitarian law by the purchasing country, the possibility of their use in terrorism or organised crime and the likelihood of their diversion, among others.²³

Civil society organisations in Brazil have warned about this situation, emphasising the impact of the poorly regulated international arms trade on armed violence, one of the primary public security concerns in our country.

Another important advantage of incorporating the ATT is its capacity to force an improvement in the transparency of domestic legislation on conventional weapons exports. In Brazil the guidelines for controlling international transfers of conventional weapons are regulated by a policy known as PNEMEM – National Export Policy for Military Equipment, which was established during the military dictatorship. Running counter to democratic principles, PNEMEM is a classified document whose updates since its adoption in 1974 have been made far from public scrutiny.²⁴

This secret policy is incompatible with the democratic period that began after the end of the authoritarian regime in Brazil. This is why the policy must be reformed to incorporate more transparent mechanisms when the country fully joins the ATT system, since the agreement establishes clear rules on transparency, in particular the duty to submit periodic reports to the Secretariat (in accordance with Article 13 of the treaty). More worrying still, this lack of transparency also underpins bilateral arms trade relations, as the case described below illustrates.

3 • Brazil-Mozambique Relations: arms donations as a tool of foreign policy

It has been estimated that nearly a million people were killed in the 16-year civil war in Mozambique (1975-1992) and between 4 and 5 million fled to neighbouring countries. The conflict also destroyed much of the country's economic and social infrastructure. The General Peace Agreement of 1992 put an end to the hostilities and Mozambique staged its first multi-party elections in 1994.

In 2013 the escalation of tensions between the ruling party FRELIMO (Mozambique Liberation Front) and the opposition party RENAMO (Mozambican National Resistance) sparked fears that the African country could slip back into civil war.²⁵

The conflict in Mozambique was the subject of a statement by the Brazilian Ministry of Foreign Relations on October 22, 2013,²⁶ in which it claimed that Brazil was accompanying “with concern the incidents occurred in recent days in the region of Gorongosa, in Sofala Province, between the defense forces of Mozambique and Renamo” . It also mentioned the importance of finding solutions to the differences between the two sides, based on dialogue and negotiation, within a framework of strengthening the rule of law, democratic institutions and stability.

Just three days after releasing the statement, the Executive branch of Brazil's government requested authorisation from Congress to donate three Brazilian-made T-27 TUCANO military aircraft,²⁷ manufactured by Embraer, to the Mozambican Air Force. In the presentation of the motives for the donation, dated May 5, 2013 - i.e., five months before the authorisation request was issued and clearly not taking into account the new climate of military tensions in Mozambique²⁸ - the Ministry of Defence justified it with the fact that the Brazilian Air Force now had more advanced aircraft - notably the AT-29 SUPER TUCANO,²⁹ also manufactured by Embraer. It also cited the cost of maintaining the TUCANOs and the potential investment to get them back into working order. Finally, the presentation of the motives also used an eminently political argument:

“[The] donation, if it goes ahead, will reinforce the strong bilateral relationship between Brazil and Mozambique in the international context, further improving the ties of mutual cooperation, which are so necessary in the current global environment.”

The Brazilian initiative to donate aircraft to Mozambique is part of a policy of donating military equipment as a tool of bilateral cooperation, to strengthen ties with partners from the Global South. Over the past 10 years, besides the initiative being analysed here, Brazil has donated military equipment, mainly aircraft, on at least six occasions:

- Bolivia: 6 T-25 aircraft, in 2005.³⁰
- Paraguay: 6 T-25 aircraft, in 2005.³¹
- Ecuador: 5 C-91A aircraft, in 2006.³²
- Paraguay: 3 T-27 TUCANO aircraft, in 2010.³³
- Ecuador: 1 C-115 Buffalo aircraft, in 2011.³⁴
- Bolivia: 4 H-1H aircraft, in 2012.³⁵

In the presentation of the motives requesting the donation of this military equipment, three arguments are recurring:

- The fact that the Brazilian Air Force currently has more modern and economical aircraft.
- The high costs of maintaining the aircraft, making it more economical to transfer them than to restore them.
- Donation as a means of improving bilateral relations and strengthening ties of cooperation.

The initiative to donate three T-27 TUCANO aircraft to Mozambique is the first not to involve a South American country and is in line with efforts observed over the past decade to build closer bilateral relations. Mozambique is the second largest recipient of Brazilian investments in Africa, just behind Angola.³⁶ Besides the reasons for the donations given above – which are also verifiable in the case of Mozambique – an additional motive is the use of older military equipment to encourage future sales of more modern versions. At a Brazilian Senate commission hearing in 2014,³⁷ the then Minister of Defence, Celso Amorim, responded to a question on the donation to Mozambique by saying:

We have obtained approval, in the Foreign Relations and Defence Commission of the Lower House, which will subsequently have to be confirmed by the full House and then here in the Senate, of an authorisation request to donate three Tucanos – old Tucanos, not Super Tucanos – to Mozambique. This is in our interest, not only because of the cooperation with a country with which we have many relationships, but also because it is what other countries do: donate the Tucano and afterwards, perhaps, sell the Super Tucano. And I am not talking in the abstract, because we have already sold a considerable number of Super Tucanos to African countries. I think that Angola already has six or eight, and smaller countries such as Burkina Faso have purchased three. So I am not talking in the abstract. I am talking about something that can happen.

Civil society organisations from Brazil and Mozambique challenged the plans to donate the aircraft to the Mozambican government during the escalation of the crisis in the country, in a clear contradiction of the concern expressed in the statement by the Ministry of Foreign Relations and the justification contained in the authorisation request submitted to the Brazilian Congress.³⁸ One of the aspects challenged by the organisations was the lack of

any clarification about the use of the aircraft by the Mozambican Armed Forces, unlike the practice adopted by Brazil in previous donations of military hardware.

The advocacy efforts with the members of Congress responsible for analysing the transfer of the aircraft led to the inclusion of an amendment in the authorisation for the donation,³⁹ with the following justification:

May it be observed that the Mozambican Human Rights League and Conectas Human Rights have expressed concern that, given the lack of any indication on the use that may be made of the aircraft donated by Brazil, their possible use for the purposes of warfare could escalate the growing political and military tension that has gripped Mozambique. On this matter, we understand that, whenever possible, the donation of public assets should be subject to previously established purposes.

The amendment suggested by the then Congressman Davi Alcolumbre, the member of the house responsible for analysing the authorisation of the donation, contains the following wording:

*Added to Article 1 of the bill is the following paragraph 2:
"Article 1.....
Paragraph 2. The donated aircraft shall be used exclusively for pilot instruction and training activities."*

As of December 2015, authorisation for the donation of the aircraft to Mozambique was still pending in the Brazilian Legislative branch.

4 • Notes on strategies for action

In light of the challenges of working with foreign policy, human rights and arms control, and drawing on the experience of Conectas Human Rights, there are a number of strategies that are worth pursuing.

A – The role of checks and balances in a democratic society

The control that Congress exercises over the activities of the Executive branch has produced some interesting results in the work of civil society with foreign policy. In Brazil the Legislative branch serves important functions in the field of foreign policy, including analysis of international treaties before they are implemented domestically, a process that precedes ratification, and authorisation for donations of military hardware to other countries, given that these cases involve the transfer of national public property. This second function was fundamental in the case of the donation of aircraft to Mozambique, as it allowed the deterioration of the political climate in that

country to be taken into consideration in the authorisation of the transfer, given that the authorisation request submitted by the Executive branch was silent on this matter.

Nevertheless, since this is just one of the many functions of members of Congress, and at times, due to their lack of interest or failure to view the topic as a political priority, lawmakers do not always address foreign policy issues quickly enough to keep up with the dynamics of the international agenda. On these occasions the Executive branch needs to serve as a catalyst, driving the Legislative into action, whether through the influence of its congressional liaison offices or by providing lawmakers with technical data and information on the political context. In the process of implementing the Arms Trade Treaty in Brazil, the support of three different ministries (Foreign Relations, Justice and Defence) in presenting the motives for the agreement to the Brazilian Congress and the work of the congressional liaison office of the Ministry of Foreign Relations has helped keep the topic on the legislative agenda.

Finally, the need to explore opportunities for social participation in the Executive and Legislative branches is always worth keeping in mind. Public hearings, working meetings, testimonies of ministers or officials involved in matters of foreign policy are some examples of the opportunities in which the involvement of civil society can play a key role in diversifying voices and providing technical information, and ensuring that the decisions of public officials are as well informed as possible.

One challenge facing civil society when working with the Legislative as a means of controlling foreign policy is to know how to cope with the partisan dynamics at play.

B – The importance of working in networks

The division of labour between a group of civil society organisations that work with foreign policy, human rights and arms control enables action to be taken on different levels – national, regional and international – without overburdening the organisations, which are often involved in several other projects. The multiplicity of voices from the actions of these organisations also helps step up the demand, serving as an additional source of pressure on issues that are not always given the proper attention by the Executive and Legislative branches.

In the case of the implementation of the ATT in Brazil, the actions of organisations with different profiles and expertise – such as Conectas Human Rights, Sou da Paz Institute,⁴⁰ Amnesty International⁴¹ and Dhesarme⁴² – permitted a diversification of strategies, strengthening the call for a swift conclusion of the process towards the ratification of the agreement.

C – The need to listen to local partners

The establishment and maintenance of partnerships with civil society organisations from the Global South is important to ensure a broad geographic approach, which is essential when working with foreign policy and human rights. Ongoing dialogue with organisations and

movements with a presence on the ground not only enhances the legitimacy of challenges to the activities of states that impact human rights, but it also allows knowledge of the situations surrounding the violations to be obtained quickly, enabling the rapid planning of response strategies and the anticipation of more serious adverse effects.

In the case of the donation of Brazilian T-27 TUCANO aircraft to Mozambique, dialogue with local partners was instrumental in allowing measures to be taken with the Executive and Legislative branches in Brazil soon after the process to transfer the military hardware began. This swift action allowed time for following up with decision-makers in the Ministry of Foreign Relations and with members of Congress who were analysing the donation.

5 • Conclusion

Analysis of the challenges of implementing the international arms control system and transparency in the process of bilateral transfer of military hardware allows us to identify opportunities for action by civil society organisations, which can lead to the establishment of instruments to control arms exports that respect human rights. The use of the democratic safeguards of checks and balances, the value of working in networks and partnerships, and the importance of responsive dialogue with organisations with a presence on the ground are some examples of strategies that, from a foreign policy and human rights approach, can contribute effectively to the improvement of the control of arms exports.

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SMALL ARMS, BIG VIOLATIONS

Daniel Mack

• *Why are firearms not among the greatest priorities of the human rights community?* •

ABSTRACT

In this article, the author ponders why small arms are underrepresented in the human rights debate. First, he challenges the distinction between war and peace, affirming that the vast majority of people today who die, are injured and otherwise have their rights violated due to violence do so in countries “at peace”. In light of this fact, the author critically revisits the predominance of firearms in harm worldwide and the most recent international efforts in this field. Finally, the author takes a look at how Brazilian civil society may further incorporate the discussion of gun violence, arguing that a human rights-based approach to public security might actually foster greater support to the ‘grammar’ of human rights by the majority of the population.

KEYWORDS

Small arms | Brazil | Gun violence | Peace | Security | Guns | Firearms

Firearms are the main vector of violent death and injury worldwide. The preponderance of small arms in the armed violence “epidemic” – over a half million killed annually – is considerable but not uniform across regions.¹ The World Health Organization considers over 10 homicides per 100,000 inhabitants an epidemic level of violence – the average global rate has remained beneath that threshold, most recently at 6.2; in over 30 countries (almost all in Europe and Asia) the rate is less than 1.² Yet, in regions such as the Americas (16.3) and Africa (12.5), rates are well above epidemic levels, constituting an ongoing public health and human rights disaster.

Under a closer lens, the picture becomes downright terrifying. Central America and Southern Africa lead at over 25 homicides per 100,000, with South America, Central Africa and the Caribbean not far behind.³ In recent years, Honduras and El Salvador have exchanged the morbid title of earth’s most violent country. Within nations, large conurbations (such as San Pedro Sula, Acapulco, Maceió, San Salvador, Tegucigalpa or Caracas) often have homicide rates more than ten-fold the epidemic threshold.⁴

In the Americas, two-thirds of all homicides occur with firearms, and the availability of illegal guns may be driving rising homicide rates in Central America and the Caribbean – the only world sub-regions experiencing increases.⁵ Globally, firearms were used in slightly less than half of all violent deaths for the period of 2007 to 2012, for an annual average of almost 200,000.⁶

While armed violence is highly concentrated geographically – the 18 countries with the highest rates account for 4% of the world’s population but 24% of all violent deaths⁷ – firearms (mostly handguns) are a major part of the story everywhere. Even in regions where armed violence is a small problem (such as much of Western Europe), guns constitute a significant vector of harm. Wherever armed violence ravishes communities and kills scores of people, in conflict or countries “at peace”, firearms are often protagonists. “Legal intervention killings” (or “death by police”) which in many societies constitute a major form of violation of human rights, are often committed with guns.

In fact, firearms are overwhelmingly involved in violence at large – not only in homicides. Guns are more plentiful and impactful than all other types of conventional weapons (bombs, mines) within the concept of “armed violence”.⁸ Including firearm suicides and accidents under the rubric of “armed violence” would further consolidate the disproportional role played particularly by handguns in the broader “epidemic”. Data on violence does not include the massive numbers of gun suicides – for conceptual and methodological reasons – but from the perspective of a threat to the right life, these cannot be ignored; in the US, for example, more people kill themselves with guns than are killed by others.⁹

In the case of non-lethal incidents and psychological effects (fear, threats), guns are also the main tools of injury and intimidation. Though precise numbers are elusive, and psychological effects are often ignored, non-lethal and non-physical harm are a major component of the epidemic. As many as 7 million people around the world over the last

decade could be living with firearm injuries in settings outside of armed conflicts.¹⁰ In the US, estimates point to three to six non-lethal victims per fatality.¹¹ Injuries, moreover, often mask so-called “slow homicides”, recorded as *causa mortis* such as infection, but caused by gun violence months or years earlier.¹²

Psychological effects are likewise grim, under-reported and widespread. In the case of São Paulo, although homicides have fallen over 70% in the last decade – a precipitous drop sometimes referred to as the “São Paulo miracle”¹³ – polls suggest that the vast majority of people think “violence” has increased – armed robbery being a major culprit. According to a recent victimisation poll, more than half of all Brazilians are “very afraid” of being killed, and almost a third believes they could be murdered within 12 months.¹⁴

These effects cannot be ignored, as “guns do not need to be fired to be effective. The carrying of a gun often symbolises its use, or substitutes for its use far more effectively than does actual use, provided the willingness of the user to actually fire the weapon has been established.”¹⁵ In the psyche of Brazilians, and throughout the Americas, this willingness is firmly established through personal experience or ubiquitous media coverage of violent crime.

Among the simplest technologies developed by humans to harm other humans, guns kill, maim and violate more rights on a daily basis worldwide than much more sophisticated, expensive and attended-to weapons: “about 60% of human rights violations documented by Amnesty International have involved the use of small arms and light weapons.”¹⁶ And even if an epidemic of clichés also surrounds small arms – the most famous (“the real weapons of mass destruction”), was penned by Kofi Annan¹⁷ – to the chagrin of human security advocates the international community has yet to wage a proportional response to their harm.¹⁸

1 • “War in peace”¹⁹

Why are small arms not among the greatest priorities of the international community? Why has firearm control not emerged as a major human rights theme? Prejudice against “merely operational” aspects (weapons are only tools) may be partially responsible. But there is more at play. Donors are often shy when it comes to funding organisations and projects that aim to decrease firearm violence, which is seen as too politically charged. US-based funders, particularly, seem resistant to engage in fear of controversy around the tense domestic debate on firearms. Several European governments, which have poured funds into other arms control initiatives, operate with too much deference to a notion of “non-intervention” into an area that entails direct advocacy and often ignites political storms. Some are perhaps mindful that they are major producers and exporters of small arms and certain choices are bad for business.

Another reason for the relative inattention to small arms may stem from the distinction between war and peace. To be blunt, blood in battle generally receives more attention –

from media, public opinion, policy makers, donors, celebrities – than blood on the streets of slums and inner-cities. Of course, armed conflict cannot be minimised, displaying the worst in humanity – mass atrocities and the utter destruction of communities or even entire countries. Today, explosive weapons and other conventional arms wreak terrible havoc in internal conflicts and terrorist attacks as far apart as Syria, Libya, Ukraine, Iraq, Afghanistan, South Sudan and Pakistan.

Precisely because of the overwhelming horror of war, the attention, instruments and concepts developed to intervene in this sort of armed violence are relatively robust and mature – albeit clearly insufficient. In the UN’s involvement alone (institutional, military and conceptual) in issues of international security (think Security Council mandate, blue helmets and the “responsibility to protect”), there are many examples of the primacy of attention to conflict violence over criminal and inter-personal violence.

Perhaps the most important distinction, the development and operationalisation of International Humanitarian Law (IHL) has provided the conceptual and legal framework for most efforts to curtail violence in conflict. In terms of limiting the effects of weaponry, the lens of “war” – and civil society’s adroit use of it – has informed the major efforts in arms control over the last two decades. The notion of “indiscriminate effects” and “unnecessary suffering” underpinned efforts to ban anti-personal landmines (1997) and cluster bombs (2008). Banning weapons that cause “unacceptable harm” matters not only for the protection of civilians in conflict, but to prevent their unintentional use or diversion to terrorists.

Nonetheless, despite the (hopefully short-term) increase caused by the gruesome conflict in Syria, less than 14% of armed violence deaths worldwide from 2007 to 2012 were direct conflict deaths, up from 10% that occurred in an armed conflict or terrorist attack between 2004 and 2009.²⁰ The number of homicides in Brazil in 2013 (over 56,000) was greater than the number of conflict deaths *worldwide* for every year between 2004 and 2009!²¹ The fact remains that the vast majority of people today who die, are injured and otherwise have their rights violated due to violence do so in countries “at peace” . This glaring fact somehow remains difficult to compute for many, still operating in the conceptually neat but artificial dichotomy of war *or* peace.

Small arms are a big part of war, heavily responsible for lethality in the aforementioned conflicts, as well as in many others in Africa, where the AK-47 has probably accounted for more loss of life than any other type of weapon in history. While the exact proportion of deaths vis-à-vis other weapons is uncertain, cases assessed in one study showed that firearms caused “between 20-55 percent of casualties (deaths and injuries) in the majority of cases examined” – with a wide range reaching its apex in the Republic of Congo, where firearms accounted for 93 percent of casualties.²² Another source estimates that around a third of direct conflict deaths globally between 2007 and 2012 occurred with a firearm.²³

Moreover, there is reason to believe – given past trends and forecasts for coming decades – that violent deaths in countries not involved in a conflict will become an even larger parcel of armed violence. Both the number of wars and of conflict deaths have decreased; “war” is less often a military contest between nation-states, but rather an internal conflict.²⁴ Indeed, civil war “has been the most prevalent form of warfare since the end of the 1950s” and was “responsible for the overwhelming majority of direct war casualties since the 1980s: between 1990 and 2002, civil conflict accounted for over 90 percent of battle deaths.”²⁵

But civil war’s prevalence is expected to decrease, and the decrease may intensify. One study forecasts “a continued decline in the proportion of the world’s countries that have internal armed conflict, from about 15% in 2009 to 7% in 2050.”²⁶ In other words, it is likely that city streets – not battlefields – become an even greater locus of intentional deaths over the coming decades.

2 • Guns and the “human rights industry”

In addition to the above, the “human rights conglomerate”, both within the framework of the UN and transnational civil society, is also responsible for small arms’ relative invisibility – and might want to re-assess its underwhelming engagement. To be sure, many multilateral agencies and civil society organisations have dedicated important efforts and resources to the “arms control” arena broadly – think of the seminal and spearheading roles of Amnesty International during the process that culminated in the Arms Trade Treaty, or of Human Rights Watch (and for that matter, UNDP) on the road towards the Convention on Cluster Munitions.²⁷

Nonetheless, most “traditional” human rights organisations – including those with a more regional or national purview – have dedicated less attention to issues of armed violence and, particularly, small arms as the “tools of human rights violations” *par excellence*.²⁸ The standout exception was the successful negotiation of the ATT, an important step forward in terms of connecting international transfers of small arms (included in the Treaty’s scope) and IHRL.

Human rights violations perpetrated or facilitated by arms are not more important when the weapons have been internationally transferred or banned by a UN instrument. A plethora of human rights violations are caused by the misuse of firearms in times of peace regardless of their origin – in Brazil, for instance, over 80% of guns apprehended in crimes were made domestically, and most never crossed an international border.²⁹

While the traditional IHL prism is ill-fitting for armed violence in its most common manifestation (urban gun violence in countries nominally at peace), what are the future prospects of further applying IHRL to small arms use by state agents, or to reduce firearm violence between civilians? Many avenues are available to reignite the connection between human rights and gun violence. Some of these have reportedly been recently considered within leading human rights NGOs, but not quite broken through into multi-year strategies and advocacy priorities.

Within the UN, options abound. For example, “mainstreaming” armed violence into UN General Assembly committees other than the First (“Disarmament and International Security”), particularly the Third Committee (“Social, Humanitarian and Cultural Affairs”), which covers “agenda items relating to a range of social, humanitarian affairs and human rights issues that affect people all over the world.”³⁰ Such actions could help break down some of the separate “silos” that issues of grave international concern are often (uncomfortably) placed into.

A particularly relevant new frontier would be proper deliberation of small arms and armed violence within the purview of the UN Human Right Council in Geneva, as well as its Universal Periodic Reviews (“UPR”). Strikingly, Brazil’ s UPR for 2012, only as an illustration, has barely any mention of gun violence, even under sections regarding the commitments to the “right to life, liberty and security of the person” or recommendations concerning “promoting public security and combating violence.”³¹ Rather, the reports duly cover successes and challenges regarding homicides by police, in prisons, specifically against women and minorities, but not much regarding broader and perhaps the most systematic violations of the human rights of the majority of the population – considering the 40,000 gun violence deaths per year, and unknown levels of injuries and violent robberies undermining any attempt of achieving “freedom from fear” .³² Even the summary from civil society “stakeholders” pays close to no attention to this facet of human rights. Could UPRs not be required to present and disaggregate the incidence and dynamics of armed violence in each reviewed country? If not always by the country government itself, certainly civil society stakeholders and UN “troikas” could become more systematic about including this information.

In this regard, a most promising step forward is currently underway, put in place by HRC resolution 29/10 (July 2015) on human rights and firearms.³³ The resolution will culminate in a report from the UN High Commissioner for Human Rights on

*the different ways in which civilian acquisition, possession and use of firearms have been effectively regulated, with a view to assessing the contribution of such regulation to the protection of human rights, in particular the right to life and security of person, and to identify best practices that may guide States to further develop relevant national regulation if they so deem it necessary.*³⁴

As a next step, roughly a decade later, perhaps the UN Human Rights Council could nominate another “United Nations Special Rapporteur on the Prevention of Human Rights Violations Committed with Small Arms and Lights Weapons” ?

Seminally, this perspective was taken up by the UN during the mandate of the UN Special Rapporteur Barbara Frey (2002-2006), resulting in a groundbreaking report.³⁵ This 2006 document highlighted that small arms are the “tools used to violate human rights” on a variety of levels: the right to life; security of person; freedom of assembly, association,

movement; free speech; right to education; right to health care, among others.³⁶ In fact, “because they are portable and highly lethal, small arms have the power to transform a basic violation of human rights into a profound one.”³⁷ As such, Frey notes that under IHRL “the state can be held responsible for violations committed with small arms by private persons in two situations: when the armed individuals are operating under color of state authority; and when the state fails to act with due diligence to protect human rights.”³⁸ In other words, national governments can be held legally responsible for human rights violations with small arms not only for commission but also omission.

Certainly, the first case is an area ripe for improvement, particularly in countries like Brazil, given the misuse of firearms by law enforcement. Despite international standards and operating protocols for the use of force,³⁹ police lethality in many societies is well beyond acceptable. For example, Brazilian (military) police is estimated to kill an average five people every day (a total of 1,890 people in 2012, 351 of those in São Paulo – about 20% of all homicides in the city).⁴⁰ As in many countries, the most central aspect of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials has not been thoroughly implemented into national law.⁴¹

Could civil society do more to constrain the misuse of firearms by state forces through strategic deployment of IHRL? What is more, could citizens suffering from high levels of gun violence have legal recourse to press their countries to tackle the issue even if the domestic paths for better legislation and public policies appear blocked? These are sincere and open questions that international law and human rights experts like Amnesty International, Conectas and Human Rights Watch could respond.

To meet a “due diligence standard regarding the regulation of the ownership and use of small arms”, according to Frey’s report,

*adequate guidelines must include the following State actions with regard to small arms: licensing to prevent possession of arms by persons who are at risk of misusing them, requiring safe storage of small arms, requiring tracking information by manufacturers, investigating and prosecuting those who misuse small arms, and offering periodic amnesties to remove unwanted small arms from circulation.*⁴²

How many countries in the world currently fail these standards – and can human rights advocates pressure them to address their failure by using this framework? Moreover, has civil society done all it can on the report’s main recommendation regarding the “misuse” of small arms in “peace”? Specifically, “the human rights community could make a very useful contribution to the international discussion on small arms by drafting model human rights principles on State responsibility for preventing and investigating human rights violations caused by armed individuals and groups”⁴³ – has this been achieved?

Human rights advocates and organisations can do more, better integrating gun violence into human rights frameworks and fora, conceptually “extending” IHRL to tackle urban violence, supporting efforts on national gun control public policies and laws, attempting to reduce levels of firearms production and stockpiles, and tackling cultural issues of demand for guns among youth. All should be part of the toolbox for civil society concerned with protecting human rights.

3 • Can increased focus on gun violence bolster the grammar of human rights in Brazil?

Not all action should occur internationally, nor be led by UN agencies and organisations based in the “North” ; on the contrary, I have argued that most efforts and resources to tackle the violations of rights at the end of a barrel should be spent nationally by those closer and more cognisant of the communities under threat.⁴⁴ And the threat is real and constant: an estimated 70% of Brazil’ s globe-topping annual homicides are committed with firearms.⁴⁵ These numbers do not cover those injured, nor those who have not been directly harmed but nonetheless live in a constant state of fear, with all the limitations that entails to the fulfillment of their basic rights, such as education, opinion/expression, culture, movement and assembly/affiliation.

Human rights advocates should gain fluency in the characteristics of weapons used in violence. In São Paulo, 61% of all homicides committed in the city in 2012 and first half of 2013 were committed with a gun.⁴⁶ Research that covered every weapon apprehended by the police in 2011 and 2012 (over 14,000 firearms) showed that a vast majority of the firearms used in violent crime were handguns, relatively low-tech, made in Brazil, and often fairly old. Almost 60% of all weapons were revolvers, 32% were pistols; 78% were produced in Brazil (almost entirely by the company Taurus) and 14% were produced before 1980, including 2% produced in the 1950s – only 10% were “new” (produced since 2010). Within the universe of weapons connected to homicides, almost 97% were handguns (revolvers and pistols).⁴⁷ Another study determined that the prevalence of firearms in circulation was strongly and positively correlated with higher rates of homicide, estimating that for every 18 guns taken off the streets of São Paulo, one life was saved.⁴⁸

These details are essential because, quite simply, security is a fundamental and unfulfilled human right for Brazilians – and many others across the “Global South” – and most often this right is violated at gunpoint. As such, “traditional” human rights NGOs working both domestically and locally should increase their efforts on reducing gun violence. Of course, given specialisation, limited funding, diverse interests and political priorities, no organisation can work on all human rights for all Brazilians. Themes, populations or regions are rightfully focused on in order to attempt to influence public policy and practice in a given cross-section of such an enormous country – larger than the continental US and with a population similar to France, Germany and the United Kingdom combined.

The human rights situation of many historically disadvantaged groups remains dire in Brazil, whether the indigenous population, persons with disabilities, the urban destitute, or the LGBTI community. Slavery has not yet been fully eradicated, and access to education, water/sanitation, or cultural rights is patchy at best. Even groups that are not a minority, such as women and blacks, have their rights systematically threatened or violated. There is plenty of work to go around, and great efforts must be expended in any given sub-theme of human rights work in Brazil. These somewhat unavoidable silos, in turn, lead many Brazilians to question *who* benefits from efforts to defend and promote said human rights – as if in a zero-sum game rather than one in which any improvement ameliorates the country as a whole.

In Brazil, still a socially conservative country at heart, this arcane mentality has been particularly prevalent in issues of law and order or “public security”, the rubric under which all issues of criminality and violence are placed. As a society which favours repression over prevention and mediation to reduce violence, in Brazil the human rights agenda has been ridiculed, perceived as being concerned with criminals at the expense of the “*cidadãos de bem*” (good citizens – as if life could comport such simplistic dichotomies). This view is perhaps best encapsulated in two infamous, but prevalent, sayings: “*direitos humanos para humanos direitos*” (‘human rights for proper humans’) and “*bandido bom é bandido morto*” (‘a good criminal is a dead criminal’). Such a mentality, mind-bogglingly widespread – a recent poll found that 50% of those interviewed agreed with the latter⁴⁹ – remains a momentous obstacle for those working on the intersection of human rights and security in Brazil.

Of course, to protect minorities, the oppressed, the vulnerable and the underprivileged is the *raison d’être* of human rights work, and these efforts must be prioritised, supported and funded in Brazil, as they are far from consolidated. Nevertheless, there are large swaths of the rights of Brazilians that tend to be violated systematically, on a daily basis, without many defenders.⁵⁰ Rather than an either/or proposition, these facets are complementary and part and parcel of the very dynamics that cause much of the violence in Brazil – whether by criminals, common citizens, or the state.

With due care not to dismiss other essential efforts, nor to replicate unfortunate right-wing mantras about “good citizens”, in Brazil the right to security, safety and freedom from fear is sometimes relegated to a lesser priority within the traditional view of defending human rights. This, in turn, often reinforces the untenable *status quo*, pigeonholing the grammar of human rights into a sometimes unpopular view while, in reality, it must be moved into a perception of a universal, positive good. No joke: in Brazil many are *against* human rights given how tainted the concept has become.

It may come as no surprise that so-called “public security” is the area with least normative evolution since the military dictatorship. In current efforts to combat violence under a democracy, the state and civil society in Brazil were left with the burden of the ineffective and inhumane tools of a dictatorship. Arguably a concession to keep some power in the military sphere, the nefarious legacy was upheld and consolidated by Brazil’s 1988 Constitution.⁵¹ Article

144 of the Constitution maintains two police forces: Civil to investigate crimes, and Military for street policing and the “preservation of public order” . The emphasis is not fundamental rights; if in perceived contradiction, protection of the state or public order takes precedence over the safety of the citizen. Thus, when uniformed police on the streets – under strict military hierarchy, training, methods and, increasingly, equipment – perceive a threat to those instances, they feel justified to use violent means against the basic rights of their fellow citizens.

With these obsolete parameters, and the practices they perpetuate, basic rights are abused on a daily basis in Brazil. Those in *favelas* fear death by police brutality or drug traffickers (and ubiquitous *balas perdidas* or “lost bullets”), while upper classes fear losing their material possessions to criminals. But most Brazilians fear life could end any minute. As stated in Article 3 of the Universal Declaration of Human Rights, “everyone has the right to life, liberty and security of person” .

In decidedly overly simplistic terms, while those oppressed by the state (prisoners, victims of police violence, slum-dwellers bereft of basic services) are (thinly and nominally) protected by the concept of human rights and its heroic defenders in Brazil, others, oppressed by systemic gun violence – whether by state commission, omission, ineffectiveness or utter abandon – perceive they are not afforded such shield. Therefore, one can argue that, in the Brazilian context efforts to decrease armed violence levels (particularly homicides and threats to psychological health posed by robberies) are essential to fulfill the basic human rights of millions – and could in turn offer hope of bringing those millions into being conversant and accepting of human rights grammar.⁵²

The priorities for human rights efforts in Brazil will by definition not be the same as those in different points of their political and socio-economic evolution. It cannot be expected, therefore, for the frameworks around efforts to protect human rights – whether conceptual, rhetorical, political, or operational – to always perfectly emulate international priorities; a cookie cutter interpretation of “classic” human rights may present an uneasy fit. Human rights are universal, but how they are threatened, the way to achieve them, and the semantics deployed to do so, differ drastically.

Therefore, for the case of Brazil, perhaps it is time to rethink some assumptions and conceptual frameworks, rendering them – or alternatives – better suited to the realities on the ground where most people are being killed, injured and terrorized?

A broad spectrum of efforts to guarantee security – including diminishing risk factors (alcohol and drug abuse, poverty/economic inequality, lack of reconciliation skills); prevention efforts with youth; and changes to institutional environments (police reform, a criminal justice reform that tackles mass incarceration and the failed “war on drugs”) are essential components of human rights work in Brazil. Likewise, advocating for better control of the “tools of human rights violations” should become a priority. On the way, focus on gun violence may assist in rescuing the universal grammar of human rights from the distorted and unpopular corner it currently finds itself in Brazil, providing a semantic and political bridge between those who currently defend and denigrate human rights.

NOTES

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51 • Tellingly, rather than under the chapter on “Fundamental rights and guarantees”, the article on “public security” appears under the rubric of “Defense of the State and democratic institutions”.

52 • As noted, this recognition should not detract from other human rights issues when attempting to design or influence public policy interventions. It remains essential to continue to emphasise the engagement and attempts to influence government actors that have historically perpetrated systematic violations of human rights of specific populations, such as efforts to curb disproportionate/unlawful violence from police forces and degrading treatment of prisoners.

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THE HUMAN COST OF BOMBING CITIES

Maya Brehm

• *How the international debate on explosive weapons* •
overlooks human rights

ABSTRACT

The use of explosive weapons (air-dropped bombs, rockets, artillery shells, etc.) in cities, towns and villages causes immense suffering to civilians. There is increasing support at the international level for the development of a political commitment to address this humanitarian problem and set a strong standard against the use of explosive weapons with wide area effect in populated areas. Human rights considerations have been largely absent from this debate. This article illustrates the negative impact of explosive violence on the enjoyment of human rights through the prism of case law. It argues that a human rights perspective can help victims of explosive violence to fully realise their rights and support efforts aimed at bringing about changes in military policies and practices to reduce harm to civilians.

KEYWORDS

Bombardment | Displacement | Explosive weapons | International Human Rights Law | International Humanitarian Law | Protection of civilians

“It’s because of these shells, the endless explosions, that I left my home. I left a few months after [giving] birth ... For the journey, I carried my baby. I have other children and I wished I could carry all of them, but I couldn’t — so they had to run for themselves. People were dying all around us, houses became rubble.”¹ In this testimony, a woman from Syria describes the aftermath of shelling of her neighborhood in the course of the conflict that has engulfed Syria since 2011. In the face of the immense devastation caused by bombardment and shelling, many people from Syria, Iraq, Ukraine, Yemen and other places often have no choice but to flee their homes and seek refuge elsewhere.² The use of explosive weapons in populated areas is a major cause of population displacement and one of the drivers of the staggering refugee crisis facing the world today.³

According to a leading study, explosive weapons such as air-dropped bombs, artillery projectiles, mortar shells, rockets or improvised explosive devices kill and injure tens of thousands of civilians every year.⁴ Explosive weapons cause harm mainly by projecting blast and fragments outward from a point of detonation.⁵ When these weapons are used in a populated area, for example a city, town or village, civilians make up around 90% of direct casualties.⁶ Explosive weapons also damage homes and businesses, as well as schools, hospitals, water, sanitation, electricity and other public infrastructure vital to the civilian population. Denial of access to health care and education, loss of livelihoods and forced displacement are among the indirect consequences of this form of armed violence.

Explosive violence is a geographically diverse phenomenon that affects some countries more than others. According to one survey, between 2011 and 2014, explosive violence was particularly prevalent in Iraq, Syria, Pakistan and Afghanistan.⁷ In 2014, very high numbers of civilian casualties were recorded in Gaza and Nigeria, and during the first seven months of 2015, more civilians died and were injured from explosive weapons in Yemen than in any other country in the world.⁸

Humanitarian actors and policy makers increasingly recognise the use of explosive weapons in populated areas as a key challenge to the protection of civilians in armed conflicts.⁹ The humanitarian problem is particularly acute with the use of large bombs, unguided rockets, cluster munitions, multiple-barrel rocket launchers or other explosive weapons that affect a wide area with blast and fragmentation.¹⁰ Civil society organisations affiliated with the International Network on Explosive Weapons (INEW) are therefore calling for an international commitment to help protect civilians by ending the use of explosive weapons with wide area effects in populated areas¹¹ — a call echoed by the International Committee of the Red Cross (ICRC),¹² the UN Secretary-General and other high-level UN representatives.¹³ In September 2015, government officials, representatives of international organisations and civil society came together in Vienna (Austria) to start discussions on such a political commitment.¹⁴

The human rights dimension of explosive violence has not received focused attention in these discussions. The debate has centred on questions of compliance with international

humanitarian law (IHL), the body of international law that governs the use of weapons for the conduct of hostilities (combat) during an armed conflict.¹⁵ The focus on IHL is not surprising considering that states tend to reserve explosive weapons for military combat and do not generally use them in law enforcement operations, which are governed by international human rights law (IHRL) standards on the use of force.

IHRL is nevertheless a relevant legal framework for addressing harm from explosive weapons. First, human rights protection does not cease in times of armed conflict.¹⁶ Second, the line between combat and policing is often contested and perhaps increasingly blurred.¹⁷ IHRL is designed to protect and promote those rights and freedoms that all human beings are entitled to enjoy by virtue of their humanity. It establishes a duty on states to uphold these rights and it provides procedures to prevent and remedy rights abuses. The remedial function of IHRL can help victims and survivors of explosive violence to fully realise their rights. Its emphasis on prevention can support ongoing efforts aimed at reducing harm from the use of explosive weapons in populated areas.¹⁸ The remainder of this article illustrates the negative impact of explosive violence on the enjoyment of human rights and briefly explores potential benefits and some obstacles to a human rights-oriented approach.¹⁹ These questions are explored through the prism of selected human rights cases.

1 • Explosive weapons and the enjoyment of human rights

A – Loss of life and life-threatening injuries

Any use of an explosive weapon risks negatively impacting the enjoyment of a wide range of human rights, most immediately, the right to life. The effects of explosive weapons are life-threatening and therefore raise potential issues under the right to life irrespective of whether the victim actually dies.²⁰ However, not every life-threatening use of force amounts to a violation of the right to life. IHRL prohibits *arbitrary* deprivation of life. To avoid arbitrary killings, IHRL places strict limitations on the use of potentially lethal force. Although IHRL standards on the use of force do not explicitly exclude resort to explosive weapons, lethal force may only be used as a last resort when absolutely necessary and in a manner strictly proportionate to the attainment of a legitimate law enforcement aim.²¹ Due to their blast and fragmentation effects, explosive weapon use is difficult to reconcile with the requirement to plan law enforcement operations involving the use of force with a view to *minimising* the risk of loss of life, both, in respect of persons against whom force is directed and of bystanders.²²

Even in a situation where police officers are confronting presumed “dangerous terrorists” the use of an explosive weapon may not be justifiable. In a case dealing with a “counter-terrorism operation” in a region of Turkey subject to a state of emergency, the European Court of Human Rights (ECtHR) has found it impossible to understand how the police could have believed it absolutely necessary to respond

with such force —firearms and explosives (probably hand grenades)— as to cause numerous extremely serious injuries. The Court found that, although recourse to lethal force may have been justified, the right to life of one of the alleged terrorists had been violated because the state failed to demonstrate that the force used did not go beyond what was absolutely necessary and strictly proportionate.²³

As the blast and fragmentation effects of an explosive weapon cannot be directed at a suspected offender in the way a firearms bullet can, explosive weapon use also threatens the lives of bystanders. In early February 2000, Russian forces bombarded the Chechen village of Katyr-Yurt with “heavy free-falling high-explosion aviation bombs FAB-250 and FAB-500 with a damage radius exceeding 1,000 metres”²⁴ ostensibly in order to protect the lives of the residents from unlawful violence. Forty-six civilians were killed and fifty-three were wounded. In the case dealing with the bombardment, the ECtHR found that “using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.” In the Court’s view, the “massive use of indiscriminate weapons” stood “in flagrant contrast” with the primary aim of the operation (to protect lives) and could “not be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.” Even if the operation pursued a legitimate aim, the Court considered that it was not “planned and executed with the requisite care for the lives of the civilian population.”²⁵

In most cases, therefore, the use of an explosive weapon against or among people will likely be more hazardous to human life than absolutely necessary to achieve a legitimate law enforcement aim. There are, however, circumstances in which a state may be justified in taking “exceptional measures”, which “could presumably comprise the deployment of armed forces equipped with combat weapons, including military aircraft”, notably, in order to regain control over territory or suppress an illegal armed insurgency.²⁶

Yet, even in operations effectively amounting to conduct of hostilities during an armed conflict (governed by IHL), human rights bodies have found it difficult to reconcile the use, in a populated area, of an explosive weapon with wide area effects with states’ duty to respect and protect the right to life.²⁷ In a case dealing with a cluster munition launched from a Colombian Air Force helicopter into the village of Santo Domingo (Arauca, Colombia) on 13 December 1998, the Inter-American Court of Human Rights (IACtHR) considered that “the use of explosive weapons launched from an aircraft constitutes an activity that i[s] necessarily categorised as dangerous, and therefore should be executed under strict safety conditions that guarantee that only the selected objective will be harmed.”²⁸ The Court concluded that given “the lethal capacity and limited precision” of the weapon used, “its launch in the urban center of the village of Santo Domingo or nearby”, violated the attacker’s precautionary obligations under IHL and amounted to a violation of the right to life and of the right to physical, mental and moral integrity.²⁹

B – Mental harm, material devastation and forced displacement

Shelling and bombardment is not only life-threatening, it can also cause severe psychological trauma.³⁰ Many applicants in cases dealing with explosive weapons claim to be victims of inhuman or degrading treatment as a result of having witnessed the violent death of a close relative or due to the destruction of their homes and possessions, their displacement or the behavior of the authorities after the event.

In a case where Kurdish villagers from Turkey complained of the terror, fear and panic created by aircraft dropping large bombs on their villages, the ECtHR accepted that “witnessing the killing of their close relatives or the immediate aftermath”, coupled with “the authorities’ wholly inadequate and inefficient response”, must have caused the applicants “suffering attaining the threshold of inhuman and degrading treatment.”³¹ The Court described the ordeal of the villagers who had to personally “collect what was left of the bodies”, place the remains “in plastic bags and bury them in a mass grave.” It considered further that the anguish and distress caused by “the wanton destruction of the applicants’ houses and belongings” also amounted to inhuman treatment.³² This finding departs from the position of the Court in earlier cases.³³ Whether this signals a shift toward recognising as inhuman treatment the potentially severe psychological impacts of the use of a powerful explosive weapon in a populated area remains to be seen.

In addition to their serious physical and mental health impacts, explosive weapons with wide area effects can reduce the built environment to rubble. Even a single explosive round can cause significant damage to private property.³⁴ Material damage can have serious and long-lasting repercussions on an individual’s life and on an entire community. The destruction of homes and displacement induced by it can amount to a violation of the right to respect for private and family life and for one’s home.³⁵ In the aforementioned IACtHR case, the residents of Santo Domingo (Colombia) who survived a cluster munition attack were forced to leave their village. The Court found “that the situation of internal forced displacement faced by the victims” in conjunction with other factors amounted to a violation of the right to freedom of movement and residence.³⁶

Finally, the use of explosive weapons in a populated area —especially extensive or repeated use— poses significant challenges to the fulfilment of a host of economic, social and cultural rights. The report of the UN Commission of Inquiry on the 2014 Gaza conflict illustrates these challenges in stark terms.³⁷ The Commission noted that the Israeli ground operations between June and August 2014 involved the firing of “extensive amounts of explosive weapons, including artillery, mortars and rockets” into densely populated areas, which had “a devastating impact on the population of Gaza, both in terms of human suffering as well as in terms of damage to the infrastructure.”³⁸ The Commission underlined that damage to vital public infrastructure had a disastrous impact on the population’s enjoyment of human rights in the short, medium and long-term, including the rights to health, to an adequate standard of living and to education.³⁹

2 • Remedial and prevention benefits of a human rights approach

A human rights perspective applied to explosive violence could benefit victims of explosive violence and support efforts aimed at reducing harm to civilians. National, regional and international human rights mechanisms offer judicial and quasi-judicial avenues to aid victims in the realisation of their rights. The availability of these avenues of redress is particularly important considering that state use of explosive weapons tends to be governed by IHL and weapons treaties, which do not grant individual victims legal capacity to enforce their rights.⁴⁰

Framing humanitarian concerns around explosive violence in human rights terms makes it easier to engage with facets of the pattern of harm beyond direct death and injury, taking into account broader concerns, such as “psychological harm, deprivation, and impact on social well-being.”⁴¹ Within an IHL framework, these aspects cannot easily be articulated due to the focus on legal assessments at the level of individual attacks.⁴² As the cases discussed above illustrate, articulating the wider pattern of harm in terms of the prohibition of inhuman treatment, the rights to private and family life, freedom of movement and residence and economic, social and cultural rights opens up avenues of redress to victims for indirect consequences of explosive weapon use. In addition, different facets of the pattern of harm, whether directly or indirectly resulting from explosive violence, are understood as interdependent. The right to safe drinking water and sanitation, for example, is inextricably related to the right to health, as well as the right to life and human dignity.⁴³ Recognition of the connections among direct and indirect impacts can promote changes in military policies and practices that are not limited to reducing direct civilian casualties, but seek to address the wider pattern of harm as well.⁴⁴

Addressing harm from explosive violence within a human rights framework may also be information-producing. Public scrutiny of incidents involving explosive weapons is typically limited due to national security considerations and the dearth of publicly available information about states’ decision-making processes and regulatory frameworks governing use of explosive force is an important challenge to effectively addressing the humanitarian problem. Under IHRL, though, states are obliged to investigate alleged violations of IHRL and IHL.⁴⁵ In accordance with the duty to ensure respect for the right to life an effective investigation must be conducted into the circumstances of explosive weapon use. Such an investigation must among other things be capable of establishing a complete and accurate record of injury and cause of death, and identifying victims and perpetrators.⁴⁶ In such investigations, “a minimum level of transparency” is required from the point of view of “assisting victims’ quest for the truth and their right to effective remedies”⁴⁷ and society at large has a right to have access to information relating to allegations of human rights violations and their investigation.⁴⁸ The duty to investigate, and the rights to truth and to an effective remedy not only have an important remedial function. They can also promote transparency about states’ policies and practices in explosive weapon use and promote recognition of the need to systematically and accurately record casualties as a means of informing policy and practice to prevent civilian harm.

Another potential benefit of addressing explosive violence within a human rights framework lies in the attention that IHRL gives to the structural causes of rights abuses, including their regulatory and institutional backdrop. States are under an obligation to take legislative, administrative and other appropriate measures to prevent rights violations.⁴⁹ For this reason, human rights bodies routinely examine state's laws, policies and practices in the use of force and the various stages of decision-making involved in the design, planning, ordering, and oversight of an operation.⁵⁰ Findings as to the inadequacy of the regulatory framework can drive the review of policy and practice with a view to preventing future harm and rights violations. The "vigorous jurisprudence" developed by some human rights bodies can be drawn upon for detailed guidance on what is required in the planning and execution of operations involving explosive force.⁵¹ In light of its findings on the devastating human rights impact of explosive weapons, the Commission of Inquiry on the 2014 Gaza conflict recommended that Israel review its policies governing military operations, including, specifically with regard to "[t]he use of explosive weapons with wide-area effects in densely populated areas." The Commission also called upon the international community "[t]o accelerate and intensify efforts to develop legal and policy standards that would limit the use of explosive weapons with wide-area effects in populated areas with a view to strengthening the protection of civilians during hostilities."⁵²

3 • Overcoming obstacles to a human rights approach

There are, however, a number of challenges and limitations inherent in a human rights framing.⁵³ Victims face significant practical obstacles to asserting their rights and receiving reparation. One of them is the difficulty of proving their allegations in situations where more than one actor could be responsible for explosive violence. It can be difficult to identify the responsible actor, especially when harm results from a delayed-action explosive weapon (e.g. a landmine) or an explosive weapon launched from a distance (e.g. long-range artillery or airstrikes).⁵⁴ Not infrequently, states deny their involvement in such cases.

An emblematic case illustrates this point. In October 2000, Ali Udayev and Ramzan Yusupov were walking home from school in the outskirts of Urus-Martan, a town in Chechnya, when they were killed by an explosion. The boys' relatives claimed that they died as a result of "a projectile of the Shmel type" fired by Russian troops stationed in the vicinity, whereas the Russian government argued that the deaths could have resulted from shelling by an illegal armed group. In the ECtHR's view, the applicants failed to present persuasive enough evidence for their allegations and it could, thus, not be established beyond reasonable doubt that Russian troops were implicated in the deaths.⁵⁵ This raises important questions about what can be expected of civilians who do not usually have specialist knowledge of weapon technologies, in terms of identifying the source of an explosion.⁵⁶ Particularly because in the context of human rights proceedings where individual applicants accuse state agents of violating their rights with explosive weapons, often only the state has access to information capable of corroborating or refuting these allegations.⁵⁷

To overcome this obstacle and ensure the effective protection of human rights, the burden is placed on the state to provide “a plausible explanation” where individuals are found injured or dead in areas under the exclusive control of state authorities and where there is *prima facie* evidence that state agents could have been involved.⁵⁸ The identification of the weapon is particularly important because some explosive weapons directly implicate state actors. If it can be established that the explosive weapon was air-launched, for instance, it is (for the time being) reasonable to assume that a state is responsible “as presumably military aircraft are held in the exclusive possession of the State.”⁵⁹ In many contexts, the same argument can be made for “heavy artillery pieces”.⁶⁰

Moreover, in human rights proceedings the onus is on the state to provide sufficient details on its decision-making procedures to allow an independent assessment of the legality of attacks and to assist victims in their quest for the truth. This concerns, notably, information about targeting decisions, including the criteria for selecting targets and precautions incorporated in such criteria.⁶¹ In cases where a human rights court is prevented from reaching factual conclusions by the failure of a government to submit information without providing a satisfactory explanation for that failure, the court can draw inferences in favour of the applicant.⁶² The shifting of the burden of proof onto the government is not only of immense practical value to victims, it can also function as an incentive for states to strictly control and properly document their use of explosive force.

In general, human rights bodies seem to increasingly require states to account for the use of force in situations where individuals died or were injured in the area of military operations where the applicants can make a *prima facie* case that military operations took place.⁶³ This “emerging duty to account for the use of force”⁶⁴ effectively shifts the burden of proof onto the state. This will, hopefully, make it easier for people who are harmed by explosive violence today in Iraq, Syria, Turkey, Ukraine, Yemen and elsewhere, to assert their rights in future proceedings.

A human rights perspective could also enrich the ongoing policy debate on the humanitarian impacts of explosive weapons. Through its emphasis on prevention and attention to the regulatory and institutional backdrop to the use of force by states, a human rights framing has clear potential to drive the review of military policies and practices. Those working toward a political commitment to end the use, in populated areas, of explosive weapons with wide area effects can draw on the rich jurisprudence of human rights mechanisms on the planning and execution of operations involving explosive force. Curtailing explosive violence could well be “the single most crucial step states could take to protect civilians from the horrors of war.”⁶⁵ It would also help address some of the underlying crises that force people into situations of displacement and are a major cause of today’s global refugee crisis.

NOTES

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- 3 • United Nations Security Council (SC), “Report of the Secretary-General on the protection of civilians in armed conflict”, UN doc. S/2015/453, 18 June 2015, §31; Simon Bagshaw, “Driving displacement: explosive weapons in populated areas,” *Forced Migration Review*, 41 (2012), accessed November 13, 2015, <http://www.fmreview.org/preventing/bagshaw#sthash.rzXh6EaZ.dpuf>. According to the UN High Commissioner for Refugees, almost 60 million people are forcibly displaced today (United Nations High Commissioner for Refugees (UNHCR), *Global Trends 2014: World at War*, 2015, accessed November 13, 2015, <https://www.unhcr.org/556725e69.html>).
- 4 • Action on Armed Violence (AOAV), “2011-2014: The Impact of Explosive Weapons,” Infographic, accessed November 13, 2015, <https://aoav.org.uk/wp-content/uploads/2015/06/AOAV-Four-years-of-explosive-violence-2011-14-FINAL1.pdf>.
- 5 • There is no authoritative definition of an explosive weapon and explosive weapons are not explicitly recognised as a coherent category under international law, but the term is commonly used in medical, military and scientific literature. See, e.g., Jonas A. Zukas and William P. Walters, *Explosive effects and applications* (New York: Springer-Verlag, 1998), 9. See also UN doc. S/2015/453, §32.
- 6 • AOAV, “Impact of Explosive Weapons”; AOAV’s methodology is explained in Jane Hunter and Robert Perkins, *Explosive States: Monitoring Explosive Violence in 2014*, (London: Action on Armed Violence – AOAV, 2015), 36-37, accessed November 13, 2015, <https://aoav.org.uk/wp-content/uploads/2015/06/AOAV-Explosive-States-monitoring-explosive-violence-in-2014.pdf>.
- 7 • AOAV, “Impact of Explosive Weapons”.
- 8 • Hunter and Perkins, *Explosive*; Robert Perkins, *State of crisis: explosive weapons in Yemen*, (London: Action on Armed Violence – AOAV and Office for the Coordination of Humanitarian Affairs – OCHA, 2015), accessed November 13, 2015, <http://reliefweb.int/report/yemen/state-crisis-explosive-weapons-yemen>.
- Due to AOAV’s methodology, explosive violence is under-reported in large-scale offensives, where it becomes difficult to identify individual instances of explosive weapon use. The reliance on English-language media reports may also lead to biases.
- 9 • The UN Secretary-General has consistently raised this concern in his reports on the protection of civilians in armed conflicts since 2009. See in particular UN doc. S/2009/277, 29 May 2009 and UN doc. S/2015/453, 18 June 2015.
- 10 • Wide area effects may result from an individual explosive munition having a large blast or fragmentation radius, the inaccuracy of delivery of individual munitions, the use of multiple explosive munitions in an area, or a combination of these factors. A cluster munition can contain tens or hundreds of explosive submunitions. After launch, a cluster munition opens up in mid-air to release the submunitions, which are dispersed over an area up to the size of several football fields.
- 11 • For more information, see <https://www.inew.org>.
- 12 • The ICRC calls on “parties to armed conflicts not to use explosive weapons that have a wide impact area in densely populated areas – because of their devastating consequences for civilians.” “ICRC alarmed over unacceptable use of explosive weapons in urban areas”, *International Committee of the Red Cross*, News release, October 13, 2014, accessed November 13, 2015, <https://www.icrc.org/en/document/weapons>.

13 • For a compilation of statements, see <http://www.inew.org/acknowledgements>.

14 • The meeting was convened by Austria together with the UN Office for the Coordination of Humanitarian Affairs (OCHA). A Chair's summary of discussions is forthcoming.

15 • No weapon treaty regulates or prohibits the use of explosive weapons as a category, although some explosive weapons, e.g. cluster munitions, are banned by a treaty. The legality of explosive weapon use as a means of warfare is, thus, mainly judged against the IHL rule on distinction, the prohibitions on indiscriminate and disproportionate attacks and the requirement to take all feasible precautions to avoid civilian harm. Although the use of explosive weapons with wide area effects in or near concentrations of civilians bears a high likelihood of causing indiscriminate effects, IHL does not categorically exclude such use.

16 • That IHRL applies during armed conflict is widely accepted today although the modalities of the interplay between IHL and IHRL are not definitely settled. Some human rights may be derogated from or restricted in times of public emergency threatening the life of the nation, which can include situations of armed conflict. See United Nations, Human Rights Committee (HRC), *CCPR General Comment no. 29: Article 4: Derogations during a State of Emergency*, UN doc. CCPR/C/21/Rev.1/Add. 11, 31 August 2001.

17 • In some countries militarisation of law enforcement has led to explosive weapons making inroads into policing, a trend that is particularly pronounced in the fight against organised crime and terrorism. A number of Mexican state police forces have been equipped with military-style fragmentation hand grenades, for instance. See Hector Guerra, *The use of hand grenades in Mexico: A problem of explosive violence in populated areas? A media review, 2011-2012*, Seguridad Humana en Latinoamérica y el Caribe (SEHLAC), 2013, accessed November 13, 2015, [http://www.inew.org/site/wp-content/uploads/2013/06/Explosive-violence-in-](http://www.inew.org/site/wp-content/uploads/2013/06/Explosive-violence-in-Mexico-Hector-Guerra.pdf)

[Mexico-Hector-Guerra.pdf](http://www.inew.org/site/wp-content/uploads/2013/06/Explosive-violence-in-Mexico-Hector-Guerra.pdf).

18 • Since the end of the Cold War, humanitarian actors have played an increasing role in addressing problems of weapons. This engagement has offered alternative approaches to traditional arms control and disarmament and has given rise to "humanitarian security regimes", such as for the control of small arms or the abolition of anti-personnel landmines (Denise Garcia, "Humanitarian security regimes," *International Affairs*, 91, no. 1 (2015): 55-75. See also John Borrie and Vanessa Martin Randin, eds., *Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action* (Geneva: UNIDIR, 2005); Amanda Moodie and Michel Moodie, "Alternative narratives for arms control: Bringing together old and new," *Nonproliferation Review* 17, no. 2 (2010): 301-321. Humanitarian practices of arms control and disarmament have benefitted from the emergence of the concept of human security, which provided humanitarian actors with a vocabulary with which they could address problems of technologies of violence (Ritu Mathur, "Humanitarian practices of arms control and disarmament", *Contemporary Security Policy* 32, no. 1 (2011): 3-19). The concept of human security has also made it acceptable to establish a link between human rights and disarmament and arms control.

However, in spite of strong conceptual links between human security and human rights, the two are separate ideas and have separate functions. Human security and human rights have, arguably, not been brought together to practical effect, and actors involved in "humanitarian disarmament" efforts have not systematically deployed human rights language in the past (Kevin Boyle and Sigmund Simonsen, "Human security, human rights and disarmament," *Disarmament Forum* 3 (2004): 5-14). More recently, strong articulations of human rights concerns in debates on the arms trade, the use of armed drones and the development of autonomous weapons signal that this may be changing.

19 • The focus is on explosive weapon use by

states. However, it is increasingly recognised that non-state actors that exercise government-like functions and control over territory or populations, especially non-state armed groups, are also obliged to respect and protect human rights. In addition, states can be held responsible, under certain circumstances, for failing to take measures to protect individuals against non-state actor violence. See, e.g., Andrew Clapham, “Human rights obligations of non-state actors in conflict situations,” *IRRC* 88, no. 863 (2006): 491-523.

20 • Ibragim Nakayev, for example, was injured in autumn 1999 in an attack on the village of Martan-Chu (Chechnya) probably carried out with “Grad” or “Uragan” multiple barrel rocket launchers. In the case he brought before the ECtHR, the Court noted that his injuries, which “included a splinter wound to the head damaging brain tissue and resulting in a permanent serious disability” was “sufficient to bring the complaint within the ambit of [...] the right to life [...], notwithstanding the fact that as a result of subsequent medical interventions the applicant’s life has been saved”. European Court of Human Rights (ECtHR), *Nakayev v. Russia*, Judgment (App. no. 29846/05), 21 June 2011, §58.) See also the reference to the “scope of the applicant’s injuries” in European Court of Human Rights (ECtHR), *Umayeva v. Russia*, Judgment (App. no. 1200/03), 4 December 2008, §74.

21 • United Nations Human Rights, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (BPUFF), 7 September 1990, Principles 4, 5, 9 and 11; United Nations Human Rights, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Code of Conduct for Law Enforcement Officials*, 17 December 1979, Art. 3.

22 • UN OHCHR, *Use of Force and Firearms by Law Enforcement Officials*, Principles 3 and 5(b). See also European Court of Human Rights (ECtHR), *McCann et al. v. The United Kingdom*, Judgment (Grand Chamber) (App. no. 18984/91), 27 September 1995,

§192; European Court of Human Rights (ECtHR), *Esmukhambetov et al. v. Russia*, Judgment (App. no. 23445/03), 29 March 2011, §146.

23 • European Court of Human Rights (ECtHR), *Mansuroğlu c. Turquie*, Judgment (App. no. 43443/98), 26 February 2008, §§98, 100. The original, in French, reads in relevant parts: “il n’est pas possible de comprendre comment [les policiers] ont pu se retrouver dans la nécessité absolue de riposter par une force de frappe – balles et explosifs – ayant causé tant de blessures extrêmement graves [...] la responsabilité de l’Etat se trouve assurément engagée faute pour lui d’avoir pu établir que la force meurtrière utilisée contre Mazlum Mansuroğlu n’était pas allée au-delà de ce qui avait été « absolument nécessaire » et était « strictement proportionnée » à l’un ou l’autre des buts autorisés par l’article 2.”

24 • European Court of Human Rights (ECtHR), *Isayeva v. Russia*, Judgment (App. no. 57950/00), 24 February 2005, §190.

25 • ECtHR, *Isayeva v. Russia*, §§191, 200. See also, European Court of Human Rights (ECtHR), *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment (App. nos. 57947/00, 57948/00 and 57949/00), 24 February 2005, §199, where the Court considered that the launching of “12 S-24 non-guided air-to-ground missiles” near the village of Shaami-Yurt was not planned and executed with the requisite care for the lives of the civilian population and referred to the “apparent disproportionality in the weapons used.”

26 • European Court of Human Rights (ECtHR), *Kerimova et al. v. Russia*, Judgment (App. nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05), 3 May 2011, §§246, 248; European Court of Human Rights (ECtHR), *Khamzayev et al. v. Russia*, Judgment (App. no. 1503/02), 3 May 2011, §§178, 180.

27 • In a situation of armed conflict, the IHRL prohibition on arbitrary killing continues to apply, but the test of whether a deprivation of life is arbitrary must be determined by the applicable

rules of IHL. See, e.g., UN doc. A/68/389, 18 September 2013, §61.

28 • Inter-American Court of Human Rights (IACtHR), *Case of the Santo Domingo Massacre v. Columbia*, Judgment, 30 November 2012, Series no. 259, §221.

29 • IACtHR, *Santo Domingo Massacre v. Columbia*, §§229, 242. See also European Court of Human Rights (ECtHR), *Benzer et al. v. Turkey*, Judgment (App. no. 23502/06), 12 November 2013, §§184-185: “an indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society [...] and cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.”

30 • “The Impact of Explosive Violence on Mental Health and Psycho-social Well-being,” *Article 36*, Briefing Paper, September 2013, accessed November 13, 2015, <http://www.article36.org/wp-content/uploads/2013/09/MENTALHEALTH.pdf>.

31 • ECtHR, *Benzer et al. v. Turkey*, §182. The bombs were described as 227 kilogram MK82s and 454 kilogram MK83s.

32 • *Ibid.*, §§209-212. The Court also noted the “apparent lack of the slightest concern for human life on the part of the pilots who bombed the villages and their superiors who ordered the bombings” and pronounced itself “struck by the national authorities’ failure to offer even the minimum humanitarian assistance” in the aftermath of the bombing.

33 • In *Esmukhambetov et al. v. Russia*, a case dealing with the bombing from the air of Kogi, a Chechen village near the border to Dagestan on 12 September 1999, the ECtHR rejected claims of inhuman treatment of all applicants but one, a man who had “witnessed the killing of his whole family”, his two young sons and his wife. Generally, the Court is prepared to accept that family members of a “disappeared person” and persons witnessing the premeditated burning of their homes can

claim to be victims of ill-treatment, but the Court has hitherto distinguished these cases from those involving shelling or bombardment. (ECtHR, *Esmukhambetov et al. v. Russia*, §186-190). See also, European Court of Human Rights (ECtHR), *Kosumova v. Russia*, Judgment (App. no. 252709), 16 October 2014, §§99-101 (No violation in relation to mental suffering endured from the loss of the applicant’s daughter due to mortar shelling and the state’s failure to investigate the death properly); European Court of Human Rights (ECtHR), *Taysumov et al. v. Russia*, Judgment (App. no. 21810/03), 14 May 2009, §§112-116 (No violation in relation to anguish and distress suffered as a result of artillery shelling of applicants’ house, their relatives’ deaths and the authorities’ reaction thereto).

34 • European Court of Human Rights (ECtHR), *Miltayev and Meltayeva v. Russia*, Judgment (App. no. 8455/06), 15 January 2013 (violation of the right to the peaceful enjoyment of one’s possessions in relation to the destruction of a photo laboratory due to a fire caused by a tank round).

35 • ECtHR, *Esmukhambetov et al. v. Russia*, §27, 179 (The villagers from Kogi had to spend the winter of 1999 to 2000 in a refugee camp in the Republic of Dagestan. The Court found a violation of the right to respect for private and family life and one’s home).

36 • IACtHR, *Case of the Santo Domingo Massacre v. Columbia*, §§266-268.

37 • United Nations, Human Rights Council, “Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict,” UN doc. A/HRC/29/CRP.4, 22 June 2015. For a summary, see United Nations, Human Rights Council, “Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1,” UN doc. A/HRC/29/52, 24 June 2015.

38 • UN doc. A/HRC/29/CRP.4, §§250, 260. According to the Commission, one hospital and five primary health care clinics were destroyed and 66 others sustained damage, further decimating the already precarious access to health care. The destruction of, or damage to 209 schools, 11 universities and

285 kindergartens exacerbated existing deficits and further reduced the availability and quality of education. Damage to critical infrastructure and direct damage to productive assets (compounded by the blockade of Gaza) increased poverty and food insecurity, impacting on the enjoyment of a wide range of other human rights. The Commission also underlined that certain groups are at a particular risk of harm. Persons with disabilities suffer to a larger extent from restrictions on access to health care and children are particularly vulnerable to obstacles in accessing education, for example (Ibid., §596).

39 • Ibid., §§598.

40 • International criminal justice mechanisms, such as the International Criminal Court, provide redress in the form of prosecution of the perpetrator of a violation and, in some cases, can order reparations to victims of violations of IHL. For a discussion, see Megan Burke and Loren Persi-Vicentic, "Remedies and reparations," in *Weapons under International Human Rights Law*, ed. Stuart Casey-Maslen (Cambridge: University Press, 2014), 542-89; Liesbeth Zegveld, "Remedies for victims of violations of international humanitarian law," IRRC 85, no. 851 (2003): 497-526.

41 • International Committee of the Red Cross (ICRC), *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects, Expert Meeting, Chavannes-de-Bogis, 24-25 February 2015* (Geneva: ICRC, 2015), 14.

42 • In relation to IHL, discussions about negative impacts on civilians resulting from infrastructure damage turn mostly around the extent to which "reverberating effects" can, should or must be factored into the proportionality and precautionary assessments of an individual attack. On the positive side, there seems to be growing support for the view that commanders must take into account the foreseeable reverberating effects of an attack in their legal determinations (ICRC, *Explosive*, 5, 23).

43 • Committee on Economic, Social and Cultural Rights (CESCR), *General Comment no. 15 (2002)*, UN

doc. E/C.12/2002/11, 20 January 2003. Health, in turn, is a fundamental human right indispensable for the exercise of other rights, integral components of which are addressed by the rights to food, water, housing, work, education, human dignity and life. (Committee on Economic, Social and Cultural Rights, *General Comment no. 14 (2000)*, UN doc. E/C.12/2000/4, 11 August 2000). For a brief discussion, see, e.g., Pierre Perrin, "The right to health in armed conflict," in *Realizing the Right to Health*, Swiss Human Rights Book, eds. Andrew Clapham et al., vol. 3 (Zürich: Rüffer & Rub, 2009), 157-72.

44 • Recognising access to vital public services as a legal entitlement also provides standards and policy guidance for reconstruction and reconciliation efforts. See, Mara Tignino, "The right to water and sanitation in post conflict legal mechanisms: An emerging regime?," in *Water and Post-Conflict Peacebuilding*, eds. Erika Weintal, Jessica Troell and Mikiyasu Nakayama (UK: Routledge, 2014), 383-402.

45 • United Nations Human Rights, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, Principle II(3)(b). With regard to the duty to protect civilians in armed conflict, the state responsible for an attack is "under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation" whenever there is a plausible indication that civilian casualties may have been sustained. (UN doc. A/68/389, 18 September 2013, §78.)

46 • ECtHR, *Isayeva v. Russia*, §212.

47 • UN doc. A/HRC/29/CRP.4, §217. "The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests." (European Court of Human Rights – ECtHR, *Özkan et al. v. Turkey*, Judgment (App no. 21689/93), 6 April 2004, §314.) Failure

to do so may amount to a violation of the right to life on procedural grounds, and of the right to an effective remedy. See, e.g. European Court of Human Rights (ECtHR), *Udayeva and Yusupova v. Russia*, Judgment (App. no. 36542/05), 21 December 2010, where after the death of two boys in October 2000 from shelling, “[n]o information was provided to the applicants between the end of 2000 and the beginning of 2005.” (ECtHR, *Udayeva and Yusupova v. Russia*, §66).

48 • United Nations, General Assembly, *Extrajudicial, summary or arbitrary executions*, UN doc. A/68/382, 13 September 2013, §§96, 100. States parties to the European Convention on Human Rights are under an obligation to “furnish all necessary facilities” to the Court to make possible a proper and effective examination of applications. States can request that public access to certain documents be restricted for reasons of national security but they need to provide specific reasons (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, Art. 38 and Rules of Court, 1 June 2015, Art. 33). See, e.g. European Court of Human Rights (ECtHR), *Albekov et al. v. Russia*, Judgment (App. no. 68216/01), 9 October 2008, §115 (Violation of Art. 38 in a case involving landmines).

49 • UN, OHCHR, *Reparation for Victims of Gross Violations of International Human Rights Law*, Principle II(3)(a). States are under a positive obligation to take appropriate steps to provide effective protection against interference with rights by state agents and non-state actors (Sandra Krähenmann, “Positive obligations in human rights law during armed conflicts,” in *Research Handbook on Human Rights and Humanitarian Law*, eds. Robert Kolb and Gloria Gaggioli (London: Edward Elgar, 2013), 170-87).

50 • The obligation to respect, ensure respect for and implement IHRL and IHL includes the duty to “take appropriate legislative and administrative and other appropriate measures to prevent violations.” (UN, OHCHR, *Reparation for Victims of Gross Violations of International Human Rights Law*,

Principle II(3)(a)). With respect to the bombardment of Katyr-Yurt discussed above, a report by experts of the Combined Armed Services Military Academy in Moscow had concluded that the attack was “in conformity with the Army Field Manual and the Internal Troops Field Manual.” The applicant in *Isayeva v. Russia* argued that this finding implied that the existing domestic legal framework in itself failed to ensure proper protection of civilian lives, which led the ECtHR to indicate that the Army Field Manual alone was not a sufficient domestic legal basis for an operation of this type. (ECtHR, *Isayeva v. Russia*, 166, 199.)

51 • William Abresch, “A Human Rights Law of Internal Armed Conflict: The *European Court of Human Rights in Chechnya*,” *European Journal of International Law (EJIL)* 16, no. 4 (2005): 741-67. The case of *Khatsiyeva and other v. Russia* deals with the killing of two male farmers by missiles launched from a Russian military helicopter in the course of an operation aimed at evacuating the crew of another helicopter that had crashed near a village in Ingushetia. The ECtHR criticised that the command centre did not seek detailed information from the pilots that would have enabled them adequately to assess the situation and take an appropriate decision. This included information as to visibility in the area, the distance between the crash site and the men, “whether the area was populated”, whether the pilots had or could have come under an armed attack, and whether the situation required urgent measures at all (European Court of Human Rights – ECtHR, *Khatsiyeva et al. v. Russia*, Judgment (App. no. 5108/02), 17 January 2008, §§136-137). In *Isayeva v. Russia*, the ECtHR argued that the planning of the operation should have included a “comprehensive evaluation of the limits of any constraints on the use of indiscriminate weapons within a populated area” as well as “serious calculations [...] about the evacuation of civilians.” It also seems that the Court would have expected those calling in fighter jets to specify what load these should carry (ECtHR, *Isayeva v. Russia*, §§189-190.)

52 • UN doc. A/HRC/29/CRP.4, §§ 679, 684.

53 • Many (albeit not all) situations where states resort to the use of explosive weapons raise complex questions about the harmonious interpretation of IHRL and IHL in a way that advances the protection of the human person whilst not imposing an impossible or disproportionate burden on states. In addition, human rights bodies are not accustomed to looking at the use of force through the lens of particular weapon technologies (with the exception of “firearms” and “non-lethal incapacitating weapons” explicitly mentioned in the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials) and may, thus, not be aware of relevant weapon-specific rules, or specific risks and patterns of harm associated with a weapon technology.

54 • Distance-launched explosive weapons can also raise issues relating to jurisdiction and control, and the extra-territorial application of human rights treaties. See, e.g., European Court of Human Rights – ECtHR, *Bankovic et al. v. Belgium et al.*, Decision (Grand Chamber) (App. no. 52207/99), 12 December 2001.

55 • ECtHR, *Udayeva and Yusupova v. Russia*, §79 (The Court found a violation of the right to life in its procedural aspect due to the failure to collect weapon fragments and question military units stationed near the town). See also ECtHR, *Nakayev v. Russia*, §80; ECtHR, *Kosumova v. Russia*, §86.

56 • In a case concerning compensation for property damage from what the applicant claimed was a missile strike, the domestic court required the applicant to submit evidence as to “the type and ownership of the weapon.” The applicant complained that this was unfair as she had no “specific knowledge regarding military equipment or access to any information about the details of the military operation in Chechnya, apart from that made public in the mass media” and was therefore “not in a position to obtain any evidence as to what type of weapon destroyed her property or to what unit of the federal forces it had belonged.” The

ECtHR rejected the applicant’s claim but it did “not exclude the possibility that in certain circumstances [the right to a fair trial] might require the domestic courts to assist the most vulnerable party to the proceedings in collecting evidence in order to enable that party to submit argument properly and satisfactorily so that the principle of fairness is respected.” European Court of Human Rights – ECtHR, *Trapeznikova v. Russia*, Judgment (App. no. 21539/02), 11 December 2008, §§88, 100.

57 • ECtHR, *Benzer et al. v. Turkey*, §157.

58 • ECtHR, *Nakayev v. Russia*, §78.

59 • ECtHR, *Kerimova et al. v. Russia*, §241. See also ECtHR, *Benzer et al. v. Turkey*, §174. In that case, the authorities denied having bombed the applicants’ villages and dismissed the applicants’ claim with reference to their inability to identify the type and make of the airplanes that bombed their villages. The Court considered, however, that “it clearly lacks any logic [to assume] that either foreign military aircraft had entered Turkish airspace, bombed the two villages, and then left without being detected, or that there existed a civilian aircraft capable of dropping large bombs, causing such large-scale destruction and flying undetected.” In the Court’s view, it should have occurred to the military prosecutor dealing with the case “that villagers with no specialist knowledge of military aviation would naturally be unable to identify the type or make of fighter jets which flew over their villages at speeds of hundreds of miles per hour.”

60 • European Court of Human Rights – ECtHR, *Mezhidov v. Russia*, Judgment (App. no. 67326/01), 25 September 2008, §60. In this case the Court accepted the applicant’s argument that “the large-calibre shells” in question (122 mm or 152 mm) could only be fired from heavy artillery pieces, and that such guns were presumably in the exclusive possession of the Russian armed forces.

61 • UN doc. A/HRC/29/CRP.4, §§216-218; UN doc. A/68/382, §98.

62 • See the discussion in Inter-American Court of Human Rights (IACtHR), *Case of Velásquez Rodríguez*

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v. Honduras, Judgment, 29 July 1988, Series C no. 4, §127-146. See also, Organization of American States (OAS), Inter-American Commission on Human Rights (IACHR), *Rules of Procedure of the Inter-American Commission on Human Rights* (as of 1 August 2013), Art. 38; ECtHR, *Benzer et al. v. Turkey*, §157 (failure to submit the flight log of Turkish fighter jets to the Court).

63 • In a case where the government claimed that the explosions were caused by home-made bombs buried by rebels in the applicant's courtyard, whereas the applicants argued that the harm was caused by artillery shelling, the

Court considered that the applicants "presented a coherent and convincing picture of the events", especially as the government failed to submit relevant contrary information and "rather dubiously assumed", in the Court's view "that explosive devices dug into the upper layers of soil could have fallen from above to punch a hole in the roof of [their neighbour's] house." (ECtHR, *Taysumov et al. v. Russia*, §§85-87.)

64 • Krähenmann, "Positive obligations," 174.

65 • Steve Goose and Ole Solvang, "Deadly cargo: explosive weapons in populated areas," *Open Democracy*, December 30, 2014.



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FIGHTING FIRE WITH AN INFERNO

Guy Lamb

• *The South African Police Service* •
and the 'War' on Violent Crime

ABSTRACT

In the context of high levels of firearm violence in South Africa this article assesses the attempts by the police to leverage effective control over the proliferation and misuse of firearms. A key strategy has been that of militarised high density policing operations in the context of a 'war on crime' ideology. Through roadblocks and cordon-and-search interventions police have seized very large quantities of firearms and ammunition from high crime areas, and arrested thousands of individuals for a range of crimes, including being in possession of unlicensed firearms. Declining trends in firearm homicide between 1998 and 2011 possibly suggest that these South African Police Service (SAPS) operational efforts may have contributed to reductions in firearm homicide. However, such operations have led to the police being exceedingly invasive and employing heavy-handed methods. Some individuals have also been injured, or have lost their lives as a result of these police operations.

KEYWORDS

Firearms | Police militarisation | South Africa | Homicide | Public policy

South Africa is one of the most violent countries in the world. It had the ninth highest recorded homicide rate in 2012, with 31 homicides per 100,000 people, which was five times the global average.¹ Between 1 January 1994 and 31 March 2014 an estimated 143,000 people were murdered with a firearm, which is equivalent to 35% of all murders for that period.² In addition, an estimated 1.25 million people in South Africa seek medical assistance for non-fatal violence-related injuries every year, with a significant number of firearm related injuries being presented.³

South Africa has a relatively large and well-armed police force, with close to 200,000 personnel employed by the South African Police Service (SAPS), rendering a 1:358 police to population ratio. The majority of operational police are issued with handguns, with the police reporting that they have 259,494 firearms in their possession.⁴ Furthermore, the SAPS has specialised paramilitary operational response bodies equipped with high-calibre weapons that can be swiftly deployed in incidents of public disorder, violent crime and terrorism.

Over the past twenty years a key response by the SAPS to these high levels of violence, particularly firearm crime, has been to launch large-scale, militarised, crackdown (or high density) operations in areas where there are excessively high levels of reported violent crime. The principal rationale behind the adoption of this approach has been that by concentrating police resources on crime hotspots the government “hoped that the national level of serious crime [would] be reduced” .⁵ The ethos and approach of these operations has been drawn from colonial and apartheid policing traditions in South Africa, and have been informed by a belligerent “war on crime” philosophy.

This article provides an analysis of the war on crime approach to policing in post-apartheid South Africa, with a particular focus on high density policing operations. Furthermore, it will reflect on the impact of such operations on South African society, in particular their relationship with firearm homicide.

1 • The geographical concentrations of violent crime within South Africa

For the past two decades the SAPS crime statistics have consistently revealed the highly uneven distribution of violent crime throughout South Africa. Overall crime has manifested within most policing precincts, but violent crime has been intensely concentrated in around 15% of policing precincts. Most of the high crime places are densely populated and infrastructurally marginalised with high levels of poverty, such as large urban townships and informal settlements. In many of these places government authority has been undermined by limited community trust in the police.

Given these dynamics, the SAPS 1996/97 Annual Plan indicated that future policing efforts would be directed towards those provinces with the greatest intensities of violent crime, and

that “all provinces would thus benefit” from this approach.⁶ By 2001 SAPS had resolved that 145 police station precincts with “high contact crimes” would be prioritised in terms of receiving additional policing resources, and to be targeted for high-density operations.⁷ was emphasised in the SAPS 2005-2010 Strategic Plan.

2 • The war on crime in South Africa

In 1996 the National Crime Prevention Strategy (NCPS) was launched, the culmination of inputs and discussions by academics and government officials that was informed by development-centred crime reduction efforts in other countries.⁸ This was an optimistic attempt by national government to fundamentally re-condition the police’s traditional response to crime from the repressive and reactive to the preventive and proactive. The implementation of the NCPS was envisaged to be an extensive, integrated, multi-layered, interdepartmental and public-private partnership enterprise.⁹ The SAPS’ response to such a radical policy shift on policing at this time was superficial and perfunctory.

In 1999 the security cluster of Cabinet Ministers, led by Steve Tshwete (Minister of Safety and Security) which had initially supported a social crime prevention orientation began to back the “get tough on crime” approach in the face of escalating violent criminality.¹⁰ This was accompanied by widespread perceptions that the police were on the back foot in terms of containing crime. In addition, various government structures were struggling to prioritise and adapt to the multiple demands of a preventive strategy.¹¹ Within a short space of time the NCPS became marginalised, and the Safety and Security Secretariat, the NCPS champion, was downgraded to relative insignificance.¹² The NCPS was subsequently supplanted by the SAPS’ own National Crime Combatting Strategy (NCCS), which was launched in 2000, with the tacit endorsement of Cabinet.¹³

The NCCS emphasised an intelligence-driven, “high-density”, hotspot policing in which high crime areas, or “flashpoints” would be clustered into “crime-combating zones”.¹⁴ The NCCS effectively framed the strategic orientation of SAPS squarely within a militarised crime-fighting paradigm, where violent crime was to be eliminated through aggressive policing, and by capturing and imprisoning criminals. “War rooms” were established with a view to deliver a more effective, integrated and coordinated crime-fighting response.¹⁵

The NCCS also became the foundation on which the police’s political leadership has perpetuated a “war on crime” discourse, frequently referring to criminals as the “enemy”,¹⁶ reiterating that “collectively, we shall defeat this scourge”.¹⁷ In the 2011/12 SAPS Annual Performance Plan, for instance, the Minister of Police at the time, Nathi Mthethwa asserted that “military expertise” amongst criminals has “drastically changed the nature of crime”.¹⁸ Hence the police have been encouraged to: “shoot to kill”; “fight fire with fire”; “show no mercy” towards dangerous offenders; and “squeeze crime to zero”.¹⁹ For example, in April 2008, Susan Shabangu, the then Deputy Minister of Safety and Security proclaimed at a community meeting in Pretoria West:

*Criminals are hell-bent on undermining the law and they must now be dealt with. If criminals dare to threaten the police or the livelihood or lives of innocent men, women and children, they must be killed. End of story. There are to be no negotiations with criminals.*²⁰

On 16 August 2012 the National Development Plan (NDP) 2030, which has been identified by President Zuma as South Africa's fundamental policy guidance, was published. It calls for the demilitarisation of the SAPS, and that all police personnel should be trained in "professional police ethics and practice".²¹ However, the following day various components of the SAPS pursued a highly militarised operation in response to a mineworker strike in Marikana. This operation resulted in the massacre of 34 individuals with a further 78 being injured.

Over the past three years the Police Minister and SAPS senior management have made public pledges to the demilitarise and further professionalise the SAPS, with the NDP commitments being included in the SAPS 2014-19 Strategic Plan, as well as an indication that SAPS would pursue a new policy on public order policing that "provides direction for a human rights based approach to dealing with public disorder".²² In addition, the Civilian Secretariat for Police has recently finalised a Draft White Paper on the Police and a Draft White Paper on Safety and Security, which encourages the SAPS to demilitarise and recommit to human rights principals. However, as with the NCPS, civilian policing specialists have mostly penned these documents, and hence there is a risk that they may not find meaningful traction with the SAPS.

Recent large-scale policing actions suggest that the SAPS may not be ripe for reform. In April 2015 the SAPS, in collaboration with the military, launched a highly militarised national operational titled Fiela-Reclaim following an outbreak of xenophobic violence (see below for more details). In November 2015 the SAPS used heavy-handed measures to disrupt nationwide protests by university students, primarily over fee increases. In addition, the "war on crime" is being perpetuated by the political leadership of the police. For example, at the memorial of murdered SAPS officials in Gauteng in August 2015, the Deputy Minister of Police, Maggie Sotyu declared that:

*Our [SAPS] strategic implementation plan must always intend to treat heinous criminals as outcasts, who must neither have place in the society nor peace in their cells! They must be treated as cockroaches!*²³

3 • SAPS focus on firearms

Firearms have consistently been a top priority for the SAPS since the mid-1990s, and firearms control is currently emphasised in the SAPS 2014-19 Strategic Plan. A Firearm Strategy was devised in the late-1990s, which amongst other objectives, sought to: reduce the number of firearms within South Africa; "protect South African citizens from crimes

associated with both illegal and legal firearms” ; and give SAPS appropriate powers to investigate, confiscate and makes arrests in relation to firearm crime.²⁴ Therefore firearms control became a key emphasis of SAPS high-density operations.

The Firearms Control Act (FCA) (No. 60 of 2000) was subsequently formulated, and eventually became fully operational in 2004 with the promulgation of its requisite regulations. The FCA included the introduction of more rigorous firearm licencing requirements, such as: extensive background checks of applicants; an increase in the legal minimum age to possess a firearm to 21 years; a reduction in the number of licensed firearms and rounds of ammunition that an individual may possess; and the requirement that firearms be stored in secure safes. Penalties for licensing infringements and firearm misuse also became more stringent. In addition, all licence applicants were required to successfully complete a written test relating to firearm legislation, as well as undergo prescribed training and pass a practical test on the safe handling of a firearm with an accredited service provider.²⁵

Furthermore, Chapter 14 of the FCA authorises the SAPS to enter any premises “on reasonable grounds” and search for, and seize firearms and ammunition from persons that they perceive to be “incapable of having proper control” of those firearms or ammunition, or who “presents a danger of harm to himself or herself or to any other person” . During the course of police operations SAPS are also permitted to search premises, vehicles, vessels and aircraft and seize firearms where there is “reasonable suspicion” that the firearms and ammunition are being held in contravention of the FCA; or to ascertain if the possession of the firearms and ammunition are in compliance with the Act.

4 • The SAPS high-density operational doctrine and method

High-density crackdown operations, or crime “sweeps” , typically entail a sudden and noticeable increase in the number of police personnel and concentrated police actions in targeted areas.²⁶ They are based on the expectation that criminal offending will feasibly drop in circumstances where the likelihood of being detained is significantly elevated and/or where repeat offenders are targeted and arrested.²⁷ Crackdowns are also expedient mechanisms to alleviate public criticism and blood baying about crime levels, as they “offer the promise of firm, immediate action and quick, decisive results” .²⁸

Available academic research from the United States and the United Kingdom suggests that such policing approaches can have a reduction impact on criminal offending in the focal areas, and possibly even in the surrounding areas in the short- to medium-term.²⁹ Further to this, evidence suggests that crackdown operations should be publicised in advance,³⁰ and be “sufficiently long and strong” in order to have a more meaningful impact on crime levels.³¹ However, the research also indicates that if the police are overly aggressive and do not actively communicate their intentions during crackdown operations then police credibility and police relations with targeted communities and the general public can be severely undermined.³²

The SAPS defines high density policing as the “saturation of high crime areas with patrolling police members, performing pro-active patrols...[that are] intent on law enforcement” .³³ High density policing was embedded in the NCCS,³⁴ and thereafter rapidly became the flagship policing approach for crime hotspots, eclipsing alternative crime prevention models, such as community policing. In essence, these SAPS dragnets have been grandiose meldings of the binary conceptualisation of high and low policing as advocated by Brodeur.³⁵ That is rank-and-file police personnel that are generally responsible for day-to-day order maintenance, as well as detectives, are deployed alongside specialised, paramilitary police groupings, such as the Public Order Policing Units, Dog Units and the Special Task Force.

The SAPS has consistently donned a militarised ethos in the design and execution of such operations. SAPS members have frequently been heavily armed and deployed in battle-ready formations and often supported by police and military armoured personnel carriers. The police have frequently entered and occupied the targeted areas like an invading army, usually in conjunction with contingents of South African National Defence Force (SANDF) soldiers. Many of these operations have been branded with martial titles, such as Operation Sword and Shield, Operation Crackdown, Operation Iron Fist, and most recently Operation *Fiel*³⁶ -Reclaim.

In the context of these operations large numbers of security personnel have vigilantly patrolled the streets. Roadblocks have been erected. Residents, vehicles and premises have been searched, and at times doors to homes have been rammed open. Illegal firearms and ammunition, drugs, and stolen goods, including vehicles, have been seized. Those in possession of such goods have been arrested and hauled off to police cells, along those individuals “wanted” by the SAPS for serious crimes, as well as prostitutes, pimps and undocumented immigrants. Resistance or antagonism towards the security forces has usually been met with a hyper-belligerent response.³⁷ SAPS high density operations have also drawn heavily from counter-insurgency doctrine, tactics and terminology in at least five respects.

Firstly, national operations have been centrally planned and directed, predominantly by the SAPS National Joint Operational and Intelligence Structure (NATJOINTS), which is responsible for coordinating all security and law enforcement operations throughout South Africa. The National Joint Operational Centre (NATJOC) has been responsible for driving the implementation of the operational strategies and instructions that have been determined by the NATJOINTS. Provincial structures, PROVJOINTs and PROVJOCs, have also established to drive and coordinate operations at the provincial level.

Secondly, “cordon-and-search” has been a mainstay method used in SAPS high density operations, and entails the sealing-off of targeted areas in which houses and premises are searched in order to capture wanted persons and seize illegal weapons and other contraband. Cordon-and-search was originally pursued by colonial armed forces in order to pacify recalcitrant communities and capture suspected insurgents in Africa, South-East Asia and Northern Ireland.³⁸ The South African Police also frequently employed such tactics under apartheid.³⁹

Thirdly, air support (particularly helicopters) has been incorporated into SAPS operations. Air support has regularly been used in counterinsurgency campaigns to protect ground forces and provide surveillance.⁴⁰ In extreme cases aerial bombardment takes place, a tactic that SAPS has not used to date.

Fourthly, the counterinsurgency concept of “flood and flush”⁴¹ also found resonance amongst crackdown policing strategists in South Africa. That is, targeted areas were “flooded” with a vast security force presence in order to “flush out” the perpetrators of various crimes,⁴² and “restore law and order”⁴³.

Fifthly, the SAPS have referred to its high density operational approach as an “oil stain strategy”⁴⁴. This was originally a French counter-insurgency pacification strategy initially developed in Vietnam in the nineteenth century that proposes that for a government to overcome an enemy, counter-insurgency efforts should be concentrated on securing and developing strategic areas and thereafter the locus of control should be expanded outwards like an oil stain on cloth.⁴⁵

The high-density policing operational approach has also conceivably been driven by organisational dynamics, culture and limitations within the SAPS. Leggett⁴⁶ has suggested that as most SAPS members “have little capacity for more reflective police work, the herding of bodies into mass operations may be the optimal use of available resources.” Similarly, Steinberg⁴⁷ has emphasised that the police’ s preference for high-density crackdown operations has been informed by the SAPS’ “strong, active national centre, and uneven [weak] policing on the ground” , as it is one of the few policing approaches that such a police organisation “can execute with accomplishment.”

5 • A ‘balanced’ approach to fighting crime in a constitutional democracy

The South Africa government has repeatedly emphasised that the SAPS’ operations would be tempered by considerations for the human rights of law-abiding citizens. For example, in his State of the Nation Address in 1996, President Nelson Mandela declared:

*The time has come for our nation to choose whether we want to become a law-governed and peaceful society or hapless hostages of lawlessness... The government will use all lawful means to ensure that they [criminals] do not succeed in undermining our social fabric. Law-abiding citizens can rest assured that there are effective mechanisms in place to prevent and punish any rapacious invasion of their lives.*⁴⁸

This narrative of discerning criminal othering has been preserved and promoted over the past 20 years, with the SAPS political leadership regularly stating that the police need to take a “tough

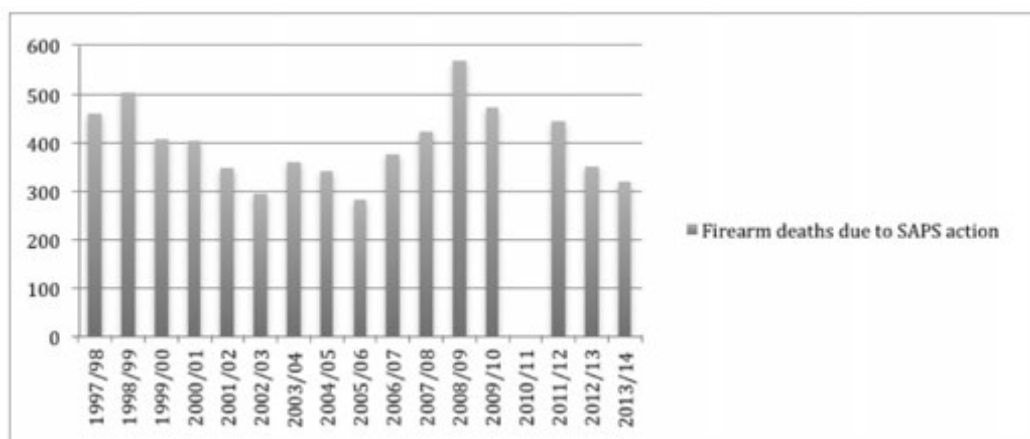
stance against criminals”⁴⁹ and “uproot the cancer of crime from our communities”⁵⁰ but this should be “balanced...with the need to ensure our police embrace our human rights culture”⁵¹.

In a further attempt to foster legitimacy for these high-density operations, the police’s political leadership, particularly during the tenure of Nathi Mthethwa, have presented these operations as a form of righteous “crusade”⁵² in which the police will strive to “push back the frontiers of evil”⁵³. Similar stances were also adopted at some SAPS stations.

However, the deployment of large numbers of police personnel with varying degrees of experience in dangerous places in the context of ferociously framed crackdown operations that have been spurred on by criminal-hating politicians is not akin to a “surgical strike”, bereft of “strike” collateral damage. Several media reports have suggested that the police, as a result of these operations, have on a number of occasions, subjected civilians, including some of the most vulnerable members of society, to serious human rights violations.

SAPS members have also been responsible for relatively high levels of firearm deaths, which have principally occurred during attempts to apprehend and/or detain suspects, or due to negligence. Some of these deaths took place during high density operations. For example, during Operation Sword and Shield (1 April 1996 and 31 March 1997), more than 100 civilians reportedly died due to police action.⁵⁴ The chart below indicates that deaths due to police shootings declined between 1998/99 and 2002/03 by 42%, but increased dramatically from by 88% between 2005/06 and 2008/09 and then declined by 44% over the next five years.

Chart 1: Firearm deaths due to SAPS action: 1997/1998 – 2013/2014

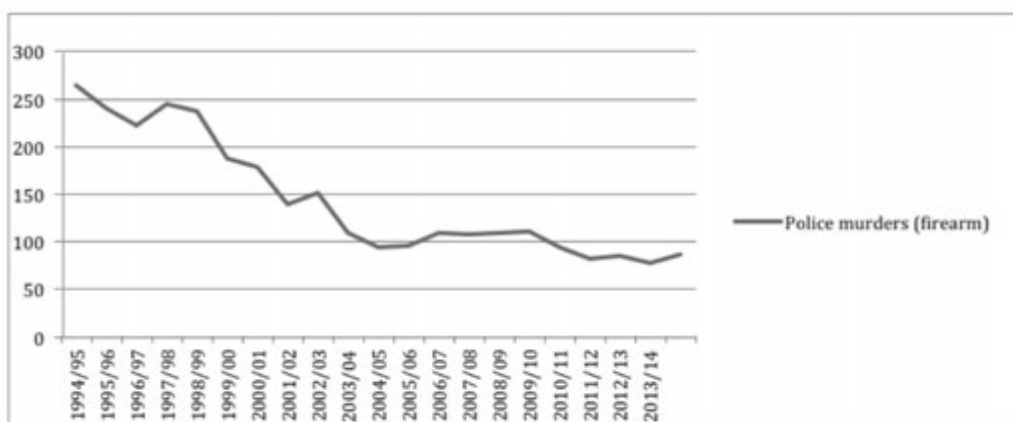


SOURCE: Independent Police Investigative Directive; David Bruce, “Interpreting the Body Count: South African Statistics on Lethal Police Violence,” *South African Review of Sociology* 36, No. 2 (2005): 141-159; David Bruce, *An Acceptable Price to Pay? The Use of Lethal Force by Police in South Africa*. Cape Town: Open Society Foundation, 2010.

A comprehensive, nationally-based study of 2009 mortuary data estimated that there had been 5,513 firearm homicides in South Africa in that year.⁵⁵ Hence, SAPS members were responsible for between 8% and 9% of all recorded firearm homicides during 2009.

Police in South Africa have also been at high risk of firearm violence. Between 1994 and 1998, 82.3% of all SAPS murders were a consequence of gun shots.⁵⁶ Following the end of much of the political violence during the mid- to late-1990s the level of police homicides declined considerably from 263 in 1994 to 77 in 2013, more than a 300% decrease over that period of 20 years. Nonetheless, the murder of police personnel has remained an area of grave concern to both the police and its political leadership. For example, in June 2013, in a speech at the funeral of a senior police official, the Minister of Police at the time, Nathi Mthethwa eulogised that the SAPS “are in the midst of a war; a war that has been declared by heartless criminals on our men and women in blue...[and that] we shall ensure that those who kill police officers pay the price accordingly” .⁵⁷

Chart 2: Murder of SAPS personnel 1994/95-2014/15

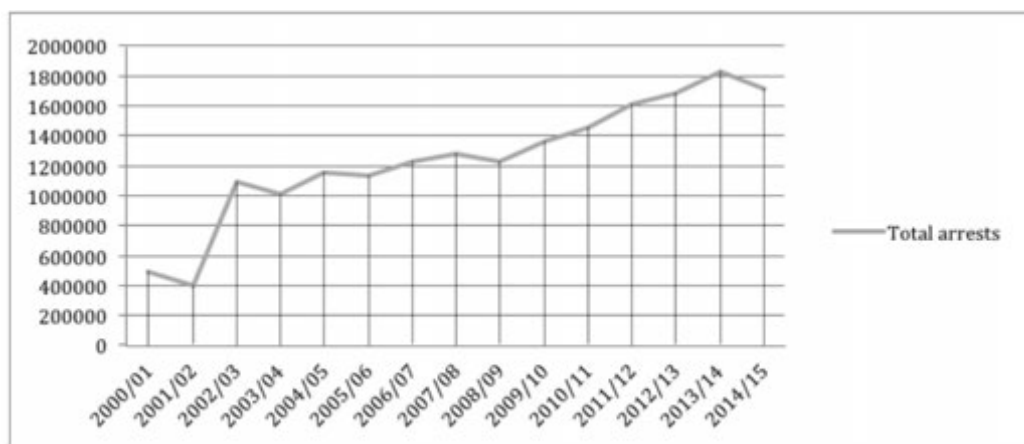


SOURCE: SAPS

6 • Arrests and firearm seizures

High density policing operations, particularly from 2001, significantly contributed to dramatic increases in the number of arrests by the SAPS (see Chart 3 below). On average 45%, of all arrests were made in the 169 crime hotspot precincts earmarked for high density operations between the 2005/06 and 2009/10 reporting years.⁵⁸ The escalation in the number of arrests also had implications for the prison population. For example, in a briefing to the South African Parliament in October 2004, the Department of Correctional Service reported that Operation Crackdown, which had been the largest high density operation since 1994, had contributed to overcrowding in prisons.⁵⁹

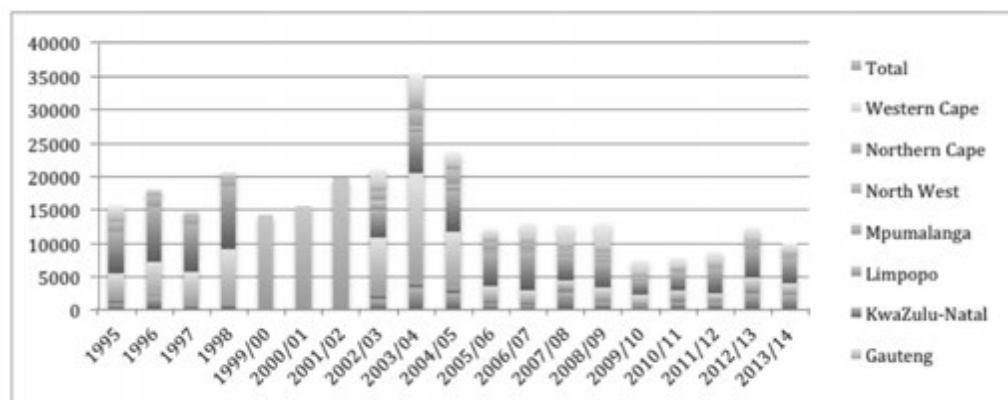
Chart 3: Total arrests by SAPS: 2000/01 – 2014/15



SOURCE: (SAPS)

Between 1995 and 2013/14, the large majority of firearms recovered during the first 10 years, namely the period during which there was a concentration of high-density operations, with the highest annual seizures being recorded during the 2003 and 2004, a period that corresponds with the implementation of a specialised and intensive firearm-specific operation, titled Sethunya. Thereafter there was a noticeable decline in firearms seizures, with there being an annual average of approximately 10,000 firearms per year. In terms of a provincial breakdown, most firearms were recovered by SAPS were in Gauteng, KwaZulu-Natal and the Eastern Cape and the Western Cape.

Chart 4: Firearm recoveries per province



NOTE: SAPS used calendar years to report firearm seizures for the period 1995 to 1998, and thereafter reported for the period, 1 April to 31 March). In addition, SAPS did not make public provincial data on firearm seizures for the period 1999/00 to 2001/02.

Case study: Operation Fiela-Reclaim (2015)

Operation *Fiela*-Reclaim is arguably one of the most controversial operations to date. It was launched in the immediate aftermath of large-scale outbreaks of xenophobic violence in the provinces of KwaZulu-Natal and Gauteng in April 2015, and is envisaged to be in place until March 2017. However, the architects of this national operation have more grandiose plans. According to the Cabinet-level Inter-Ministerial Committee on Migration, the intention of this operation has been to target the micro-spaces “which are known to be frequented by criminals” .⁶⁰

This operation was therefore pursued in order “to rid our country of illegal weapons, drug dens, prostitution rings and other illegal activities” ⁶¹ and thereby “reclaiming our communities so that our people can live in peace and harmony” ⁶² and to “help create a level of systemic normality” .⁶³ State Security Minister, David Mahlobo suggested that the South Africans were highly supportive of government intention to “clean out those criminal services” throughout the country.⁶⁴

The operational blueprint for Operation *Fiela*-Reclaim, branded the “Multi-Disciplinary Integrated National Action Plan to Reassert the Authority of the State” , penned by the National Joint Operational and Intelligence Structure (NATJOINTS), revealed a deep sense of disquiet within government’s security cluster, namely that the authority of the state had eroded considerably in high-crime communities. According to this plan, the security forces would “dominate and stabilise” focal areas by: pursuing high visibility policing actions; arresting wanted persons; fast tracking criminal investigations; and adopting a zero tolerance approach to lesser forms of criminality, such as traffic offences, operating illegal businesses, selling counterfeit goods, illegal mining, drinking in public and undocumented migrants.⁶⁵

As with previous high-density operations, the SANDF actively participated in the formative stages of Operation *Fiela*-Reclaim, namely between April and June 2015.⁶⁶ However, the military were extracted at the end of June 2015 following concerns raised about the adverse repercussions that their long-term internal deployment would have on the state of democratic governance in South Africa.⁶⁷ In addition, there was intensive civil society advocacy concerning the arrest and the apparent disproportionate targeting of undocumented migrants by the security forces under the auspices of this operation.⁶⁸

Similar “pacification” operations have been undertaken in the *favelas* of Rio de Janeiro by Special Police Operations Battalion (BOPE) and its *Unidades the Polícia Pacificadora* (UPP) (or Pacification Police Units). This type of police action, which has been undertaken in collaboration with military personnel, was initiated in 2008 in order to impose state control in these marginalised communities that had traditionally been viewed as “enemy territory” by the state as they were mainly governed by criminal groups.⁶⁹ The *modus operandi* has entailed the pre-announced, large-scale, militarised incursion (often with air support) into *favelas* in an effort to forcibly oust the criminal

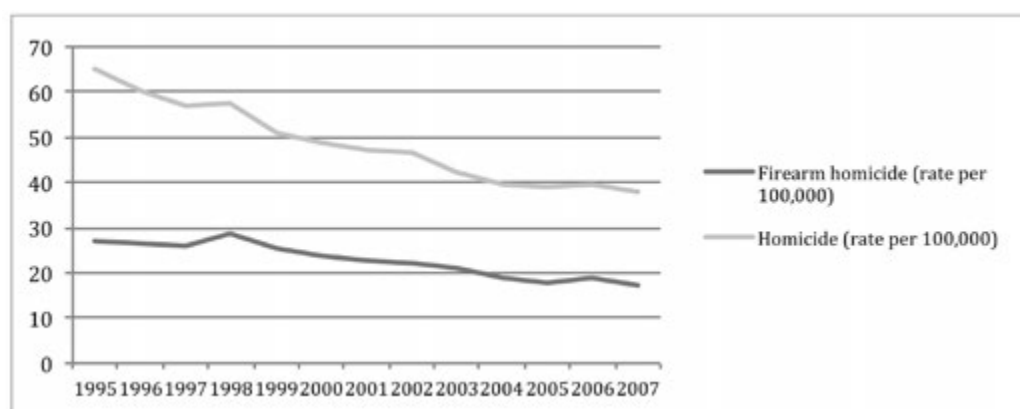
groups or arrest their members. Thereafter permanent police posts are established, and highly visible armed policing is pursued in an attempt to prevent the criminal gangs from regaining control over these spaces.⁷⁰

7 • The decline in firearm homicide in South Africa

Between 1994 and 1998 South Africa's firearm homicide rate remained relatively constant, averaging close to 28 per 100,000 people, with the proportion of homicides involving firearms increasing from 41.5% to 49.4%.⁷¹ In 1998, firearms were reportedly used in 49% of all murders and in 75% of all attempted murders. Close to half of all firearm homicides in 1998 took place in two provinces, namely KwaZulu-Natal and Gauteng.⁷²

From 1998 South Africa's firearm homicide rate steadily declined to 17 per 100,000 in 2007 (a 40% reduction), with the total number of firearm homicides in South Africa shrinking from 12,413 to 8,319 over the same period (a 33% reduction).⁷³ By 2008 sharp force injuries had become the leading cause of non-natural death (and therefore homicide too) in South Africa (13.6% of total non-natural deaths) followed by firearms (10.8% of total non-natural deaths). This trend was maintained in 2009, with sharp force injuries (41.8% of all homicides) continuing to be the leading cause of homicide⁷⁴ followed by firearms (29% of all homicides).⁷⁵

Chart 5: Homicide rate in South Africa (per 100,000): 1994-2007



SOURCE: UNODC, 2011

The decline in homicide has principally been attributed to the FCA by a variety of public health researchers.⁷⁶ However, the firearm homicide rate began to significantly decline from 1998/99, five years before the enactment of the FCA. As mentioned above major high density policing operations were introduced and were regularly sustained from 1996/97 onwards. In addition, these operations resulted in large-scale arrests, particularly of individuals at high risk of committing violent acts, as well as the mass seizure of illegal

firearms from crime hotspot places. It is possible that this combined effect may be a key contributor to the initial and continued decline (along with the implementation of the FCA) in firearm homicides in South Africa.

8 • Conclusion

In the context of high levels of firearm violence in South Africa this article has explored the SAPS' attempts to leverage effectual control over the proliferation and misuse of firearms. A key strategy has been that of militarised high density policing operations in the context of a "war on crime" ideology. Through roadblocks and cordon-and-search interventions police seized very large quantities of firearms and ammunition from high crime areas (where firearm murders tended to be concentrated), and arrested thousands of individuals (mainly young men), for a range of crimes, including being in possession of unlicensed firearms. Therefore, significant numbers of high risk potential perpetrators of firearm violence, as well as the instruments of such violence, were extricated from such high crime areas. Declining trends in violent crime between 1998/1999 and 2010/2011 suggest that the SAPS operational efforts may have contributed to reductions in firearm homicide. However, such operations have seen the police wield extensive and invasive powers, which has led to the eroding of the Constitutional rights of many residents in high crime areas, who have often been subjected to heavy handed police actions and at times treated in an undignified fashion. Some individuals have also been injured, or have lost their lives as a result of these police operations.

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RIOT CONTROL AGENTS: THE CASE FOR REGULATION

Anna Feigenbaum

• *Producers of tear gas and other so-called “less-lethal” weapons* •
take advantage of a deregulated market to the detriment of human rights

ABSTRACT

Tear gas, first used in World War One, is increasingly becoming the weapon of choice for security forces across the globe. Anna Feigenbaum offers a bleak picture of how companies – with a particular focus on Condor in Brazil – are capitalising on this trend and reaping financial benefits by marketing it as a “non-lethal” weapon. She demonstrates how in reality categorising tear gas as “non-lethal” is at best misguided and at worst disingenuous. Feigenbaum sets out the historical reasons for this “non-lethal” categorisation of tear gas – ones which governments and big business are happy to rely on today despite the ever increasing body of evidence that shows the extreme human rights abuses that its use inflicts on civilian populations worldwide.

KEYWORDS

Less-lethal weapons | Condor | Police brutality | Protests

1 • Introduction

As Brazil prepares for the 2016 Summer Olympics, companies are snapping up profitable security contracts. Hosting mega-events, like the Olympics and the World Cup, allows a country to shine a spotlight not only on its tourist hot spots, five star hotels and fine cuisine, but also on its security sector. As security analyst David Evans writes, “Major events, and especially the Olympic Games, can change ways of working forever and can introduce new opportunities. It is the forward-looking companies that recognize this, and they seek to use the games to drive their business forward.”¹

Brazil’s Condor Nonlethal Technologies (“Condor”) has taken full advantage of this business opportunity. Condor is one of the world’s leading suppliers of policing equipment and the largest company of its kind in Latin America.² The company is currently working night and day to fulfil product demands. With over 30,000 police planned to patrol during the Olympics, Brazilian journalists report that a “discreet policing” strategy will be used involving plain-clothes officers, x-ray systems and so-called “non-lethal” technologies.³ More accurately named “less-lethal” weapons because they can and do cause death and serious injuries, Condor is part of a growing, international industry in military and police technologies.

As this article will discuss, over the past 100 years, dubious definitions, loose export regulations and the failure of governments to hold police or corporate manufacturers accountable for human rights violations have all given rise to a dangerous business in profiteering from protest and social unrest. Using Condor as a case study to examine how companies benefit from systems of deregulation and unaccountability, the article makes connections between the current security context in Brazil and the recent history of riot control. This article argues that protest profiteering is a global phenomenon, made possible through the transnational exchange of both weaponry and tactics for maintaining social and political control. Governments and businesses strike million-dollar deals—often outside the view of the public—that seek security through the weaponisation and militarisation of policing. Brazil, and its flagship security company Condor, holds a central position in this matrix of buying and selling riot control under the guise of respecting human rights and maintaining democracy.

2 • Condor as a Protest Profiteer

Since 1985 Rio de Janeiro-based Condor has developed over one hundred distinct products for the military, UN peacekeeping forces, special operations forces and mainstream law enforcement.⁴ Today Condor produces a wide range of these policing and crowd control munitions. Condor products include Oleoresin Capsicum (“OC”), chemical agents that come in a variety of forms including as foam, gel and aerosol sprays. Condor also produces the chemical compound most commonly referred to as “tear gas” 2-Chlorobenzalmalononitrile (“CS”) that comes in 12 gauge, 37/38mm, and 37/40mm sizes.⁵ Types of tear gas projectiles

include triple and multiple charges,⁶ canisters that split into pieces to allow for greater coverage and more difficult “throw back” (where a civilian picks up and throws a projectile back toward police lines, or away from a crowd). Condor advocates that it spreads the less-lethal concept in accordance with the United Nations Basic Principles on the Use of Force and Firearms,⁷ by “Agents Responsible for Law Enforcement” that was adopted by consensus in 1990s.⁸

Condor also supplies impact munitions including rubber-coated bullets and rubber pellets, smoke grenades that emit coloured smoke, stun grenades that emit blinding flashes of light, and flash bang grenades that emit both light and an intensely loud noise.⁹ Most “less-lethals” companies carry products that additionally combine these effects together, such as Condor’s Multi-impact line. Condor also carries a North Atlantic Treaty Organization (NATO) specific line of these types of ammunitions and prides itself on being the only Latin American company invited to the 2011 North American Technology Demonstration event.¹⁰ In 2015, at the major defence expo IDEX, Condor showed off its newest product line, 40mm x 46mm “high accuracy munitions” that the company claims will allow “the Armed Forces and the Police Forces to face various day-to-day situations with efficiency, safety and respect to the human rights.”¹¹ As discussed in greater detail below this appeal to human rights runs throughout Condor’s corporate identity.

During Brazil’s heavy-handed policing of the 2014 World Cup, Condor products were widely on display. The company won a \$22-million contract, providing tear gas, rubber bullets, Tasers, light and sound grenades to police and private security forces during the event.¹² At the 2014 LAAD Defence and Security International Exhibition, Condor displayed its equipment in preparation for both the World Cup and the Olympics. Antonio Carlos Magalhães, Condor’s Institutional Relations Director said, “The factory today works 24 hours a day to handle Brazilian orders that have come in amid expectations (of protests) for the World Cup and afterwards for the Olympics, but also international orders. The company operates in 45 countries today.”¹³ Such public showcases of Condor’s products have helped cement the company’s place as a world leader in militarised policing supplies.

Since the international use of tear gas has grown since the Arab Spring in 2011, Condor’s sales have soared. In 2011 and 2012 Condor’s products turned up on the streets of Egypt and Bahrain,¹⁴ leading to international pressure on the Brazilian government to intervene. Responding to these humanitarian criticisms, in 2011 the Brazilian government claimed that no Condor products were being directly shipped to the region. This suggested that sales were going through an intermediary or nearby nation. In 2013, reports of use in Turkey also surfaced.¹⁵ Four years later, Condor products are still turning up in Bahrain, where tear gas is consistently used against protocol, fired directly at people and into enclosed spaces, causing serious injuries and death. Government records show that between US\$10million and US\$50million in sales were made from Condor to Bahrain in 2014.¹⁶

“We always advise the right escalation of force” , promises Beni Iachan, a senior business analyst for Condor.¹⁷ But in reality, there are reliable reports that Condor’s technologies

continue to be used intentionally by state forces to cause harm including allegedly the systematic torture of people in Bahrain and Egypt.¹⁸ Investigative work done by the NGO Bahrain Watch connected Condor tear gas to the death of an elderly man in January 2015.¹⁹ Abdulaziz Al-Saeed died at his home in Bilad Al-Qadeem due to tear gas inhalation. Photos of tear gas canisters taken outside his home by the “prominent Human Rights Defender Nabeel Rajab” showed the inner projectile of a multiple charge canister listed on Condor’s CS Munitions catalogue.²⁰

Expired chemical agents bearing the Condor brand are also being used against civilians, most recently documented on the streets of Venezuela.²¹ Tear gas canisters normally have an expiry date. The expiry date lets users know when the ammunition is no longer safe or effective to use. Expired tear gas is dangerous for a number of reasons. First, the mechanism that sets off the canister and grenade can become faulty. This can lead to injury for personnel using the device. It can also make incendiary devices increasingly likely to cause fires. Secondly, the chemical compound contained in the grenade may no longer be approved according to the most recent safety tests and certificates. Thirdly, it can be even more difficult to trace expired gas canisters to their point of sale. This is because less-lethal ammunitions do not have the same kind of tracking procedures as firearms, they can be moved between storage facilities with little or no publicly accessible documentation. Just as it is unclear whether Condor is directly supplying certain countries with these devices, it is also troublesome that expired gas is still in circulation on the streets. Old equipment is meant to be taken out of circulation and destroyed according to careful environmental protocols for waste disposal.

Such misuse of Condor’s products has put its 2010 promise to be a “pioneer in the dissemination of the ‘Non-Lethal’ concept in Brazil...through the controlled use of the escalation of force, without any harm to human rights”²² under scrutiny. Condor’s for-profit interests now overshadow even rhetorical commitments to civilian safety. While Condor will not publicly divulge details of its profits, according to the CV of its Marketing Director, in 2014 the company had international sales of US\$ 50 million of non-lethal weapons/ammunitions.²³ In recent years, Condor has seen a 33% revenue increase via a new marketing strategy engaging an advertisement campaign around their depiction of the gradual use of force and increased trade show participation.²⁴ With these initiatives the marketing director has reportedly overseen an average sales growth of 90%²⁵ and has increased sales from 12 to over 40 countries, with new markets in Asia and Africa.²⁶

3 • The Problem of Regulation

As with many other countries, Brazil’s regulation of less-lethal weaponry leaves open much room for corruption, error and unaccountability. According to a report by investigative journalist group Publica, all international sales of tear gas in Brazil go through Brazil’s Ministry of External Relations and the Ministry of Defence.²⁷ However, they do not keep

a record of how they are used after that, and sales figures are not made public. As Publica says, “[i]n this industry, the norm is a lack of transparency.”²⁸

Despite their increased use as a deadly force, “riot control agents” remain exempted from the Chemical Weapons Convention that permits toxic gases to be deployed by law enforcement against civilians. While there are some regulations around the trade in tear gas at both national and international levels, how these are implemented varies from country to country. France, for example, has a high domestic production and law enforcement use of tear gas, but strict controls on their export to MENA region and African countries.²⁹ In other countries trade laws are more lax, making it easier for direct commercial sales to be made with little or no government oversight.³⁰ Like other technologies that can be classified as policing equipment, these agents often fall outside of arms sales restrictions. This leaves their trade even less regulated than products in the pharmaceuticals industry.³¹

The use of tear gas falls under some guidance from law enforcement bodies, as well as from the United Nations 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) that offer guidelines for policing with riot control. The Weapons Law Encyclopaedia summarises:

The BPUFF provides that the ‘development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons’ and that ‘the use of such weapons should be carefully controlled’ (Principle 3). The BPUFF also requires that, ‘whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- *Exercise restraint in such use and act in proportion to the seriousness of the offence . . .;*
- *Minimize damage and injury, and respect and preserve human life;*
- *Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.’³²*

Although many manufacturers adopt these guidelines in their training and marketing materials, in reality they often do not translate on the ground when it comes to their application by law enforcement officials. Since these basic principles are not legally binding, their ability to regulate effectively the manufacture and use of riot control is limited.

So while the Brazilian government evades responsibility for monitoring how their exports are used, corporate manufacturers like Condor remain protected behind warning labels, despite the increasingly abusive deployment of their products. Since their early adoption in the post World War One period, the lax regulation of tear gas – and later flashbangs, rubber bullets and other riot control devices – has repeatedly been challenged by government officials, United Nations delegates, NGOs and medical associations.³³ While there are a myriad of forces at

play in keeping the trade in less-lethals poorly regulated, a major force shaping legislation and policy around this equipment dates back to Northern Ireland in the late 1960s.

4 • “Consider as a Drug, Not as Weapon”

On 12 August 1969, the Bogside area of Derry, Northern Ireland became the first UK site of civilian tear gassing. In a 36-hour standoff with the police, Bogside residents faced a barrage of 14 grenades and 1,091 cartridges containing 12.5g of CS gas. The gas entered homes, indiscriminately harming children and the elderly. Media reports sent waves of public outcry, leading to the first wide-scale medical investigation into the effects of CS tear gas.³⁴

An investigation was conducted between 1969-1971 by a group of medical experts led by the highly regarded doctor, Sir Harold Himsworth. While the Himsworth Committee was deemed independent, all of its members had military ties. One even worked as a researcher for the Ministry of Defence.³⁵ In the early stages of the review, Himsworth explained to his team that the effects of CS tear gas should be considered “from a standpoint more akin to that from which a drug is regarded than from that from which we regard a weapon.”³⁶

This approach was derived from the United States, where testing and development at Edgewood Arsenal followed such clinical protocol. This distinction was both scientific—accounting for the toxicological measurements that determine tear gas “safety”—as well as a public relations ploy. Those people keen to promote and profit from the proliferation of less-lethal gases for law enforcement were keen to keep this class of chemical agents separate from regulations surrounding both small arms and chemical warfare.

Despite the testimony of local general physicians in Northern Ireland who accounted for various injuries and ill health effects, the Himsworth Committee found no reason to condemn the use of CS tear gas. Instead, the report declared CS tear gas safe for the masses without “evidence of any special sensitivity of the elderly, children or pregnant women.”³⁷ While it recommended caution when CS tear gas was used in enclosed locations, the committee’s findings were interpreted like a safety certificate or a Food and Drug Administration approval label.

The report’s findings caused outrage among many of the general physicians who had consulted on the Committee’s report. Dr. Raymond McClean, a well respected doctor in Derry who went on to become the city’s mayor, challenged the report’s evaluation of CS tear gas as a drug, questioning how the political situation in Northern Ireland could be reduced to a set of side effects and insubstantial sociological factors. Drawing on his own experiences of increasingly violent repression and internment in Northern Ireland, McClean spread word that “the real purpose of this report must remain in serious question.”³⁸

Dr McClean was far from alone in his objections to the Himsworth’s committee. In fact, two years before the final report was released, the British Society for Social Responsibility in

Science pre-emptively criticised the enquiry. The Society felt that although the Himsworth committee was already serving as an official investigation team, it was important to look beyond the clinical and include social scientists perspectives “if it is to make the necessary inquires about the effects of the use of CS gas—not merely on the eyes and lungs of those who consulted doctors, but on the whole group of people affected.”³⁹ But Himsworth had no interest in human experience. Suggestions that the psychological conditions of riot situations could have physiological impacts were brought up in his final report only to be separated out from the “real effects” of CS tear gas. The final report treated bodily reactions as side effects; as if they were the result of personal dysfunctions or rare allergies to an everyday product, rather than human bodies responding to air poisoned by chemical weapons.

Despite objections from within the medical community, for the next two decades the Himsworth Committee report served as a key justification for the international community to continue its deployment and development of riot control agents. Business interests, alongside military and government interests in maintaining social control proved much more powerful than doctors’ records and human rights testimony. Most clinical trials of tear gas—and later those of other less-lethal weapons—were conducted in highly secretive, defence research establishments like Edgewood Arsenal (US) and Porton Down (United Kingdom). This meant that the motivations shaping the study of human impacts of these weapons were determined by military priorities—designed to defend against the enemy combatant, not protect civilians. In addition, these studies were often highly classified and not available to anyone without high levels of security clearance. This means that those in the medical community are unable to scrutinise the studies upon which claims to the safety of less-lethals are based.

While incidents of human rights abuses using less-lethal weapons sometimes entered policy and public debate, the mantra of the Himsworth Committee remained the dominant position. In a June 1988 report, Amnesty International recorded up to 40 deaths resulting from tear gas, as well as thousands of cases of illness. According to the report, as part of their operations, Israeli forces had thrown tear gas into houses, clinics, schools, hospitals and mosques, often deploying it in residential areas with children and elderly people.⁴⁰ Upon review of these human rights violations in relation to the US export of US\$ 6.5 million worth of tear gas to Israel between January of 1987 and December of 1988, the Department of State cited the Himsworth Report’s findings that “the margin of safety in the use of CS gas is wide.”⁴¹ They concluded that suspending tear gas shipment “would be inconsistent with US efforts to encourage the use of restraint by Israel and could work to the disadvantage of the Palestinian population in the occupied territories.”⁴²

In the 1990s, CS tear gas and pepper sprays proliferated. The mass production of aerosol dispensers made these control agents mobile, coming in handheld form, strapped to the equipment belts of security and law enforcement officers. In the 1990s aerosol pepper sprays began to be deployed to police across the US.⁴³ Soon after, similar handheld sprays of CS tear gas were dispatched to police across the globe.

In a 1993 catalogue for the Milipol Security Expo, Israeli manufacturer ISPRA explained this blurry line between drugs and weapons, introducing its new line of pepper spray:

Taking into consideration the sensitivities of the European Public and bearing in mind the new aim of environment preservation, ISPRA has developed the Protectojet Model 5 OC ... OC stands for Oleoresin Capsicum, which is an extract of natural pepper plant. Although the OC is used in the food and drugs industry, it was successfully converted by ISPRA's skilled staff, to be used from Protectojet Model 5, taking advantage of its tremendous power as a tearing and irritating material. Once dispensed from our Protectojet it becomes an effective deterrent device.⁴⁴

ISPRA's approach to marketing this pepper spray aerosol is emblematic of the less-lethal industry's public relations efforts to make their products sound "organic" and safe, while at the same time, able to cause intense pain.

5 • 100 Years of Unaccountability

ISPRA's dual promise of safety and threat has been part of the advertising of riot control agents since they first came onto the commercial market in the 1920s. For example, an early brochure for Lake Erie Chemical Company promised that their tear gas would deliver, "An Irresistible Blast of Blinding, Choking Pain" in which "No permanent injury is possible."⁴⁵ Their sales brochure also highlighted the lack of regulation surrounded the trade in tear gas, promising customers that their product "does not come under law prohibiting possession of dangerous and deadly weapons."⁴⁶ In other words, Lake Erie used the unregulated status of tear gas to help market the product as a tool for law enforcement.

In this way, early advertisements marketed tear gas on the grounds of effectiveness, while at the same time elevating the moral status of chemical "by-products" from the World War One. "There are many instances on record in which tear gas could have been used with a consequent saving of human life", one claimed.⁴⁷ In another, tear gas was purported to be as "innocuous and efficacious as the family slipper."⁴⁸ This apparent harmlessness meant that police did not need to wait for orders or for violence to break out before deploying the weapon. Rather, tear gas could be applied without qualms "the moment the mob appears and begins to form."⁴⁹

In the post World War One period promotional writing on tear gas struck a careful balance between selling pain and promising harmlessness. The psychological impacts set tear gas apart from bullets, working to demoralise and disperse a crowd, without firing live ammunition. Through sensory torture, tear gas forces people to retreat. These features pronounced the novelty value of tear gas in a market where previously only the truncheon

and bullets were available to officers. The invisibility and ephemerality of tear gas would also provide for better police-public relations. Alleviated from the backlash that comes with shooting a man, officers could disperse a crowd with “a minimum amount of undesirable publicity.”⁵⁰ Instead of traces of blood and bruises, tear gas evaporates from the scene, its damage so much less pronounced on the surface of the skin, or in the lens of the camera.

6 • Conclusion

One hundred years later, these weapons, now referred to as “less-lethals” or “riot control agents” are seeing rapid growth. National and international pressure to appear democratic and humane exists alongside civil unrest around the impacts of climate change, austerity, war and growing wealth inequalities. A business information company, Visiongain, published its 2015-2025 market report for police equipment. The report observes an “increasing use of non-lethal weapon systems, even in countries usually invested in lethal-force systems.”⁵¹ As smaller manufacturers team up with larger ones, both horizontal and vertical integration are taking place in the industry. Product partnerships like the one between Ripple Effect and Condor allow for the sale of integrated technology systems (ammunition + launcher), benefiting both manufacturers.

Meanwhile, networks like NewCo Safety’s Network of Competence brings together companies in the Middle East, India, North America, South America and Europe, enabling them to share tenders and negotiate profitable supply chain strategies. In October 2014 Condor appointed Canadian military veteran and engineer Tawfiq Ghadban as regional manager based in Abu Dhabi, responsible for 30 countries across the Middle-East, North-Africa, Central-Asia and Turkey.⁵²

Currently, many African and Middle Eastern countries are embracing less-lethals. Since riot control agents are tolerated and regularly deployed by leading Western powers, and often promoted by Western democracies, countries can generally use them to suppress protest without coming under too much international scrutiny. Even in countries like Bahrain, Turkey and Brazil, where human rights groups have condemned the abusive and excessive use of riot control, little has been done to hold governments, police departments or corporate manufacturers accountable.

Because less-lethal weapons are not well regulated under international law or trade policies, it remains relatively easy for security forces to acquire large quantities of them without public scrutiny or human rights oversight. For riot control manufacturers like Condor, a good market is one where you can easily move your product. In business terms, less-lethal weapons create and then fill a growing niche – the demand for political control without too much blood. The appearance of reasonable force is maintained, in part, through the continued fiction that riot control agents are safe – that these are law enforcement equipment and not chemical weapons.

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THE TECHNOLOGIES OF VIOLENCE AND GLOBAL INEQUALITY

Thomas Nash

• *The dangerous emergence of autonomous weapons* •
is deeply rooted in disparities of power between states

ABSTRACT

The development, use and control of military technology are characterised by serious inequality amongst states. Thomas Nash discusses how the development of new weapons remains largely unchecked, despite international obligations that exist and examines how - in the context of lethal autonomous weapons systems - this trend could have particularly serious consequences. The author examines the inequality in the production, transfer and impact of conventional weapons and how this translates into the limited representation of lower income countries at multi-national forums. Nash concludes by calling for equal participation of states, the involvement of civil society and the development of mechanisms to ensure the meaningful participation of those states who have been most affected by the weapons.

KEYWORDS

Weapons technologies | Lethal autonomous weapons | Global inequality | Arms trade

The development, use and control of military technology are characterised by serious inequality amongst states, with high-income countries dominating not only the purveyance of technologies of violence but also global forums for disarmament and arms control. The producers of weapons tend to be higher income states. Lower-income states are generally more likely to be importers of weapons, and are also more affected by armed violence than higher-income states. Lower-income states are also vastly more likely to be part of nuclear weapon free zones, whereas higher-income countries are vastly more likely to be part of nuclear-armed alliances and / or possess nuclear weapons. The use of armed drones by mainly high-income countries on the territory of low-income countries illustrates another aspect of these patterns of inequality and dominance, which will be further exacerbated by current technological developments towards weapons systems with sophisticated software and sensors that allow greater autonomy over their operation.

Talks at the United Nations on lethal autonomous weapons systems, which are weapons that would be able to identify, select, and engage targets without meaningful human control, have highlighted various ethical and legal concerns in relation to these developments.¹ Problematically though, participation in discussions on disarmament and the restriction and prohibition of weapons is generally skewed towards higher-income countries. Nevertheless, some lower-income countries have made concerted efforts to participate actively and/or to use rules of procedure such as consensus to exercise vetoes and enhance their relative levels of influence over specific processes or forums.²

These are global issues that may affect states in different ways. All states, regardless of the level of their income and their interests with regard to weapons technologies, have a stake in scrutinising the development, transfer and use of weapons. All states should have an interest in promoting rigorous and transparent weapon reviews, in taking action on the arms trade, in stopping the use of heavy explosive weapons in populated areas. All states should be working to stop the limitless expansion of the battlefield that armed drones facilitate and should be working to prevent the emergence of lethal autonomous weapons systems. This article briefly examines some of the different aspects of global inequalities between states on disarmament and weapons issues, and explores the urgency of a new legal instrument to pre-emptively ban lethal autonomous weapons systems in this context.

2 • Unchecked weapons development

Patterns of inequality in the production, transfer, use and control of weapons represent a relatively underdeveloped area of study in discussions around disarmament, arms control and the protection of civilians. Similarly, the distinct lack of scrutiny over the emergence of new weapons is an area that merits much greater discussion internationally. A transparent, international conversation about the processes involved in the development of new weapons would open up space for an examination not only of the permissibility of new systems, but also on the wider impacts they may be expected to have on societies.

Despite the existence of the legal obligation in article 36 of the 1977 Additional Protocol I to the Geneva Conventions, by which states must review any new weapons they develop or acquire, the development of weapons technologies is not properly scrutinised. Few states undertake such reviews and those that do undertake them provide scant detail on the assessments they have made.³

One might ask whether cluster munitions, a weapon that since 2008 has been banned by most of the world's nations, would have been developed if an adequate level of scrutiny had been applied by the states developing or acquiring them. Of course, such decisions are political as much as they are technical or legal and the level of consideration given to the humanitarian impact of a weapon is not necessarily the same as the level of consideration given to its perceived "effectiveness" in countering a perceived "security" threat.

Contemporary experience with the development and use of armed drones provides a good example of the negative results of this inadequate scrutiny. It is unclear whether legal reviews of armed drones – as an overall weapons system – have been undertaken by any state and, if so, what the assessments were and what consideration was given to the various ethical and humanitarian objections that have been raised in relation to armed drones. Could such legal reviews be expected to take into account the way in which armed drones facilitate the potentially limitless expansion of the battlefield, allowing political leaders essentially to kill anyone, anywhere, at anytime? Could they be expected to consider the psychological impact armed drones have had on communities in Pakistan, where children are afraid of the blue sky and parents are reluctant to send them to school on clear days for those are the days on which drone strikes are more likely?⁴

Whether or not one has any confidence with the existing processes for the review of weapons before they are developed, these concerns should be at the forefront of international discussions on lethal autonomous weapons systems (aka "killer robots"). Far from being an alternative to new international law prohibiting the development of autonomous weapons – as states such as the US and UK have argued – properly conducted weapon reviews should provide a clear basis for the prohibition of lethal autonomous weapons systems.

A next generation of weapons systems that are able to select their own target objects and fire upon them, without a human being directly involved in either the selection of the target at the time, or pressing the button to fire the weapon, are not a distant possibility. They are a very real prospect. Their development would constitute an attack on ethics, human rights and international law.⁵ Their use would almost certainly fuel injustice and inequality. States should prohibit their development and use now, taking advantage of the international discussions that have begun at the United Nations. A window of opportunity is open, and states should act without delay before it closes. If not, history suggests that the development of lethal autonomous weapons systems will only further the gap between the wealthy and powerful states and those that command less military and financial might.

3 • Inequality in the production, transfer and impact of conventional weapons

Taking the Stockholm International Peace Research Institute's (SIPRI) 2014 data on the top 20 arms exporting countries, which does not include data on small arms transfers, this list is dominated by the US, Russia, and China, the NATO states and other highly militarised countries. The list of the top 20 arms importing countries, by contrast, includes lower-income or developing countries such as Afghanistan, Algeria, Egypt, Indonesia, Iraq, and Venezuela.⁶ Looking at this data on the top 20 exporters against the top 20 importers (excluding the importers that are also on the top 20 exporters list), the difference in total GDP is USD 51,749,949 million versus USD 6,677,207 million. The average per capita GDP for these same two groups is USD 38,700 versus USD 12,954.

Similar trends are true for small arms exporters. According to Small Arms Survey, Austria, Belgium, Brazil, Germany, Italy, Switzerland and the United States routinely report annual exports of small arms, light weapons, their parts, accessories, and ammunition worth USD 100,000,000 or more per year. The levels for China and Russia are likely the same though reporting is incomplete.⁷ However, when it comes to importers, some high-income countries dominate the list. Australia, Canada, France, Germany, Italy, Japan, the Netherlands, Saudi Arabia, Spain, the United Kingdom and the US routinely import small arms, light weapons, their parts, accessories, and ammunition worth USD 100,000,000 or more per year, along with Egypt, Pakistan, Thailand, and Turkey.⁸

Conventional arms transfers both reflect and drive global inequalities between states, and patterns of dominance and militarisation in international affairs. Arms manufacturing companies are frequently supported through state subsidies and in some cases are owned by the state. Governments often proactively promote their arms industries by including their representatives in government delegations for overseas visits, as well as supporting large arms fairs such as the Defence and Security Equipment International exhibition (DSEI) in the United Kingdom. Some countries even include arms purchases in their development aid packages. Arms industries in wealthy countries, in turn, drive the development and production of advanced weapons technology, with the public justification of generating military advantages for these countries – and with the technology sold on to friends and allies in other states.

Not only do arms transfers frequently go to lower-income countries, they also go to countries involved in armed conflict or in regions at risk of or currently suffering from armed violence. The recently adopted Arms Trade Treaty (ATT) contains obligations to prevent weapons transfers that contribute to human rights violations or breaches of international humanitarian law. However, decisions such as that by the UK and others to continue sending weapons and military equipment to Saudi Arabia and other countries involved in the bombing campaign in Yemen suggests that some countries may prioritise the concerns of their arms industries over their obligations under international human rights and humanitarian law.⁹

The different interests with which lower and higher income countries are aligned also extends to weapons of mass destruction: high-income countries are most likely to be in nuclear-armed alliances, whereas lower-income countries are most likely to be in nuclear-weapon free zones. It should be no surprise then, that an international nuclear disarmament conversation dominated by wealthy states has failed so far to produce results in favour of disarmament, as discussed below.

With conflict and armed violence primarily affecting lower-income countries, conventional weapons tend to have a disproportionate impact on these populations. Two examples are the impact of explosive weapons in populated areas and the impact of small arms. Based on extensive reviews of English-language media reports, in 2014 the use of explosive weapons affected 58 countries and territories. Developing countries Iraq, Syria, Gaza, Nigeria and Pakistan topped the list. Lower-income countries also dominate the rest of this list: Afghanistan, Ukraine, Lebanon, Yemen, India, Libya, Somalia, Thailand, Kenya and the Philippines.¹⁰ Similarly, the impact of small arms is generally more acutely felt in lower-income countries.¹¹ Conflicts in Africa, for example, are largely prosecuted with small arms, while the highest rates of violence in countries “at peace” (particularly in the Americas), depend overwhelmingly on firearms.¹² In the context of small arms, studies have described a bi-directional relationship between armed violence and development, by which poverty is both a driver and symptom of armed violence.¹³

4 • Inequality in participation at multilateral forums

Article 36 is currently conducting research to map participation at multilateral disarmament forums, examining global patterns in attendance and the giving of statements by country income category, region and gender of participants.¹⁴ Data collected from thirteen different processes and forums covering both conventional weapons (including small arms and explosive weapons) and weapons of mass destruction between 2010-14 reveals that overall, the lower a country’s income group, the less likely that country will be to attend any given meeting, hold office at it, or give an individual country statement, compared to a richer country with an equal right to participate. Lower-income countries will also field smaller delegations on average, which can further exacerbate low rates of participation.

There are some variations in these patterns across the forums, which may be explained by factors such as priority or national interest or the effectiveness or inclusiveness of the forum. Nevertheless, the general patterns are strong. Focusing on nuclear disarmament forums, the data also shows that inequality in representation increases for meeting sessions that addressed more specific topics, in comparison to general debates. For example, the percentage of the lowest-income parties to the Nuclear Non-Proliferation Treaty (NPT) making a statement to the main committees, clusters and specific issue session was only 1% on average across all NPT meetings between 2010 and 2014, according to the available data. At several of these individual sessions, no low-income countries contributed at all.¹⁵

A study on participation in forums focused on small arms or the arms trade might produce different results, with stronger participation from lower-income African and Latin American states, for example. However, the underrepresentation reflected in nuclear weapons forums suggests a particularly egregious inequality, in which the states possessing or including nuclear weapons in their security doctrines dominate the debate, despite the capacity of these weapons to destroy all life on earth.

Greater equitability between countries in multilateral discussions is important in principle. But it is particularly important for advancing the potential to change dynamics through challenging the dominance of particular interests associated with higher income countries. In the data collected, the nuclear weapons meetings that achieved the nearest to equal attendance across country income groups were the recent conferences on the Humanitarian Impact of Nuclear Weapons. These were slightly different to other meetings in the dataset for not being part of a formal process – but were also seeking specifically to bring in a greater diversity of perspectives on nuclear weapons, and to address the interests of a wider range of countries. As a result, the humanitarian initiative on nuclear weapons has been recognised by both states and civil society as bringing greater democracy to the global conversation on nuclear disarmament – which has, in turn, generated momentum towards new effective measures.¹⁶

Where more equal representation is achieved between countries in multilateral disarmament forums, in terms of both quantity and quality of participation, discussions may have a greater chance of generating a more balanced debate and a larger range of proposals to address global disarmament concerns.¹⁷ Given that weapons and disarmament concerns are global issues, the interests of all countries must be represented for any attempt to achieve the most equitable outcomes for populations worldwide. Representative, inclusive and participatory processes are necessary to achieving progressive outcomes. Countries most affected by armed violence are usually those prepared to support the strongest, most progressive measures to prevent and resolve this violence through national and international mechanisms. Such processes require more equal participation of states, the involvement of civil society, and mechanisms to ensure the meaningful participation of those who have been most affected by the weapons under discussion.

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FIRE FROM THE BLUE SKY

Mirza Shahzad Akbar & Umer Gilani

• *Drone attack victims from Pakistan, their voice and their struggle* •

ABSTRACT

The United States' continued deployment of Unmanned Aerial Vehicles, or drones, across Pakistan, and in particular the Federally Administered Tribal Areas, has serious human rights implications on Pakistani citizens. In increasing numbers, citizens are becoming collateral damage in the war against terror. In this article, the authors describe the difficulty of counting the number of victims, given the refusal by the US to release any official figures. After examining the best available figures collated by the Bureau of Investigative Journalism, the authors offer three stories of victims of drone attacks. The voices of the victims are too often forgotten in the general discourse surrounding the legality of the drone programme. The cases they have brought within Pakistan offer a sense of hope to Pakistani citizens, many of whom continue to live under the constant threat of "fire from the blue sky".

PALAVRAS-CHAVE

Drones | Pakistan | War on Terror | Victims

Since 2004, the US and some of its allies have come to rely upon a form of aircraft that unleashes indiscriminate and lethal violence mostly upon civilians: the Unmanned Aerial Vehicles (UAVs) popularly known as drones. Predecessors of a dark future where lethal autonomous weapons such as killer robots¹ might wage wars across the globe, drones continue to terrorize the communities living under them through their constant visible presence.

One of the key target regions of US drone strikes is FATA – the Federally Administered Tribal Areas – which constitutes Pakistan’s north-western boundary with Afghanistan. In the period 2004-2015, between 423 and 965² civilians have been killed in this poverty stricken part of the world. As drones continue to fly above FATA, millions of others citizens in the region live terrified lives, their souls crushed by knowing that there is a fire in the blue sky which can come down, upon any one of them, any time, any day – even if only on account of mistaken identity.

Nevertheless, the true human rights implications of drone strikes get ignored in both the policy and legal circles.³ As various perceptive commentators have pointed out,⁴ the public discourse has so far largely missed out on the human side of the story. Few seem to be seriously interested in listening to the voice of those rights-bearing individuals, the actual human beings, who lie behind the aggregated numbers but whose suffering can never be fully depicted by statistics. For this reason, we bring to the fore the life stories of the victims of these strikes. By telling these stories, we aim to contribute towards fostering a public discourse on drone strike in which the victims are viewed not just through a strategic or legal perspective but through a more human lens that captures both the depth of their suffering and the magnitude of their struggle for seeking justice.

1 • The Stats: Scale of the Drone War in Pakistan’s Federally Administered Tribal Areas

Since the US drone programme is shrouded in secrecy, the US government has never published exact figures about when it began. But it seems that the first drone strike in the FATA region occurred in 2004.⁵ Since then, there have been an average of 38 strikes per year, peaking in 2010 when 128 strikes took place.⁶

The number of fatalities resulting from drone strikes in Pakistan has also never been officially disclosed by the US. The only time it reports a fatality is when an influential terrorist has supposedly been killed. However, using media reports and leaked government documents, experts at The Bureau of Investigative Journalism (TBIJ), have estimated that a minimum of 3,989 people have been killed.⁷ Of these, 965 were confirmed to be civilians.⁸ Between 172-207 of those killed by drone strikes in Pakistan were children⁹ and thousands have been injured or have lost their property or means to a living. Another study estimates that for every militant killed, at least

ten to fifteen civilians are killed.¹⁰ A comprehensive investigation by TBIJ found that only 4% of drone victims have been named and reportedly identified as members of Al Qaeda by available records – although the group was the original intended target of the drone programme.¹¹ According to one study the US seems to have killed at least 1,147 unnamed civilians to achieve assassination of 41 named militant targets in drone strikes in Pakistan.¹²

TBIJ’s estimates of casualties are more reliable than those of daily newspapers and news channels because TBIJ staff identify all the dead through open-source reports and leaked Pakistani government reports, before tallying a total. So, for instance, in news reports, often the same militant is alleged to have been killed in three different drone strikes. The actual number of civilian casualties caused by drone attacks is, however, expected to be even higher than the TBIJ estimates, since journalists have little or no access to the war zones where the drone strikes are being carried out and, as already noted, the US does not release the names of any of the deceased. The only exception to this rule was in early 2015 when President Obama admitted and apologised for having killed Warren Weinstein and Giovanni Lo Porto, two western hostages, in a drone strike.¹³

All evidence points to the fact that civilians are not just collateral damage but rather account for the overwhelming proportion of drone strikes victims – it is therefore crucial that their stories are heard.

2 • The Victims: Their Stories and Struggles¹⁴

To show the human effects of drone strikes the voice of three human beings, who are in the middle of the conflict, are detailed below. These drone victims have narrated their stories to us, as their lawyers practicing at the Islamabad-based NGO Foundation for Fundamental Rights.¹⁵ By telling their stories and narrating the legal struggles that they are waging, we hope to counter the general narrative that depicts drone victims as mere passive objects.

A – Karim Khan’s Story

Before the drones forced him out, Karim Khan was a permanent resident of the Federally Administered Tribal Area. He hails from the Wazir tribe and his family has been living in the village of Machi khel, Mir Ali, North Waziristan for centuries.¹⁶ Karim now lives with his family in Mardan after being forced to leave his home.

Karim says he has seen drones in the sky on a daily basis since 2004. He says that most of the drones he has seen are white, “have a blade in the front” and make a frightening “znnnng znnng” sound. When the missile attacks, there is “fire everywhere” and “everything burns”. His most tragic encounter with drones was on 31 December 2009.

That day, around 9 p.m., missiles, fired from a drone, landed on Karim' s *hujra* (family house). Three people were inside and died immediately. The attack also left the house badly damaged. The three killed included Karim' s son Zahirullah Khan, who was a high school student. He was intelligent, had memorised the Quran and was in the top ten percentile in his class at school, as well as in the recitation of the Quran. Karim' s brother, Asif Iqbal, was also killed in the attack. He was a respected secondary school teacher at a local government school. The third casualty was Khaliq Dad, a mason, who was renowned in the entire region for his skill at building domes and minarets. Khaliq had come to Karim' s village in order to assist in the construction of the village mosque. All the deceased were peaceful and law-abiding people who cannot even remotely be connected with terrorism; their death in a drone attack came as a shock to everyone in the area.

Karim notes the irony that those killed by drones are often reported by the media as terrorists even, when they include children as young as three-years old. "How could children as young as three ever be considered as terrorists?" , he asks.

Although devastated by the loss of his son and brother and forced out of his homeland because of the fear of drones, Karim was neither daunted by the risk of prosecuting the mightiest country in the world nor short of hope. In November 2010, he submitted a request for registration of a First Information Report, against Jonathan Banks, the CIA station chief based in Islamabad at the time the order for the drone strike was given. Initially, and not surprisingly, the local police force was reluctant to register his case. Karim therefore sought an injunction from the judiciary. The lower courts too were initially reluctant to grant it. However, on 7 April 2015, the Islamabad High Court finally concluded the matter by issuing an order in *Karim Khan v. The Inspector General of ICT Police*, ordering the commencement of criminal proceedings against the accused CIA personnel.¹⁷ Left with no other choice, on 29 April 2015, the Islamabad Police registered a First Information Report No. 91/2015 at the Police Station Secretariat implicating Jonathan Banks for murder and other offences. Fueled by a desire to seek justice for drone survivors, Karim is pushing Pakistan' s domestic court system closer towards finding the top CIA operative in the country guilty of murdering civilians by drone.



Karim Khan holding up pictures of Asif and Zahirullah (deceased)

B – Nabila ur-Rehman’s Story

6-year-old Nabila was playing in the fields as her grandmother, 67-year-old Maimana Bibi, worked on the family’s vegetable farm. It was the 24 October 2012, a sunny afternoon in Tappi village near Miranshah, Waziristan. Maimana Bibi’s other grandchildren were also around - Naima, Asma, Safdar, Kaleem, Zubair, Samad, Rehman Saeed and Shahid. All were aged between three and seventeen years old. The younger children were playing while the older ones were helping their grandmother in preparation for the upcoming feast for *Eid-ul-Azha*.

Around 2.30 p.m., a hellfire missile was fired from a drone, striking Mamana Bibi. She fell to the ground in front of her grandchildren. Thereafter, a second missile was fired by the drone which hit the same spot; Mamana Bibi’s body was blown to pieces. Her son Rafiq put together the pieces of his mother’s body from all over the field before she could be buried. Many of the children were also seriously injured. The family’s livestock, an important source of their meager income, was also destroyed in the attack. Nabila, Zubair, Shahid and Kaleem were taken to Mirali hospital after the attack. Kaleem’s injuries were more severe so he was taken to a hospital in Peshawar. A few days later Zubair was brought to Ali Medical Hospital in Islamabad, where his injuries were checked. Zubair needed an expensive laser treatment for his foot. The medical expenses incurred in the treatment of Nabila, her siblings and cousins have left the family heavily in debt.

Nabila, now 11 year of age, and her father Rafiq have not given up on the idea of justice. They have emerged as leading campaigners in the drone victims’ struggle. They have knocked on every possible door, seeking justice. On 29 October 2013, Nabila appeared before a Congressional meeting in Washington D.C. and testified together with her father and brother. The visit received widespread media coverage and was significant in creating a new, more informed and rights-conscious discourse on drones.¹⁸ In November 2015, Nabila visited Japan where she narrated her story on, amongst other forums, prime-time TV, and vowed to continue her struggle to protect human rights.



Naima, Nabila’s sister, who was injured in the October 2012 drone attack. She lost her grandmother in the attack. Here she is at the Foundation for Fundamental Rights (FFR) office holding up “peace cranes” sent to her by schoolchildren in the US to show solidarity and hope for peace. Nabila’s family has now been displaced as the result of the Zarb-e-Azb operation and they are living as internally displaced people.

C – Noor Khan’s Story

Malik Daud Khan, Noor Khan’s father, was a well-respected member of his community and had been recognised by the Government of Pakistan for his assistance to the Pakistan armed forces. He worked to empower women, as evidenced by his efforts to establish the Women Skills Development Center in his village, and headed a tribal *Jirga*, a meeting of elders, who had assembled in North Waziristan.

On 17 March 2011, Daud Khan was heading a *Jirga* which was trying to resolve a dispute over the ownership of a chromite mine through a mutually acceptable settlement. At around 11am, the gathering was struck by missiles fired by a CIA-operated drone. Over 40 people were killed, including Daud Khan.

Noor Khan has since been fighting for justice in Pakistan and the United Kingdom. He became one of the co-petitioners at a landmark case before the Peshawar High Court known as *Foundation for Fundamental Rights (FFR) v. The Federation*.¹⁹ In this case, the petitioners asserted that the continuing drone strikes represented a violation of the citizens’ fundamental rights, including the right to life, seeking from the Court both a declaration with regard to the illegality of these strikes and a court order against drone strikes. After a litigation spanning over year and half, the Court granted the petition on 11 May 2013 and came out decisively in favour of drone victims.

Peshawar High Court held that drone attacks are illegal under international law since “neither the Security Council nor the UNO in general at any point of time [...] permitted the U.S Authorities particularly the CIA to carry out drone attacks within the territory of Pakistan, a sovereign State...” (*para. 7*) The Court declared these strikes to be “a War Crime, cognizable by the International Court of Justice or Special Tribunal for War Crimes, constituted or to be constituted by the UNO for this purpose.” for which “the US Government is bound to compensate all the victims’ families...” The Court directed that the Government of Pakistan should take the matter before the Security Council and, if necessary, requisition a General Assembly session for passing a Resolution condemning drone strikes. If, after the passage of the envisaged resolution the US still did not stop these strikes, the Court opined that the Government of Pakistan must “sever all ties with the USA and as a mark of protest shall deny all logistic & other facilities to the USA.”

The *FFR v. The Federation* judgment represents a major victory for the civilian victims of US drone strikes from Waziristan and an important milestone for protection of human rights judicially. No court anywhere else in the world has issued such a sharply worded critique of these strikes and presented a more activist strategy for defending human rights. In that sense, the judgment represents the finest rights-protective streak of the public law jurisprudence developed by the judges of Pakistan.

While, to date, the FFR judgment remains largely unimplemented by the executive branch of government, it does nonetheless represent the value of human rights

litigation. If nothing else, the litigation succeeded in bringing otherwise ignored human voices into the jurisprudential field – which would not have been possible without the bravery of the petitioners such as Noor Khan.

3 • Conclusion

In this paper, we have presented the human stories of individuals who have become the casualties of the US drone campaign in Pakistan. We have highlighted the struggle that drone survivors are waging for justice, hoping to pierce the thin legal armour of the drone campaign. There is an emerging consensus in human rights circles that US drones strikes in Pakistan are illegal and indefensible. At the very least, international law requires States – both conducting and being affected by drones – to put in place transparency and accountability systems, including taking seriously allegations of international crimes.²⁰

It is our position that US drone strikes run contrary not only to international humanitarian law and to international human rights law but also the domestic law of Pakistan. CIA personnel who are perpetrating these attacks do so at the risk of exposing themselves to criminal liability under these various legal regimes. Likewise, the states which either conduct or facilitate these strikes - or fail to protect their citizens from such strikes - expose themselves to various forms of legal liability. We are confident that as more victims speak out against the atrocities inflicted upon them, the drone programme will no longer be justifiable – from neither an ethical nor a legal perspective. For that, the victims’ voices must be heard.

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ARMS TRADE REGULATION AND SUSTAINABLE DEVELOPMENT: THE NEXT 15 YEARS

María Pía Devoto & Héctor Guerra

• *Considerations on the possible implications of the Arms Trade Treaty and the 2030 Agenda for human security* •

ABSTRACT

This article analyses the confluence of the 2030 Agenda for Sustainable Development and the Arms Trade Treaty (ATT) processes as they pertain to human security. It identifies opportunities for the mutual reinforcement of these processes through implementation measures which could be adopted in this early phase of each process's existence. Special attention is given to Goal 16 of the 2030 Agenda, which deals with peace and security, specifically Target 16.4.2 on the control of the illegal arms trade, which can provide the central locus of interaction between these processes. The article also takes into account the humanitarian approach and the limitations of the ATT, and considers possibilities for overcoming them in the implementation process.

KEYWORDS

2030 Agenda | Arms Trade Treaty | Sustainable development | Arms transfers | Goal 16

Today, 15,700 nuclear warheads, of which 1,800 are in a constant state of alert, can be found in 9 countries.¹ All the while, armed conflicts continue to expand and become increasingly complex in North Africa, the Middle East, Eastern Europe and Central Asia. The international relations between the West, China and Russia are undergoing a process of strategic readjustment the outcome of which will remain uncertain so long as the “cold wars” of the Korean Peninsula and South Asia continue. There is no end in sight to the Palestine-Israel conflict, which has turned into a humanitarian catastrophe for the people of Gaza. Global climate change is affecting access to food, water, farmland, housing, health and the planet at the immediate expense of the most vulnerable. There are 60 million people currently in intra- and inter-state migration.² More than 800 million people live in extreme poverty.³ We have reached levels of inequality in which 1 percent of the world population owns 65 times the amount of wealth of the poorest 50 percent of the population; seven out of every ten people live in a country where inequality has increased in the past 30 years; and the poorest half of the population has the same amount of wealth as the 85 richest people on the planet.⁴

In this context, it will be difficult to establish a world order of peace and security. This is especially true so long as the serious problem of armed violence, which threatens the lives of thousands of men, women and children, is not confronted head on. Between 2007 and 2012, an average of 508,000 people died every year as the result of violence in and outside of armed conflicts.⁵ Furthermore, in addition to the loss of lives, armed violence has social and economic impacts, with an annual cost estimated at hundreds of billions of dollars.⁶ Situations of conflict generate an annual burden of US\$400,000 million and the cost of armed violence outside of armed conflicts, measured in terms of loss of productivity, is between US\$95 billion and US\$163 billion.⁷

There is a vicious cycle between armed violence and underdevelopment. The latter is not only the consequence, but also a structural factor in this violence. “Countries suffering from sustained levels of armed conflict or violence are also those furthest from reaching their Millennium Development Goal (MDG) targets. In fact, 22 of the 34 states furthest from achieving these targets are in or emerging from armed conflicts.”⁸

Between 2014 and 2015, two international processes have produced potentially complementary means to address armed violence: the Arms Trade Treaty (ATT) that came into effect in December 2014⁹ and for which the first conference was held in August 2015 in Mexico; and Goal 16 of the 2030 Agenda, adopted in September 2015 at the United Nations Sustainable Development Summit in New York. Goal 16 is designed to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels” .¹⁰ In this article, we analyse the extent to which these two processes can be seen in an integrated manner, since sustainable development is only possible in a world free from the daily violence imposed by weapons.

1 • Parallel Processes: Sustainable Development and the Regulation of the Arms Trade

The objective of the ATT is “to prevent the illicit trade in conventional arms and prevent their diversion” through the “[establishment of] the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms”. Its purpose is “to contribute to international and regional peace, security and stability; reduce human suffering; promote cooperation, transparency and responsible action by States Parties in the international trade in conventional arms, thereby building confidence among States Parties.”¹¹ The ATT is the most recent contribution to arms control from a humanitarian and a human rights perspective, together with the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons (PoA)¹² and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, which complement the United Nations Convention on Transnational Organized Crime¹³ and which were both adopted in 2001.

The proliferation, generalised presence, easy access to and improper use of weapons together with the presence of non-state armed groups diminish the state’s capacity to meet the basic needs of the population - from guaranteeing water supply and vaccinations to access to justice and the maintenance of public infrastructure. Even worse, many states become perpetrators of abuse and violence against their own populations.

It is in this context that international arms transfers take place, and end up being both a business and a means to intervene in the internal affairs of other countries, without attention always being paid to the humanitarian risks that they generate. In the absence of adequate controls, arms transfers divert essential resources away from human development needs in arms receiving countries.

Arms transfers, unless they are illegal from the start - that is, intended either to supply arms to terrorist groups or criminal groups, or to violate arms embargoes imposed by the Security Council - should arrive only at their final destination and be used for the declared purposes registered on the transaction certificate. This is not always the case, however, as sometimes the arms, their parts, components and munitions are deviated during shipment and end up in the hands of unauthorised recipients, or the designated recipients are governments that commit acts of genocide, war crimes, torture or large scale human rights violations, but are not subject to embargoes.

One notable example is that of South Sudan - a country where arms transfers have caused humanitarian disasters and contributed to the incapacity to meet the population’s sustainable development needs. Marked by low income, only 25% of the population in South Sudan has access to health services and the life expectancy is 55 years of age.¹⁴ The country has been in conflict since its foundation in 2011 and even earlier, during the decades of independence struggles, the country’s territory suffered the devastation of various forms of war: tribal, cross-border, and civil war. This has resulted in 50,000 deaths, 1.5 million internally displaced persons and 500,000 refugees.¹⁵

The atrocities committed in this conflict have been carried out with arms that travelled through Kenya, Uganda and Sudan with the authorisation and, at times, the direct participation of these countries' governments, despite the situation mentioned above.¹⁶ The original destination of the transfer of a large portion of these weapons was Sudan, which was to be the final user, but authorities there redirected them to the conflict in South Sudan. The countries of origin of these arms - Russia, Iran and China - continue (or did at least until last year) to transfer all sorts of weapons even though they are being deviated. This occurs despite the arms embargo imposed by the European Union on Sudan and the existence of a UN Security Council expert panel that is supposed to monitor and report on arms transfers to South Sudan.¹⁷

The ATT process has taken place in the midst of advances at the international level, such as bans and restrictions on arms that infringe international humanitarian law (IHL) (e.g. anti-personnel mines and cluster munitions) and ongoing actions to eliminate arms of mass destruction, advances in which states with progressive positions on these issue and civil society organisations actively participate. However, efforts to regulate conventional arms, especially small and light weapons, have not advanced beyond politically binding commitments, as is the case of PoA.

The relation between sustainable development and armed conflict was clearly recognised in the 2030 Agenda through Goal 16 (SDG16), which focused on the promotion of peaceful and inclusive societies. Economic stagnation, poverty, growing inequalities, the scarcity of basic resources for survival and ecological pressures play a pivotal role in the generation of armed conflicts - even more than strategic factors.¹⁸ Therefore, “[the] inclusion of Goal 16 reflects the growing acceptance that issues related to peace, security, and good governance should play a role in the post-2015 development framework” .¹⁹ SDG16 is perhaps the most diverse and heterodox goal of the 2030 Agenda as it covers a wide range of issues, from armed violence, violence against children and terrorism to legal identity, governance, transparency, the fight against corruption, access to information, inclusive decision-making processes, the rule of law and access to justice, and measures against illegal arms trafficking.

SDG16 puts emphasis on preventing and reducing violence through Targets 16.1,²⁰ 16.2²¹ and 16.a.²² Through Target 16.4,²³ the Agenda seeks to take action on illicit arms flows due to their negative impacts on sustainable development. Indicators are to be adopted for this goal and the first steps of institution building for the 2030 Agenda to be taken. We will thus have initial baseline indicators for Target 16.4.2, which are to constitute core elements of the actions to fight armed violence included in national sustainable development plans.

The ATT contributed to the consolidation of an international regime for the control of arms transfers by supporting steps taken beforehand at both the global and regional levels to address this issue. While some countries have had national control systems in place for many years, for the majority this is not the case. In 2006,²⁴ three years after the launch of the global campaign for a legally binding international instrument for the control of the arms trade, the resolution entitled “Towards an Arms Trade Treaty” was presented by the First Committee of the UN

General Assembly.²⁵ Seven years later, the Treaty was adopted when, immediately after the second session of negotiations ended without reaching a consensus, 12 governments put a resolution on the negotiating table proposing that the text of the Treaty be approved by the General Assembly at its April 2 session.²⁶ 154 states voted in favour of the resolution.²⁷

2 • The First Conference of States Parties (CSP) to the Arms Trade Treaty in 2015

The First Conference of States Parties (1CSP) to the ATT took place in Cancun, Mexico, in August 2015, after a series of preparatory meetings were held in Mexico City, Berlin, Port-of-Spain, Vienna and Geneva. Mexico was in charge of the provisional Secretariat.

More than 130 signatories - including 69 States Parties, as well as 11 observer states (including Saudi Arabia and China) - participated in the Conference, as did 10 intergovernmental organisations; civil society representatives from the Control Arms campaign; the arms industry and even NGOs that lobby in favour of firearms, such as the National Rifle Association.²⁸

Agreement was reached on the Rules of Procedure (ATT/CSP1/2015/WP.1/Rev.1), which finally established guarantees for civil society participation; a decision-making process based on consensus with the option to vote; and meetings open to the public. The Financial Rules were also established (ATT/CSP/2015/WP.3/Rev.1), with funding based on the UN quota system and voluntary contributions; public meetings, and Secretariat headquarters²⁹ in Switzerland. Simeon Dumisali Dladla from South Africa was named the provisional secretary. He will hold this position until 2CSP, when the process for selecting a permanent secretary will be completed. An Administrative Committee directly related to the Secretariat was created, in accordance with the terms of reference established in ATT/CSP/2015/WP.5/Rev.2, with the goal of supervising the Secretariat on financial issues. Côte d' Ivoire, the Czech Republic, France and Jamaica are members of the Committee. The issue of annual reports was left open, and accordingly, a working group on the reports was established.

Ambassador Emmanuel E. Imohe of Nigeria was elected to preside over the next Conference, even though the location of the second meeting of the State Parties has not yet been defined. The representatives of Costa Rica, Finland, Montenegro and New Zealand were elected as vice-presidents. In the first few months of 2016, a one-day extraordinary meeting, announced in Cancun, will be held in Geneva to revise and consider, for adoption, the proposal on administrative arrangements for the Secretariat and subsequently, the revision of its provisional budget. Furthermore, this Committee is carrying out the temporary administrative functions of the Secretariat, as Dumisali Dladla assumes the position. It has not been decided if preparatory meetings will be held for 2CSP - although the possibility of holding at least one meeting has been informally mentioned, without discarding the possibility of it being

in Nigeria. In any case, it has been established that if no other country offers to organise the meeting, it will take place in the city of the Secretariat's headquarters, Geneva.

The Conference of the States Parties agreed to consider actions and activities from its Plan of Action (ATT/CSP1/2015/WP.8.Rev.1). In the period between the first two CSPs, the following activities will be considered, among others: identifying and evaluating developments in the field of conventional arms; comparing best practices for the implementation and operation of the Treaty; promoting the universalisation of the Treaty; identifying lessons learned and the need for adjustments during implementation; and comparing the practices of designated states on the basis of the Treaty's interpretation.

3 • Agenda 2030 and its Relationship to the Arms Trade

Only a few days after the 1CSP, the 2030 Agenda was adopted at the United Nations Sustainable Development Summit held from September 25 to 27, 2015 in New York. Thus, the real challenge of giving substance, an institutional framework and assessment capacity to multilateralism for sustainable development has only just begun. The first step in this direction is to generate indicators for each of the 169 targets, which are still in the process of being elaborated and will only be defined during the March 2016 meeting of the United Nations Statistical Commission.³⁰ In its October 2015 meeting in Bangkok, Thailand, the Inter-agency and Expert Group on the SDGs had the mission of revising the list of possible global indicators and discussing its framework, the connections between different targets, critical issues regarding the disaggregation of data, the final phase of the work plan and the next steps. Even though the process is still ongoing, various indicators have already been approved. There are, however, cases where work remains to be done on the indicators in order to improve precision and add a scheme for disaggregation. These are the so-called "green indicators".³¹

Such is the current status of the indicators for Target 16.4.2 on the control of the illegal arms trade. Prior to the meeting in Bangkok, a proposed indicator "Percentage of firearms seized that have been registered and traced in accordance with international standards" had already been presented and during the event it was the subject of general agreement. The proposal introduced in Bangkok of using the "Percentage of small arms marked and recorded at the time of import in accordance with international standards" as an indicator was also accepted without any objections. Thus, these proposals were accepted by the IAEG, though they were still subject to additions.³² The group of interested parties also proposed the "Percentage of seized illicitly-manufactured or traded firearms that are traced in accordance with international standards" as an additional indicator.³³

While the proposed green indicators for Target 16.4.2 mentioned above have the approval of the UN Statistics Division,³⁴ the Rule of Law Unit of the United Nations Secretary General Office noted that these indicators do not cover all types of weapons. Therefore, it recommended that adjustments be made so as to craft a single indicator on firearms.³⁵

The IAEG-SDG process has not been free of criticism. According to the civil society organisations involved in the process, the scope of SDG16 is limited in comparison to the Agenda's purpose. They emphasise that the process of elaborating indicators "is not simply a technocratic process"³⁶ and affirm that too little attention is being given to this target, as the debate at the Bangkok meeting on SDG 16 was condensed into that on SDG17. Finally, they launched a call for the adoption of dynamic indicators that can be updated as the implementation of the Agenda advances.³⁷

It appears that we are coming close to the finalisation of a set of indicators for Target 16.4.2. Unfortunately, though, we run the risk of undermining the universal nature of the Agenda, as not all situations and actors have been assigned indicators. Not only countries that import arms or are affected by armed violence require indicators, but also those involved in other phases of arms transfers. The indicators also fail to cover all types of conventional arms. It is in this sense that the ATT, to which the Rule of Law Unit refers in its concept note on SDG16,³⁸ is a relevant source for the elaboration of complementary indicators that can fill this gap.

Therefore, Article 12, on Record keeping, Article 13 on Reporting, and Article 14 on Enforcement of the ATT should be taken into consideration. They can serve as a reference for proposing indicators on the creation, maintenance and updating of national records on the authorisation of transfers - at least exports - of all kinds of conventional weapons, or, failing this, small and light weapons; the presentation of minimal reports on regulatory measures for transfers; annual reports on transfers; and measures to support implementation, such as laws and regulations.

Target 16.4.2 and the ATT have the potential of being tools for building "positive peace", understood as "the presence of attitudes, institutions and structures which create and sustain peaceful societies". It "represents the capacity for a society to meet the needs of citizens, reduce the number of grievances that arise and resolve remaining disagreements without the use of violence".³⁹ Both processes arose from the recognition that poverty, inequality, armed violence and uncontrolled arms transfers are part of a vicious cycle. They therefore have the potential to fill existing gaps in human security. It is necessary to "[link] the benefits of promoting the norm of responsible international arms trading with the achievement of the MDGs and SDGs, mostly in terms of the treaty's potential contribution to reducing armed violence".⁴⁰

Cooperation on implementation will be fundamental. SDG17 on the strengthening of the means of implementation and the revitalisation of the global partnership for sustainable development offers a space for providing assistance on capacity-building; funding for development; the production and improvement of coherent strategies and public policies at the national level. This is another important point of convergence with the ATT. It is worth exploring the synergy that can be generated with Article 15 on International Cooperation and Article 16 on International Assistance.

The foundations have been established, but as of now, both processes only exist on paper. An ongoing show of commitment to implementation is needed from the United Nations Member States and the other parties responsible. Otherwise, they will be just another list of good wishes.

Possibilities for concerted action exist, resulting from decades of international work by governments, organisations and civil society, and the production and generation of knowledge. Such action is necessary to address the serious global existential challenges we are facing and put an end to the profound socio-political, economic, military and environmental consequences these challenges generate.

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- 21 • “End abuse, exploitation, trafficking and all forms of violence against and torture of children.”
- 22 • “Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime.”
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INFOGRAPHICS



INFOGRAPHICS:
ARMS AND HUMAN RIGHTS
Curated by Daniel Mack
Graphics by Cassiano Pinheiro



THE WEAPONS

CONVENTIONAL ARMS

Small arms



- REVOLVERS
- PISTOLS
- RIFLES
- CARBINES
- SUB-MACHINE GUNS
- ASSAULT RIFLES
- LIGHT MACHINE GUNS

Light weapons



- HEAVY MACHINE GUNS
- GRENADE LAUNCHERS
- PORTABLE ANTI-AIRCRAFT
- PORTABLE ANTI-TANK
- MANPADS
- MORTARS

Unmanned Aerial Vehicles



- UAVs-DRONES
- LAWS

Explosives and munitions



- CARTRIDGES (bullets)
- AMMUNITION
- GRENADES
- BOMBS
- TORPEDOES
- MINES
- SUB-MUNITIONS

Missiles



- MISSILES
- MISSILE LAUNCHERS



Artillery systems



Tanks and armoured vehicles



Military aircraft



Warships and submarines

WEAPONS OF MASS DESTRUCTION



Biological



Chemical



Nuclear

LESS LETHAL



Rubber Bullets



Tear Gas



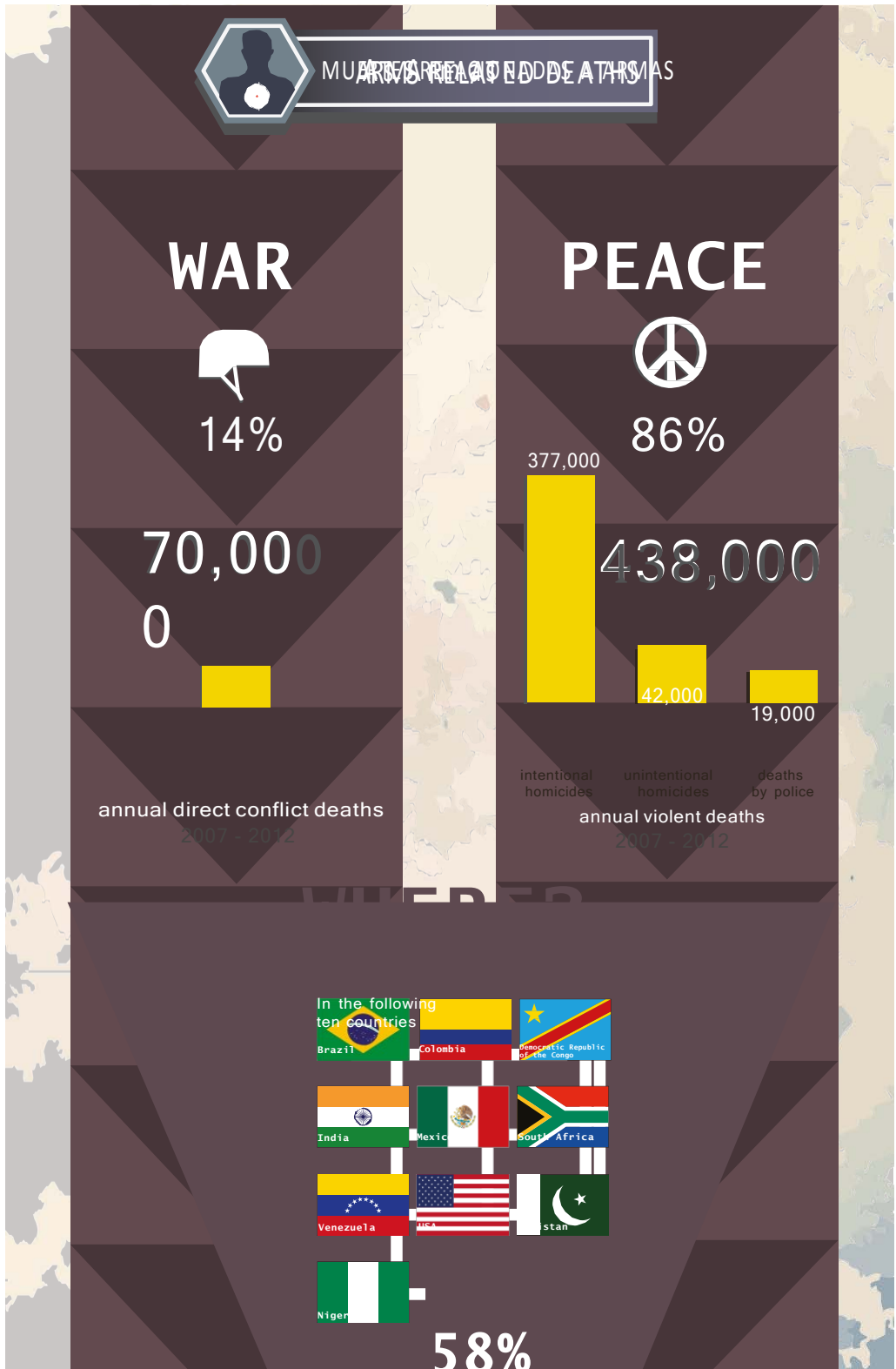
Electroshock weapons



Grenades: Stun, sting and gas

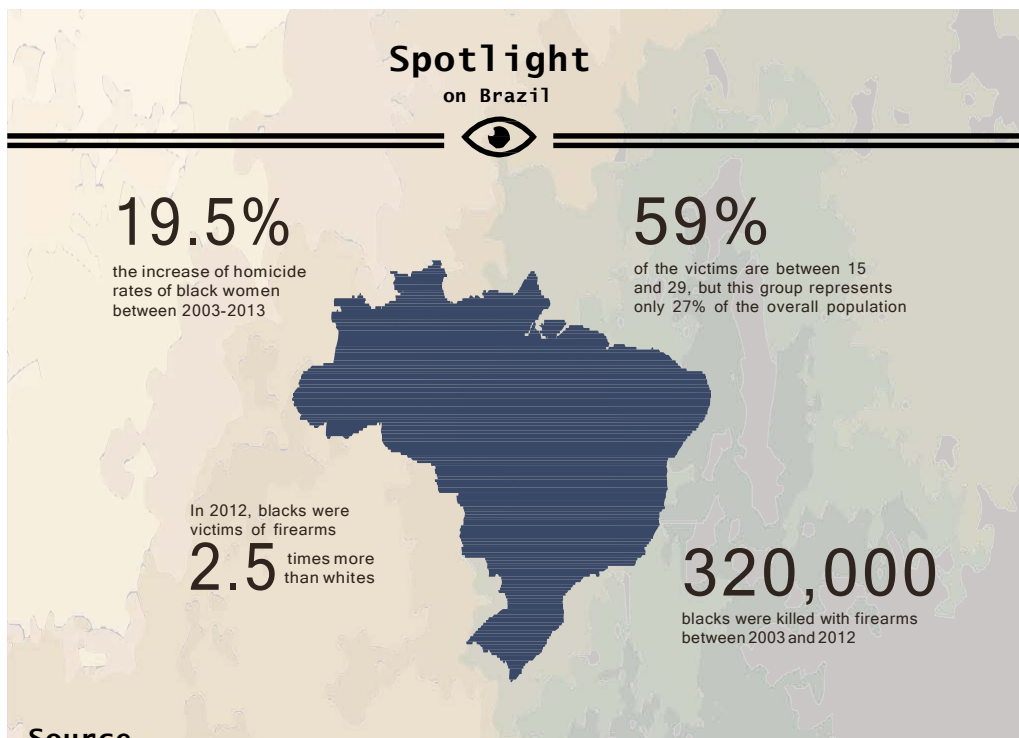
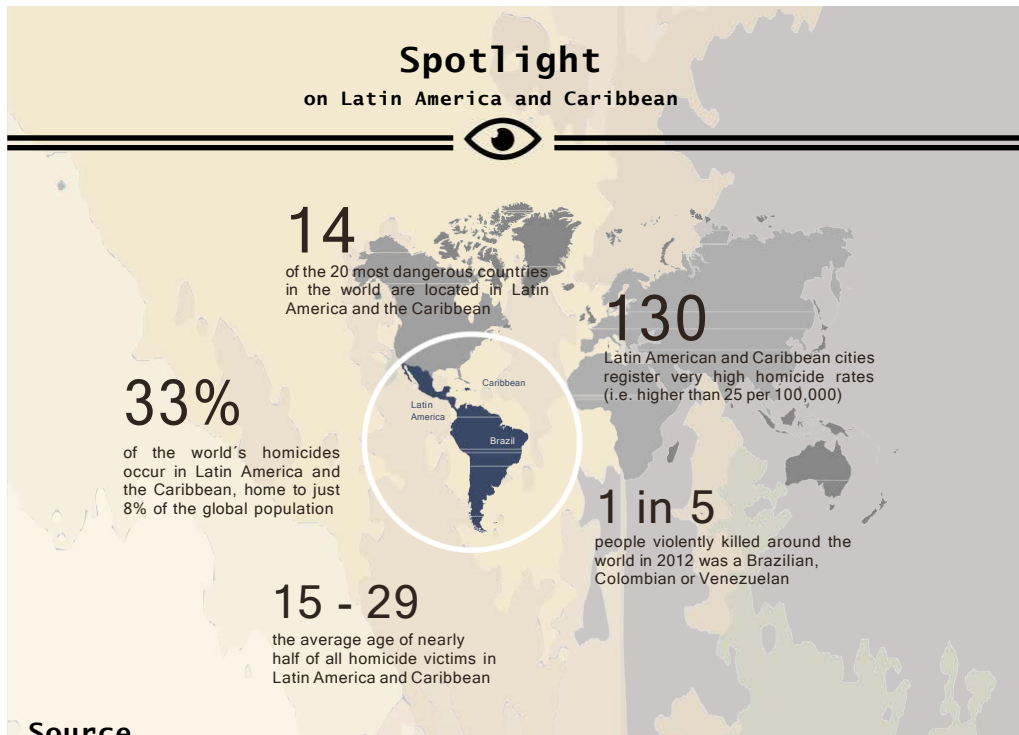
Sources

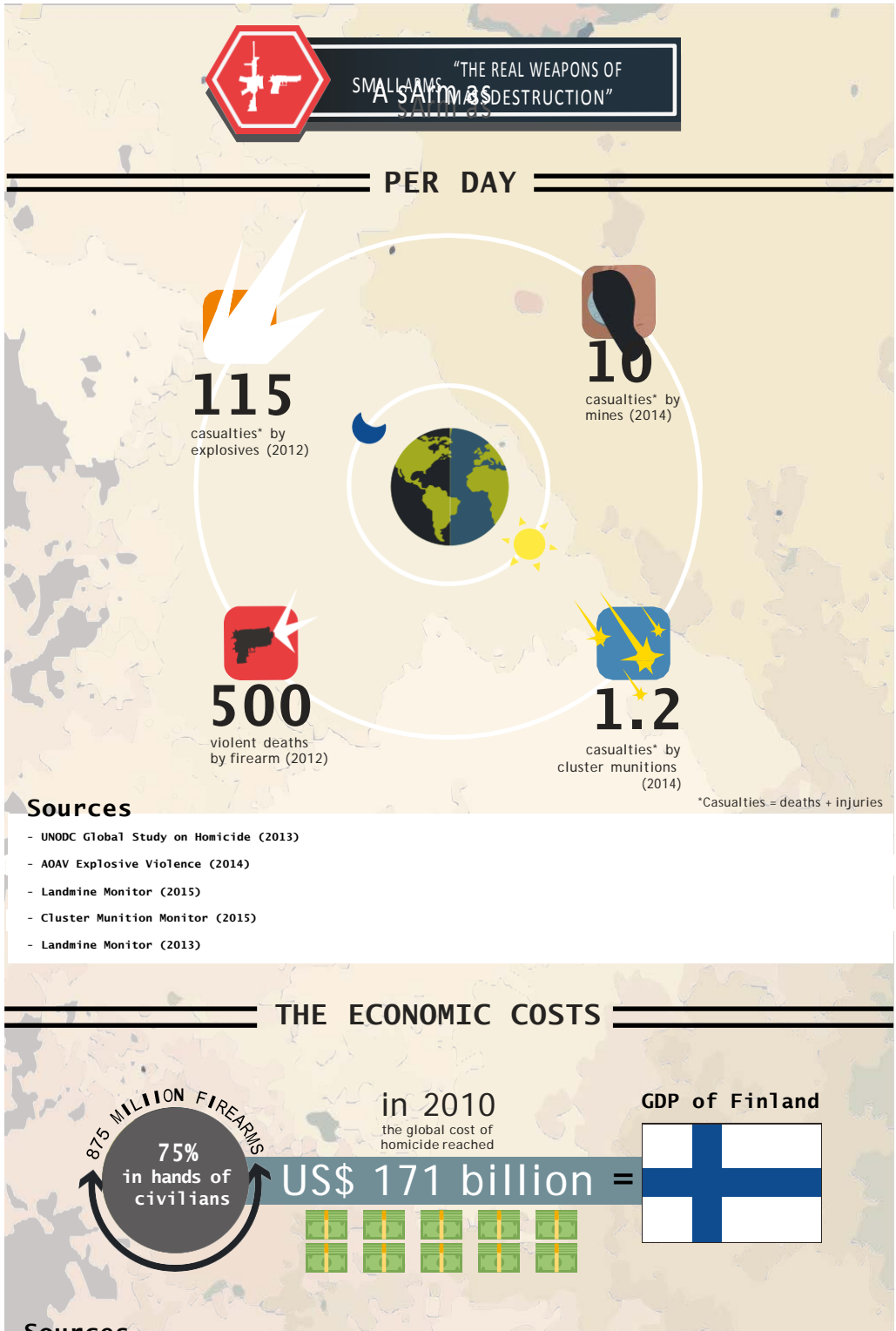
Small Arms Survey (2008); UN Register



Source

-Global Burden of Armed Violence (2015)





Sources

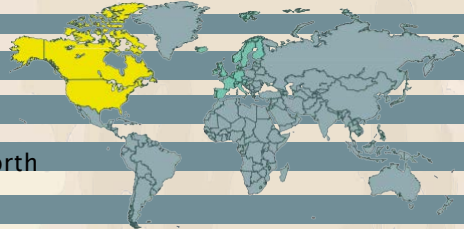
- Global Burden of Armed Violence (2015)
- Small Arms Survey (2015)



MERCHANTS OF DEATH THE WEAPONS

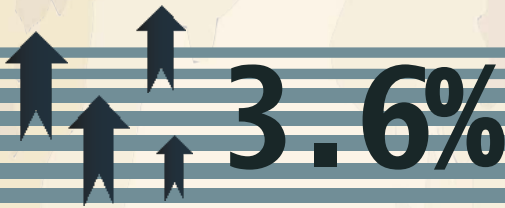
PRODUCTION

84.2%

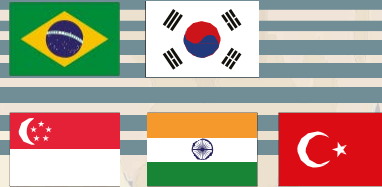


of arms sales are from companies in North America and Western Europe.

North America Western Europe



3.6%



of arms sales are from companies in emerging arms producing countries (Brazil, India, South Korea, Singapore and Turkey).

Sources

-SIPRI Fact Sheet (December 2014)

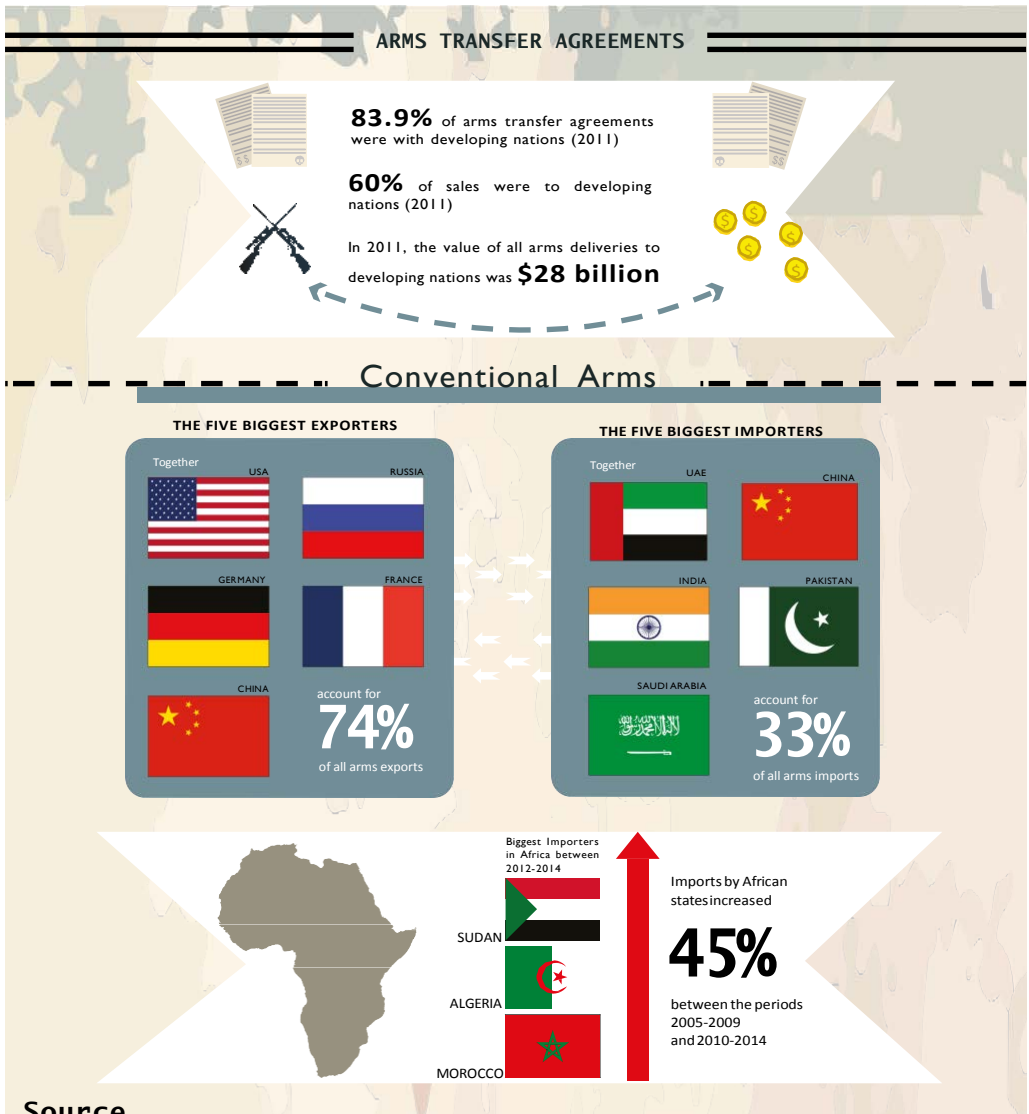
THE INTERNATIONAL ARMS TRADE

Value globally approximately

\$100 BILLION / YEAR

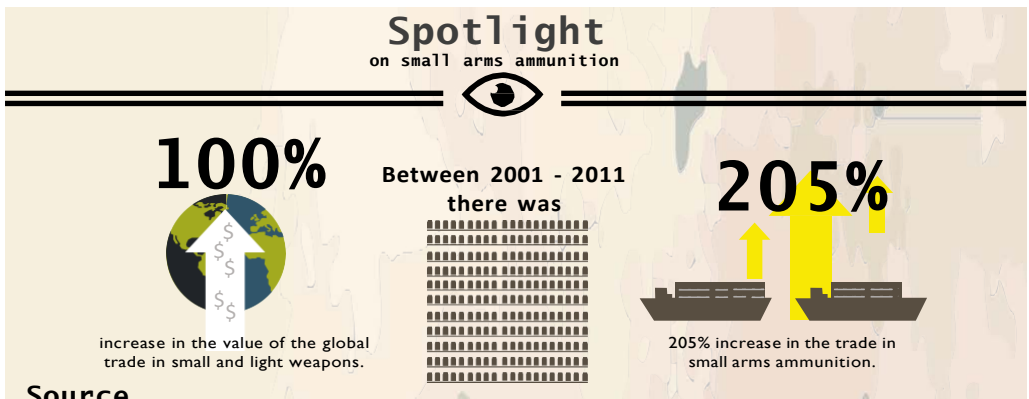
Sources

-Amnesty International - Killer Facts (2015)



Source

-SIPRI Fact Sheet (March 2015)



Source

-Small Arms Survey Yearbook (2014)



TO SAVE AND PROTECT ?

THE WEAPONS

POLICE, ARMS AND VIOLENCE

19,000

average number of global deaths per year due to legal police interventions (2007 - 2012)



1,040

people were killed by the US police in the first eleven months of 2015

3

people per day



3,000

people were killed by Brazilian police (2014)

8

people per day

Sources

- Global Burden of Armed Violence 2015
- The Guardian (2015)
- 9ª edição do Anuário de Segurança Pública (2015)

LESS LETHAL WEAPONS

450

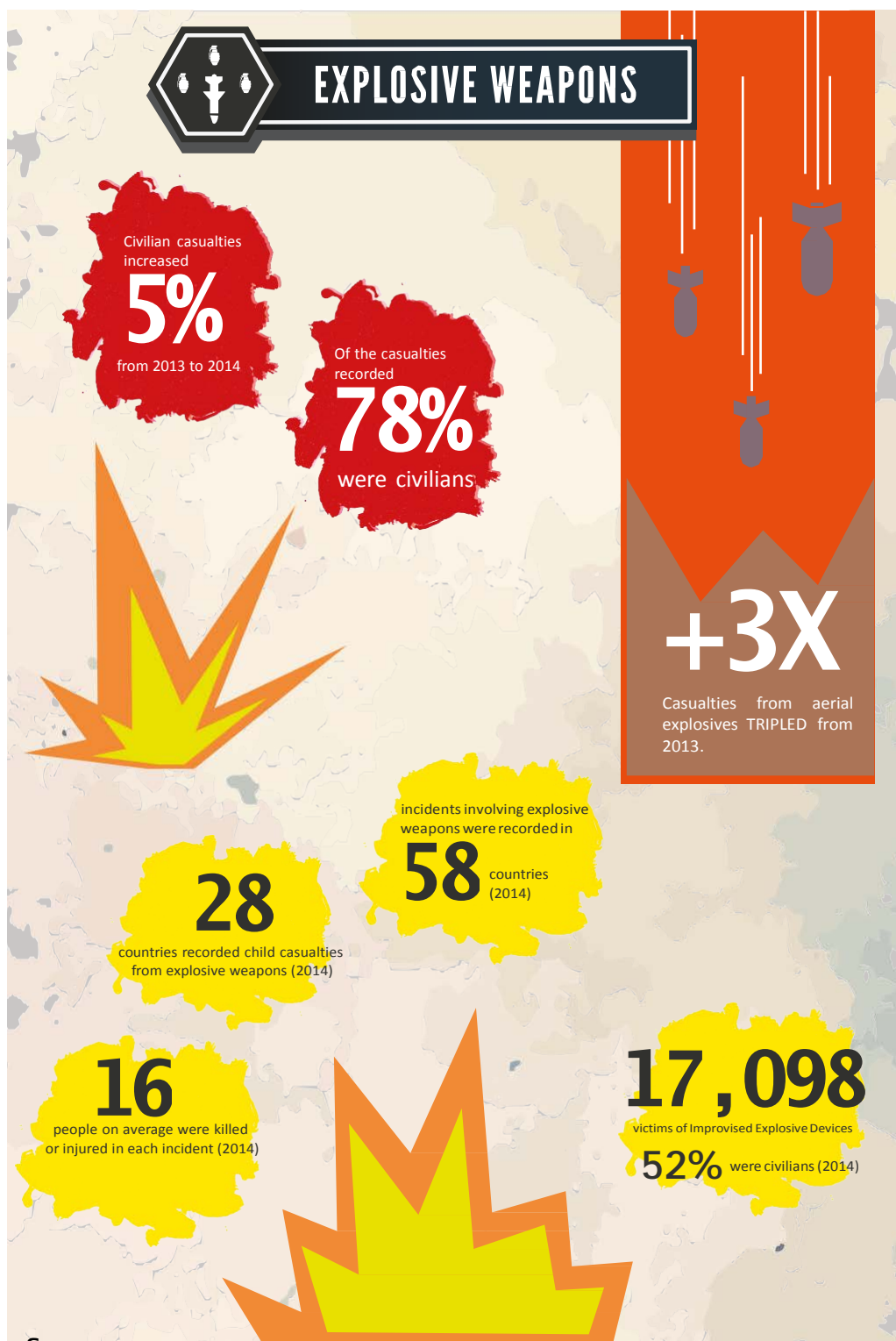
companies in 52 countries manufactured less lethal weapons in 2011

16,200

law enforcement agencies in about 100 countries purchased at least 543,000 electro-shock (TASER) devices between 1998 and 2011

Sources

- Small Arms Survey (2011)



- A0AV Explosive Violence (2014)

IMAGES



THE IMPACT OF ARMS ON CIVILIANS

A photo essay by Magnum Foundation Fellows

MAGNUM FOUNDATION'S PHOTOGRAPHY AND HUMAN RIGHTS FELLOWSHIP

From the front lines of Ukraine to the streets of Kenya, Magnum Foundation's Human Rights Fellows lend us insider perspectives on issues that have true global relevance. As you're drawn into these pages, you will see the devastating effects of weapons and warfare on civilian populations through the eyes of documentary photographers for whom "out in the field" means being home. The diversity of experience in our network of Fellows is extraordinary, and together their images show us that pain and resilience are shared amongst humanity.

2011 Human Rights Fellow Boniface Mwangi was born and raised in Kenya. Today, he uses his photography to combat violence and political corruption in Kenya, while advocating for a citizens' movement to rebuild the country. He has established safe, creative spaces for locals to discuss and organise peacefully, catalysing real community-driven action. His commitment to his country gives his images a certain weight and guile that is often out of reach for a non-native photographer.

2014 Human Rights Fellow Loubna Mrie picked up a camera when Syria's revolution first began. She was compelled to shed light on the atrocities that the Assad regime was inflicting on the Syrian people. She embedded with the rebels, obtaining unparalleled access. Boniface and Loubna, along with Eman Helal of Egypt, Pattabi Raman of India,

Anastasia Vlasova of Ukraine, and the rest of our Human Rights Fellows are all driven by a commitment to bear witness inside their countries, to reveal powerful evidence and share insights that often go unseen.

Our Fellows are dedicated to finding impactful visual strategies to create frameworks that expose and engage. In their work they do not simply illustrate, they interrogate. They show us that when independent, intelligent, and critical eyes are on the world, photographs can endure as testimony to inform the public and shape policies.

There is a resounding need for platforms to allow young regional photographers to harness their abilities as storytellers and as activists, and to contribute meaningfully to their home countries and beyond. Magnum Foundation's Photography and Human Rights program provides a transformative opportunity for photographers to tell stories within their communities. With professional training and intensive mentorships, we have empowered 28 Fellows from 19 countries. They have continued to share their learning with their communities and a broader network of colleagues and activists. Since the inception of the program 6 years ago, we have been fostering a global network of support as well as instilling values of ethical practice. These 28 Fellows continue to bring the human rights violations in their backyards to public attention through in-depth documentary photography.

Magnum Foundation





ANASTASIA VLASOVA

Debaltseve, Donetsk Oblast | Ukraine

January 22, 2015

“The view of a room in a kindergarten which was hit by a Grad rocket launcher in the city of Debaltseve, Donetsk Oblast. According to reports, Kremlin-backed insurgents struck the empty kindergarten rather than their presumed target of a Ukrainian military field command centre nearby.”

ANASTASIA VLASOVA

Debaltseve, Donetsk Oblast | Ukraine

February 3, 2015

“A local resident sits in an evacuation bus after being evacuated from the embattled city of Debaltseve, Donetsk Oblast on February 3, 2015. The woman described how she was injured after the roof of her house fell as a result of the shelling of Debaltseve.”





BONIFACE MWANGI

Mathare, Nairobi | Kenya

January 17, 2008

“Opposition supporters retreat while being engulfed by tear gas smoke in Mathare, Nairobi in Kenya. It was reported that violence killed over 1,000 people and left over 500,000 displaced.”





BONIFACE MWANGI

Mathare, Nairobi | Kenya

June 7, 2007

“A woman carries her unconscious baby after police tear gassed her house during a crackdown on members of the Mungiki sect in Mathare, Nairobi. The slum was believed to be a major hideout for the allegedly quasi-religious, militant sect members. When the guns fell silent, 14 people lay dead, most of them shot at close range having surrendered or having been cornered by the police.”



EMAN HELAL

Cairo | Egypt

October 2013

“An Egyptian woman asks an army soldier to let her cross Tahrir Square to go home, but he refused. The Egyptian police in riot gear cleared two sprawling encampments of supporters of the country’s ousted Islamist president in Cairo with armored vehicles and bulldozers. The army closed streets if they heard any news about marches by the Muslim Brotherhood and would not allow people to walk on the closed-off streets.”



EMAN HELAL

Tahrir Square, Cairo | Egypt

January 25, 2011

“Egyptian protestors fled after the riot police fired a lot of tear gas in Tahrir square on the first day of the Egyptian Revolution, in Cairo, Egypt. The police used a lot of violence to control the square and tried to force the protestors to leave but they refused to go until the early morning of the following day.”

LOUBNA MRIE

Aleppo | Syria

August 2013

“A Free Syrian Army fighter in Aleppo, Syria, rests inside his military base, which used to be a house. The picture shows the transformation of what once was a house into a military base for fighters. Behind his bed, the fighter has drawn a map of Syria and listed the names of his fellow fighters who have been killed.”







LOUBNA MRIE

Aleppo | Syria

August 2013

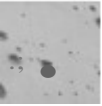
“This picture, taken from a sniper hole, shows a street that separates the rebel area from the Syrian government’s area in Aleppo City, Syria. Through the hole you can see both sides of the disputed street. It is rare to see anyone walking these streets since they will immediately get shot at. On the frontline of Aleppo, only a few meters separate the rebel held areas from the government-controlled areas. The battle is window to window, wall to wall.”

PATTABI RAMAN

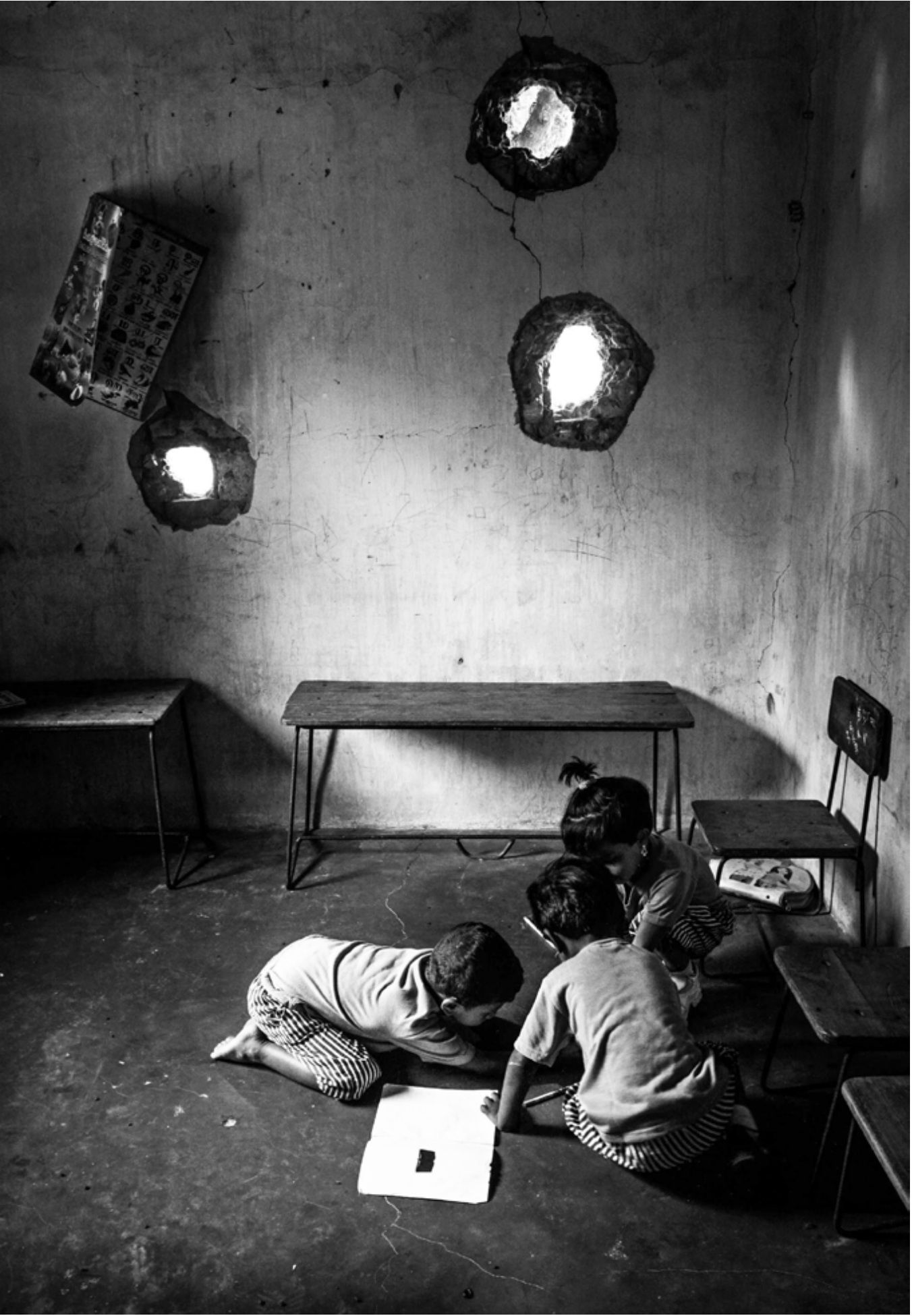
Pudukudirrupu | Sri Lanka

July 17, 2012

“Women and children inside their house after de-mining at Pudukudirrupu, north Sri Lanka, one of the worst affected areas of the war between government forces and Liberation Tigers of Tamil Eelam (also known as the Tamil Tigers).”







PATTABI RAMAN

Jaffna | Sri Lanka

November 23, 2011

“A working kindergarten in Jaffna District, north Sri Lanka, one of the worst affected regions during the war.”

CONVERSATIONS



**“ANY WEAPON CAN BE
A LETHAL WEAPON”**

Maryamal-Khawaja

“ANY WEAPON CAN BE A LETHAL WEAPON”

Maryam al-Khawaja

- *The leading human rights activist describes the deadly use of less-lethal weapons to control protests in Bahrain - and her fight to stop it* •

The popular uprising against the Bahraini regime began in 2011. Bahrain's rulers acted swiftly, requesting assistance from Saudi Arabia and the United Arab Emirates given the extent of the protests. A brutal crackdown on protesters ensued which has seen over one hundred people killed, and thousands detained – reports of enforced disappearances are extensive and many detainees have been systematically tortured. Many more have been injured.

Underpinning this repression is Bahrain's use of so-called “non-lethal” weapons, such as tear gas and pellets. This has allowed much of the atrocities occurring in the Gulf state to be downplayed internationally – both by Bahrain and its allies. However, local human rights activists continue to risk their freedom and security by insisting that the regime has done little to change its old ways.

Maryam al-Khawaja, who helped push for the original protests and is now co-director of the Gulf Centre for Human Rights, is one such activist. When she was sentenced in absentia, she was in effect sentenced to exile, but tirelessly continues to draw the world's attention to the ongoing human rights abuses that are taking place in Bahrain. Before, during and immediately after the protests, she worked to document the injuries that protestors had sustained after coming under attack from security forces using “non-lethal weapons”. These findings confirmed – as if there was any doubt - that this name is an oxymoron, especially when in the hands of certain repressive regimes.

In an exclusive interview with Sur Journal, Maryam describes the real impact of these weapons on a civilian population. She discusses the crucial role that civil society must play documenting their use to facilitate holding the companies that supply these weapons

to account. In particular, she recalls the successful #stoptheshipment campaign that generated massive international pressure and resulted in South Korea cancelling a huge shipment of tear gas canisters that were destined for the streets of Bahrain.

• • •

Conectas Human Rights • Which weapons are used and in which ways by the Bahrain security forces against the civilian population?

Maryam al-Khawaja • One of the things we have seen in Bahrain is the use of less lethal weapons as lethal weapons. If you look at the lists that were compiled by the Bahrain Center for Human Rights you will find that tear gas has been one of the main causes of death in Bahrain over the past 4-5 years, since the uprising started. However, we believe the number to be actually larger than what is documented. The reason for this is that the forensic doctors are all employed by the government of Bahrain so they record whatever they are told by the government to record as the cause of death. The list of people who have died from tear gas injuries is limited to the cases which we have been able to document: cases of people subjected to tear gas and who straight afterwards were suffocated as a result of it, or people who were shot directly in the head with the tear gas canister causing their deaths.

The Bahraini government is smart because they know that if they use live ammunition, this would draw international criticism, especially when it causes extrajudicial killings. And when someone like me goes and meets with, for example, the German government and tells them that the Bahrainis are using tear gas as a lethal weapon or that they are using tear gas excessively then the response is usually “Well, what is the problem with that? We use tear gas here too.” Tear gas has become such a normal crowd control weapon that it does not seem like a big deal. But what most people do not understand is that in Bahrain tear gas is being used in an unprecedented way - we worked with Physicians for Human Rights on a report that details this. Also, if you look at the videos coming from Bahrain - many are available on YouTube - there are tens if not hundreds of videos that show how riot police in Bahrain go inside a residential area and shoot tear gas, or they will walk up to a home and shoot tear gas inside the window. And, considering such unrestricted and often lethal use, almost every rule or regulation that surrounds the use of tear gas as a less lethal weapon is actually being broken.

Conectas • How do you see the insistence by some on the name “non-lethal weapons” ? From your experience should they be regulated (production, export, sale, use) differently than other types of arms?

M. K. • Any weapon whether it is called “non-lethal” or “less-lethal” , can be a lethal weapon, so why is it that the regulation is different?

But the issue is not the weapon and the regulation that surrounds it. It is about the country you are selling it to. A company knows that when it sells tear gas to the Bahraini government - whether it is identified as a less lethal weapon or not - it is more than likely going to be used as a lethal weapon. Also we do not even know what kind of medical issues are going to emerge in 20-30 years time because of the way that tear gas has been used in Bahrain. What will the effect be on thousands of people that have been subjected to tear gas almost on a nightly basis for several years? So the regulation should focus on who the weapon is being sold to and how it is being used, especially if there is a history of a government using it as a lethal weapon.

Conectas • What are the origins of the majority of weapons that are found in Bahrain?

M. K. • In the beginning, the tear gas was mostly being bought from NonLethal Technologies Inc. in the USA. Since 2012, we have started seeing a massive influx of tear gas coming from a Brazilian tear gas company, Condor - we have actually seen canisters that prove that they have been sold as recently as 2014.

The Bahraini government has also been using pellet shot guns, which are usually used for hunting birds - the second cause of death after tear gas. They are also considered a less-lethal weapon, but at short range they become very lethal. We have seen a number of children and adults who have been killed by the use of pellets. The company that we know is selling to the Bahrain government is based in Cyprus, VICTORY Cartridges.

We were told that Rheinmetall Denel Munitions, the German/South African company from which we have found canisters of tear gas in Bahrain, is not actually selling weapons directly to Bahrain, but rather to the United Arab Emirates (UAE). We suspect that even though there is an end user agreement between South Africa and the UAE, the UAE is giving the tear gas to the Bahrainis. We have not been able to get evidence on that yet, but this is something for South Africa to investigate and if they find that the UAE has actually breached the agreement and has been giving the tear gas to Bahrain then they need to cancel any agreement that they have.

What is even more troubling is Brazil selling tear gas to Bahrain directly when there are very well documented cases and very well documented reports and an international recognition of how tear gas has been used in Bahrain.

Conectas • How do you evaluate the role of local civil society organisations/movements documenting the use of weapons (live and less-lethal) and raising awareness on human rights violations on the ground?

M. K. • In the beginning there was a genuine belief by people in Bahrain that documentation [by civil society] would lead to something. We did not need to go around convincing people to document, they did that on their own, and that is why we see hundreds of videos

- including of the extra judicial killings - because people were automatically pulling out their cameras and trying to document as much as they could. The problem was that people were not aware of how to do the documentation so you would see, in the videos, boxes full of tear gas canisters but you would not be able to read the label to see when and where it was manufactured. So one of the things we had to work on was making people aware of how to take pictures of canisters so that we can actually identify them. When it comes to accountability, when it comes to looking for legal methodology, then the expiration date, when it was manufactured and the name of the company are critical and if this information does not exist then we can not do anything.

Unfortunately, in 2015 that genuine belief in the idea of documentation to some extent no longer exists. Many people do not feel like the documentation that they have done over the past four years has brought any real kind of accountability. Until we are able to truly hold companies and governments accountable for selling these weapons that are being used to kill people, we are going to find less and less people believing in the importance of documentation. This is not just frustrating but it is a very hard hit to our work, because without the documentation, of course, we cannot really move forward.

Conectas • So you would call on civilian populations to continue documenting, to continue taking photographs, taking videos of these weapons?

M. K. • Yes, for sure. That is one of the things that we are trying to do, but it is becoming more and more difficult. Before you could videotape at the protests. Now the protests are much smaller, they are attacked much faster, and there is no space to actually stand there and take a picture of the canister. And if you are carrying a camera, you are immediately a target. We, of course, cannot put people at risk, so we always tell them “If you can, please take a picture of this. If it puts you at risk, please do not do it.”

Conectas • Let’s talk about #stoptheshipment campaign – a great example of a civil society campaign that our readers might be able to replicate in other locations and for other causes.

M. K. • Bahrain Watch received leaked documents from a good Samaritan that showed that the South Korean government was about to sell three million tear gas canisters to the Bahraini government – equivalent to about 4 tear gas canisters per Bahraini citizen. The leaked document was a tender so it was still in the process of being negotiated between the South Korean government and the Bahraini government.

Bahrain Watch created an entire online campaign surrounding the sale. First, they partnered with local South Korean NGOs, including Amnesty South Korea. Then they set up an online form, part of their website, where people could go to send a fax or an email directly to the Foreign Ministry in South Korea, condemning the sale of tear gas to the Bahraini government. The campaign #stoptheshipment made it so easy for people to participate, that it completely jammed the email systems and the fax

machines of the Foreign Ministry in South Korea. The campaign went on for a few months before South Korea backed down.

One of the most important components of the campaign was reaching out to local South Korean NGOs which generated real awareness in the country. This local support enabled massive outreach to be generated online and on social media.

More challenging was getting support from international NGOs and getting media attention on the issue. Much of the attention and support actually came after the campaign was successful in cancelling the shipment.

Conectas • Finally, what are the assets and liabilities on focusing campaigns on a corporate actor rather than only on a government?

M. K. • There are both pros and cons. You have the issue of how do you target a corporation? Civil society in our region has so much experience in targeting and criticising governments but we do not have as much experience targeting companies. We find that arms companies are less susceptible to international pressure than governments and other non-arms producing companies. This makes putting pressure on them to change their policies a lot more difficult.

We are going to be looking more and more into how we can target these different companies and when they are connected to the government also target the government. Because usually, like we saw in South Korea, targeting the government helps ensure that the campaign is a success. If the South Korean government had not been involved in the selling of weapons from the South Korean company, I think it would have been a lot more difficult to get the company itself to stop that sale.

International civil society needs to get together and develop a stronger strategy of how we are going to move forward when it comes to targeting arms companies and governments who are selling arms that are being used for war crimes and human rights violations.

*Interview conducted in October 2015 by Oliver Hudson
and Thiago Amparo (Conectas Human Rights).*



MARYAM AL-KHAWAJA – *Bahrain*

Maryam al Khawaja is co-director of the Gulf Center 4 Human Rights
and a member of Bahrain Watch.

Original in English.



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"ANY WEAPON CAN BE A LETHAL WEAPON"

ESSAYS



**BANKS AND HUMAN RIGHTS:
A SOUTH AFRICAN EXPERIMENT**

Bonita Meyersfeld
& David Kinley

**LATIN AMERICA'S PROTAGONIST
ROLE IN HUMAN RIGHTS**

Kathryn Sikkink

**FROM HYPER-MATERNITY TO HYPO-MATERNITY
IN WOMEN'S PRISONS IN BRAZIL**

Ana Gabriela Mendes Braga
& Bruna Angotti

BANKS AND HUMAN RIGHTS: A SOUTH AFRICAN EXPERIMENT

Bonita Meyersfeld & David Kinley

• *How facilitating dialogue between banks
and the human rights sector results in gains for all* •

ABSTRACT

Human rights actors have increasingly turned their attention to the role of multinational corporations (MNCs) and their ability to promote or impede the fulfilment of economic, social and cultural rights. This discussion requires an analysis of all relevant players, including those who finance the operations of MNCs. Banks can have significant influence over the operations of MNCs and their role needs to be the subject of greater interrogation, in theory, policy and practice. This article records and analyses some of the policy-oriented initiatives undertaken in South Africa towards the creation of standards for banks operating in the region. Experts and practitioners in Africa have come together to determine the realities faced by the banks of major development projects in the region. This resulted in the Draft Johannesburg Principles of 2011—yet to be adopted by industry— which speak to the overall protection of human rights by banks.

KEYWORDS

Human rights | Multinational corporations | Banks | Johannesburg Principles | Business and human rights

1 • Introduction

International law and the regulation of multinational corporations is a rapidly developing and highly contested area of law. For the most part, there is agreement that there is a need for some type of global standardisation of multinational corporate activity to prevent human rights violations. This is reflected in the UN's Framework (and accompanying Guiding Principles) on Business and Human Rights.¹ The Guiding Principles consider three players: affected communities (or victims); business enterprises; and states. Their focus, as well as the thrust of the global debate, oscillates around the corporation as an entity undertaking potentially harmful operations. A narrower concern, however, is slowly emerging.

In this article we propose that banks are a key, and under-discussed, entity in achieving human rights-centred business operations. Banks provide the capital with which large-scale development projects are funded and are at the heart of most economies worldwide. Their role, therefore, requires a most specific and detailed analysis.

During the course of 2011, the School of Law at the University of the Witwatersrand (Wits) held two roundtables regarding banks and human rights to facilitate better understanding between financial agents and human rights actors. The roundtables provided the basis for the formulation of the so-called Draft Johannesburg Principles - *A New Framework for South Africa: Financial Institutions, Human Rights and International Best Practices (Draft Johannesburg Principles)*, in November 2011.² The seminars brought together representatives from three different sectors: human rights activists; academics; and those working in public and private banking sectors. Each participant in the seminar brought a unique insight and breadth of knowledge, and allowed the group to develop an approach that took account of the difficulties encountered by the banking sector while ensuring that it met the concerns of human rights activists. At the time of writing, the Draft Johannesburg Principles are being refined and negotiated with a view to engaging banks in South Africa.

The Draft Johannesburg Principles, and the discussions which informed them, are a useful point of reference to consider the role and responsibilities of banks in the developing area of business and human rights law. This article discusses the genesis and development of the Draft Johannesburg Principles, with a focus on their implications for the role of banks in the business and human rights debate. In particular, the authors focus on the impact and role of banks that emanate from or operate in sub-Saharan Africa. The focus is on this area for two reasons.

The first is that the majority of the work in international law on business and human rights is developed by academics and policy makers in the Global North. This is not to say that the Global South is absent or silent in global law making. Rather, our proposition is that the Global South can and must increase its contributions to international law discourse. There is a wide body of literature discussing the global hegemony in international law and the way that the actors of the Global North tend to drive global policies.³ This is relevant to the outcome of global policies, which tend to be influenced by the dominant interests and/

or experiences of such actors. For example, the Rome Statute of the International Criminal Court contains three crimes: genocide, crimes against humanity and war crimes (with the crime of aggression still to be developed). It is noteworthy that the crime of illegally dumping toxic waste, for example, was not included in the Statute. There are many reasons for this and we do not seek to address them here. Rather, we note that the *effect* of its omission is that one of the most significant forms of harm affecting developing economies – and a practice that protects developed economies from having to live with toxic waste – is not a global crime. There is a correlation (not necessarily causation) between the harm criminalised in the Rome Statute, which is harm committed often by African heads of state, and the omission of harm committed by the developed world through toxic waste dumping.

In the same way, there is at least a correlation between the current international law principles (or the lack thereof) regulating banks and the Global North's economic strength, which is fortified in part by the current status quo vis-à-vis banks' operations. The same deficiencies exist in respect to existing principles regarding project finance in Africa, such as the Equator Principles,⁴ which speak mainly to best practice and compliance with *environmental* standards and speak less to human rights – although human rights standards were inserted into the third iteration of the Equator Principles in 2011.⁵ The same is true of the OECD Guidelines, which are recommendations addressed by governments to multinational enterprises operating in or from adhering countries (the 34 OECD countries plus 8 non-OECD countries: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania).⁶ The majority of the signatories hail from the Global North.

It is also significant to note that the harm we propose to address is moored in the structure of poverty. In the context of global economic inequality, the phenomenon that is most often under-discussed in the business and human rights debate is that of poverty; poverty represents a range of human rights violations. Banks have a role, albeit limited, to promote corporate activity that has the potential to alleviate poverty through wealth creation and (crucially) wealth distribution. The inverse is also true: banks have a role to ensure that corporate activity does not profess to alleviate poverty when, in fact, it entrenches structural poverty in the areas of operation.

The second reason for this approach is that sub-Saharan Africa is the location of a peculiar co-existence of increasing wealth and increasing poverty, particularly in the case of South Africa. South Africa is both the recipient *and* perpetrator of harmful transnational corporate conduct. As is the case with most BRICS countries, this bifurcated character manifests itself in a developing economy housing a stubbornly high proportion of indigent peoples.⁷ This anomaly is not entirely new but its coexistence with the development of business and human rights principles in international law is. These two reasons are at the heart of our focus on the Global South and sub-Saharan Africa.

The remainder of this article is divided into two parts. In the next part, we contextualise the role of banks in the reality of global governance gaps that exacerbate poverty in the

Global South. In the final part of the article we describe the practical proposals for a regulatory regime that would facilitate banks' responsiveness to human rights violations by the multinational corporations in which they invest.

2 • Business, Human Rights and Banks: The Absent Regulator

Given the significant power of banks, especially in the developing world, it is interesting to note that relatively little attention has been paid to this category of actor in the international law debates regarding human rights and business. The debate regarding the extractive industry and human rights, for example, rarely includes an assessment of banks that provide the capital for mining. Of course there is a great deal of discussion regarding trade, financing and investment from a developmental point of view;⁸ but the intersection of a fiscal analysis and international human rights law is a relatively new and under-explored enquiry.⁹

The link between banks and human rights has a particular resonance for the BRICS economies. BRICS states, such as South Africa, are poised at a unique historic moment where they are both growing their own economies and contributing to the growth of other less developed economies. This is particularly true of South Africa, which is both a target jurisdiction for foreign financial activity and has its own financial sector that is targeting surrounding developing African states.¹⁰ This duality as an emerging economy provides a seminal moment in financial development, where a regulatory system could be developed to protect human rights standards both within the jurisdiction of the BRICS state and in surrounding states. Appropriate regulation could well protect a country, such as South Africa, from harmful and exploitative investment practices from foreign investment; it could also ensure that South Africa's growing financial sector applies similarly protective standards when investing outside of South Africa, and in particular, in the broader African region.

It was in response to this opportunity that the Draft Johannesburg Principles were formulated. The Wits University roundtables envisaged three objectives. The first was to bring together entities that rarely engage with one another, and when they do, appear to "speak" in different languages. The concept that perhaps draws "finance" and "human rights" closest is that of "risk" and its avoidance and management. Here, there can be a shared aim that, for example, a proposed investment not be compromised by legal or social instability triggered by human rights violations. Typically, the delineation of these two camps has, over the decades, created entrenched positions that are seen as alien and mutually exclusive. It was time to bridge this divide.

The second objective was to develop a regionally relevant framework for the integration of human rights considerations into the operations of banks that take account of the unique situation in which South Africa finds itself, namely, as one of the largest financial markets in Africa.

The third objective was to avoid the traditional North-South development of standards. This was an opportunity to pre-empt a situation where standards are developed in

the Global North and then applied to the Global South. Banks in the South African environment face both similar and different constraints to banks in Europe and the United States. As such, the roundtables sought to allow South Africa to lead the way in ensuring appropriate standards for lending in its own context.

Why would banks and human rights advocates come to the same party? As the workshops progressed, a distinct focus on project finance emerged (namely, the long-term financing of large-scale infrastructure or industrial projects), with human rights issues and responsibilities in transactions coming out most clearly in project financing roles. In preparing the seminars, two questions came to the fore. The first was why banks matter to the implementation of human rights and, in particular, economic, social and cultural (ESC) rights. The second question was why ESC rights considerations in particular would matter to banks.

The first question - why project financing matters to human rights law - reveals the obscure and often hidden role of banks. When the idea of coalescing project financing and human rights was first mooted, many human rights activists raised the proverbial eyebrow in surprise. Companies generally operate in the public realm, with reputational considerations that often (although not always) affect their bottom line. An oil spill, mass eviction, or chemical contamination, is “low hanging fruit” in this regard: easily discernable and with a clear nexus between the corporate conduct and the harmful outcome. This nexus, however, is less clear when considering the responsibilities of banks who provide capital to corporations that commit human rights violations. Their invisibility has obfuscated seminal questions that must be asked by human rights activists, especially following the financial crisis. Are such banks complicit in the harmful actions of the multinational corporations that they fund; do banks have an obligation to take steps to help prevent the violation of human rights by the corporations in which they invest; and finally, is it unlawful for banks to profit from the operations of multinational corporations that are complicit in, or commit, human rights violations?

The legal answers to these questions are, at best, unclear. The strategic answers, however, are all resounding “yeses”: the role of banks matters enormously to the protection of human rights. Without investment and finance, corporate activity is blunt. In addition, in the absence of a comprehensive global legal framework governing the role of multinational corporations, banks become themselves potential regulators of sorts. Simply by choosing whether or not to invest in corporations and by imposing investment conditions, banks can compel multinational corporations to comply with international human rights and environmental standards. Banks are thus potentially regulators themselves - *in loco custodis*, as it were - in the absence of home state and/or host state controls.

But why would banks worry about human rights standards? Banks often dismiss human rights considerations as the responsibility of states, not private actors. Such considerations are typically viewed as extraneous to - or indeed, fundamentally incompatible with - the profit-making mandate of banks. Exceptionally, there are those

in finance who argue that human rights considerations are imperative to sound fiscal decision-making. The Thun Group of Bank's 2013 Discussion Paper on the application of the UN Guiding Principles to the banking sector exhibits both sides of this divide when it proclaims that "this is a complex issue for banks as most of their human rights impacts arise via the actions of their clients and are addressed through influence, leverage and dialogue rather than through direct action from the banks themselves."¹¹

Notwithstanding this divide between project finance and human rights, there are several reasons why human rights considerations ought to be seen as integral to the operation of banks. The first is that human rights considerations are helpful indicators of the stability and long-term value of a project. A rights-inclusive analysis may unearth important information regarding investment returns and risk-management, and for this reason it has been argued that responsible lending represents a financial benefit, rather than a financial cost.¹² The European Commission confirms this, noting that socially and environmentally responsible policies "provide investors with a good indication of sound internal and external management. They contribute to minimising risks by anticipating and preventing crises that can affect reputation and cause dramatic drops in share prices."¹³

The second reason why a rights-inclusive assessment makes for prudent investment is the evident monetary value of a corporation's reputation, which in turn will affect a bank's return on its investment. There has been a dramatic increase in the financial value of corporations' reputations, which will inevitably affect their profitability in the longer term. For example, the reputational capital of Coca-Cola in 2005 was said to be \$52bn; and \$12bn for Gillette in the same year.¹⁴ The historic Ford Pinto Memo revealed that the Ford Motor Company knew that the Pinto had design flaws that could result in a fuel tank explosion when the vehicle was subject to a rear-end collision. Ford decided, based on a cost-benefit analysis, that it would be cheaper to settle the legal claims of those who suffered death and disability as a result of the design flaw rather than to recall all Pinto models. It took Ford decades to recoup its reputational – and financial – losses.¹⁵ Similarly, the oil spill in the Gulf of Mexico – and the threat of litigation – has had a dire impact on the share price of BP.¹⁶

A counter example is Johnson and Johnson's Tylenol crisis in 1982, which although over three decades ago, is still one of the most relevant lessons in reputational protection. When seven people in the Chicago area in the United States died after ingesting Extra Strength Tylenol medicine capsules which had been laced with potassium cyanide poison, Johnson and Johnson recalled every package of Tylenol worldwide. This show of honesty – and Johnson and Johnson's invention of the first inherently tamper-proof capsule – restored the company's reputation and the company's stock returned to the 52 week high at which it had been trading immediately before the crisis.¹⁷

Banks, therefore, should be taking the reputational value of their portfolio corporations into account.¹⁸ The human rights and environmental impact and practices of corporations particularly are not extraneous considerations or non-monetary factors,

as is sometimes claimed.¹⁹ Human rights violations are, indeed, not good for business.²⁰ The devastating strikes at the Marikana-based Lonmin platinum mine in South Africa on 16 August 2012 revealed a shuddering fault line underlying the platinum industry.²¹ That business model is clearly unsustainable, a message that had emanated from the human rights community mere days prior to the massacre.²²

The real question is not *if* banks have a role to play in human rights compliance but rather *what* role banks ought to be playing. The Wits University roundtables were an opportunity to harness this question and provide an analysis that is rooted in reality and informed by inter-disciplinary expertise.

3 • Bridging the Gap: The Draft Johannesburg Principles and Practical Steps for Banks

3.1. Roundtables

The financial crisis exposes the links between lax financial practices and human rights violations.²³ When the banking industry errs, individuals and communities suffer. Propelled by the adoption of the UN' s Guiding Principles, the financial sector faced the challenge of establishing standards that would mitigate the sector' s contribution to human rights violations. There has been considerable progress in this regard. The International Finance Corporation (IFC) Performance Standards and the OECD Guidelines on Multinational Enterprises, for example, require the financial sector to meet certain human rights and environmental standards.²⁴ Both the IFC Standards and OECD Guidelines were revised in 2011 to include specific references to the UN Guiding Principles.

The problem that remains is the issue of specificity. While the IFC has led the way with its 2010 *Guide to Human Rights Impact Assessment and Management*²⁵ and, more recently, with its study on the UN Guiding Principles on Business and Human Rights and IFC Sustainability Framework these initiatives provide little guidance for responsible lending for South African banks.²⁶ Indeed, the barometer for responsible lending, which is still a vague and amorphous concept for many banks, remains Basel III, the international regulatory framework for banks that focuses on governance matters relating to minimal capital requirements, rather than the broader concerns of the social impacts (still less human rights) of banks.²⁷ Banks clearly need specificity. If they are to be compelled to play a role in assessing and managing human rights violations, they need to know what such violations look like, which are relevant to them, and the manner and form of their responsibility. To any human rights lawyer, the question is strange: human rights standards inhere in international human rights law. However, for banks, human rights standards are vague, indeterminable and often unidentifiable.

In this context it was apparent that the South African financial sector could be in a position to contribute to these developments by way of creating home-grown, contextually relevant

standards of practice. The objective of the roundtables was to discuss: the content of these standards; how they apply to the work of the South African financial sector; the utilisation of these standards within a commercial context; and the ideal role the finance sector should play in respecting human rights in South Africa, as well as Africa as a whole. The discussion was within the framework of risk mitigation, utilising an approach based on human rights.

The first-named author initiated two roundtables, in partnership with local and international organisations. The meetings brought together experts and representatives from banks, the private sector, the academy, the public interest sector, and government and regulatory officials. Discussions were structured around what, in real and practical terms, banks need to do to comply with international and domestic human rights standards and, importantly, what they are *able* to do, given the regulatory constraints within which they operate. Four themes emerged.

3.2. Four Themes

The first theme focused on the pre-contractual obligations of banks in respect of human rights assessment. The second considered the extent to which a bank has responsibility for the promotion and protection of human rights during the life of a project (the “in-contract” obligations of banks). The third theme related to South African banks’ responsibility for human rights compliance in projects outside South Africa. The final area focused on the consequences of borrowers’ non-compliance with national, regional and international human rights standards.

3.2.1. The pre-contractual obligations of banks

The pre-contractual consultation process - also known as due diligence - is a seminal stage in determining whether or not a proposed project will have harmful social, economic or environmental consequences. The following practical issues are potential hindrances to the pre-contractual assessment of human rights standards in a project: (i) lack of community consultation; (ii) inadequate transparency, especially as a result of the commodification of corporate information; (iii) the question of who undertakes the bank’ s due diligence and at whose cost; and (iv) the task of determining which factors are taken into account in assessing the efficacy and impact of the proposed project, and when such assessment should occur.

i – Due Diligence: The project assessment and the process of consultation

Consultation is a critical aspect of project finance due diligence. Banks may seek to consult with both potentially affected communities and the project sponsor. In keeping with the Equator Principles, most signatory banks adopt a policy of “effective stakeholder engagement” with the borrower to construct solutions to any potential violation of communal rights.²⁸ This forms part of a project’ s due diligence process, which has a number of objectives, including, but not only, an assessment of the rate of return (i.e. the extent to which a bank’ s loan will be repaid at an interest rate that contributes to the bank’ s profit). This process also ensures that a responsible bank works in partnership with a borrower to prevent

social disruption and human rights violations. Effective and meaningful participation in the project at an early stage ensures a common understanding of the goals of the project. This is necessary for respecting communities' dignity and right to choose; it also secures community buy-in if the consultation is successful— an essential ingredient for ensuring the implementation and long-term success of a project.

Notwithstanding the importance of pre-contractual consultation, this process raises one of the more contested areas of business and human rights, namely, the extent to which business is required to consult with the communities in whose geographical surrounds they intend to operate. The large body of research and literature around free, prior and informed consent is relevant in this context.²⁹ Banks face the same “consult versus consent” paradigm of their portfolio companies but with little guidance about how to approach community engagement and the extent to which this is the role of the bank. It is not clear, for example, what the objective of the consultation process is. Is the process about consultation to share information or is it negotiation to achieve consent? Do international standards of free, prior and informed consent apply to the banks or only the borrowers? Must a bank assess the risk of investment alone or also the risk of *not* financing the project? What happens if the community rejects the project but the government approves it?³⁰ With whom should the bank consult, noting that a community is not homogenous and often includes groups with varying degrees of power and vulnerability?³¹ As is evident from this array of questions, there is no doubt as to the importance of consultation but there remains a great deal of uncertainty regarding the scope and content of a pre-contractual human rights assessment of financed projects.

ii – Transparency

The extent to which a due diligence process can be fully transparent is equally challenging. How transparent can and should the due diligence – and by extension the consultation – be? The consultation is likely to yield market sensitive material, which is both confidential and economically valuable. The protection of this information as a commodity imposes confidentiality constraints that mitigate the extent to which banks can be transparent about their decisions. How should banks manage the imperative of confidentiality versus the imperative of transparency in pursuing a rights-inspired consultation process?

iii – Consultants and Equality of Arms

A key concern expressed by representatives of the banking sector is that of the role of consultants who undertake the human rights and environmental impact assessments. Consultants are costly (borne, for the most part, by the banks themselves) and often do not produce reports that are rigorous and sufficiently in-depth. This is not an issue only for banks but also for the majority of business enterprises, which seek to outsource this specialised skill of community engagement. The private sector, as a whole needs to improve its monitoring and evaluation of consultants and to ensure that such consultants have the requisite knowledge and expertise relating to human rights.

This process is also compounded by the fact that there is seldom “equality of arms” in the consultation – that is, ensuring that the community has adequate (let alone equal) legal representation, knowledge of their rights and technical information about the consequences of the project.³² This often impedes a full and equal consultative process, which is exacerbated by other related factors such as language and cultural dissonance.

iv – A long-term, holistic analysis

The thrust and parry of financing often creates a context of short-termism, with a view to maximising profit in the shortest period of time. This is often antithetical to the long-term impact of project financing on social and environmental factors. This was one of the first and probably most obvious points of discord between the theory of rights protection and the reality of making financing decisions. A human rights assessment requires an analysis not only of a contract’s short-term financial impact, but also its long-term environmental, social and cultural impact. Although this might be contrary to the historic trend of looking at the short-term profits to be gained from a project, this dual approach has clear commercial advantages.³³

The adoption of a holistic and long-term approach to financing demands a shift in the nature of investment decision-making and an elongation of market expectations. These are changes that will not come naturally or easily to the financial sector, and certainly not without a legal imperative to move it along. However, the roundtable participants did recognise the possibility of including long-term considerations in the consultation and assessment processes that precede the conclusion of the investment contract.

It is clear that pre-contractual due diligence processes are essential, but the detailed manifestation of how they are implemented suffers from more questions than clarity. The proposals that constitute the Draft Johannesburg Principles in respect of pre-contractual human rights assessment seek to create more specificity in an otherwise vague requirement.

3.2.2. The in-contract obligations of banks

i – Human rights standards as terms and conditions of the loan agreement

Typically banks impose “in-contract” obligations to ensure that the project in which they invest operates in accordance with legal and other regulatory requirements. The same is true of human rights standards. The due diligence stage is obviously the stage when the bank would have the greatest control in assessing risk potential. However, that obligation does not end when the project begins. It is precisely at this point that a lender can exercise the type of regulatory control that states may be unable to provide. That said, it is understood that banks are not government regulatory bodies, nor can we expect them to be so. They are, however, powerful watchdogs with the potential to pull funding if non-compliance with human rights standards is a term of the financing arrangement. That much can and should be expected of them.

Clear contractual terms and conditions are an effective method of enforcing human rights obligations by the borrower. If a borrower violates a condition of the loan agreement relating to human rights standards, it would be in default of the loan agreement (either in part or in whole). Current contractual conditions include, as a matter of practice, prohibitions against illegal conduct. However, the Wits roundtables evinced a clear consensus that it is necessary to go beyond merely avoiding what is illegal under national law (such as child labour) to ensure that contracts do not infringe regional or international human rights standards.

ii – Degree of monitoring and intervention: Staggered Loans

A key question for banks, however, is the extent to which it is their core business actively to monitor the projects that they finance. During the currency of a contract, banks are reluctant to become involved in the monitoring of projects, not least because such involvement in the day-to-day practice of the borrower's project may expose banks to liability. On the other hand, an absent lender may well be accused of complicity if its investment is associated with human rights abuses.³⁴

A common-sense balance should be struck, whereby banks can insist on human rights standards forming part of their financial instruments. Such standards, however, can only be enforced where banks retain leverage. Typically, banks pay the full loan to the borrower, with a repayment schedule during the life of the project. This impedes leverage and weakens the bank's ability to hold a corporation to account. Staggered lending, i.e. providing the loan in instalments rather than in a full, upfront payment, therefore, is a seminal – and entirely practicable – mechanism by which to hold a borrower to account. Banks will have little or no clout where the entire loan has been paid. The deployment of staggered loans is therefore preferred, allowing subsequent portions of the loans to be used as leverage to enforce contractual conditions.

iii – The consequences of borrowers committing human rights abuses during the contract term: Looming Liability

Apart from identifying relevant and applicable human rights considerations, perhaps one of the greatest difficulties facing the financial sector is what it should do if and when a human rights abuse is identified, either in the pre-contractual due diligence phase or during the life of the project. The increasing trend on the part of banks is to engage the borrower to stop abuse, rather than terminate the financial arrangement.³⁵ Suspension and termination of financial contracts are extreme options, utilised only as a final step. These steps should be used with caution, not only because of the financial implications, but also because they may have a detrimental effect on the community in which the project is based. The unintended consequences of exiting from a project, at all stages of its development, should not be understated.

As always, however, there is a competing value. As much as banks must exercise caution in determining their approach to human rights violations by their borrowers, they must also be prudent to protect against their own liability. Banks may operate behind the scenes in

relative obscurity but increasingly they have liability for conduct associated with human rights violations. Such liability will depend on a number of factors, including proximity to the deal, the extent to which the bank did or should have retained control over the project and the seriousness of the harm. When banks are close to the violation, or have power over the operation of the contract, they may be a liable party. The more significant the injury sustained by the affected parties, the more likely liability will arise. A standard of negligence may well apply. If a bank is negligent, and does not comply with the reasonableness standard in due diligence and monitoring of the contract, then the prospect of punitive liability may loom.

Where a borrower directly or indirectly commits, or is complicit in the commission of, a human rights abuse, banks should take the following steps:

- in accordance with international standards such as Principle 5 of the Equator Principles III and Principle 22 of the UN Guidelines on Business and Human Rights, *engage* with the borrower to stop the abuse, ensure its non-recurrence and commit to remediation;
- where a borrower fails to re-establish compliance, *delay, suspend or cancel* the loan, where possible; and
- always *consider* the unintended consequences of any remedial action, such as the loss of income to the local community, before effecting the cancellation of a contract.

The attainment of a human rights-focused approach to financing requires the integration of human rights and environmental specialists into all operations of banks. Management, shareholders and depositors should be encouraged to support these endeavours. This is necessary for the sake of the profitability of the investment but also because of the need to attenuate liability for human rights violations. The future, therefore, is clear. The nature of liability for banks is changing and the sector should pre-empt and inform this change.

3.2.3. Extraterritoriality: Responsibility for human rights compliance in projects outside South Africa

As noted earlier, one of the greatest challenges for the implementation of ESC rights is the extent to which corporations may have a negative impact on the implementation of these rights in jurisdictions outside of the state in which they are incorporated or have their primary place of business. Many argue that the rules governing a corporation in its home state should apply equally to its activities outside that state.³⁶ This is an equally important consideration for banks, particularly those operating in BRICS jurisdictions where the developmental project positions banks as entities that simultaneously demand fair standards and from whom fair standards are being demanded.

This is particularly true of South Africa, which is poised to become the veritable “United States of Africa” within the region. The project finance opportunities on the African continent are vast and South Africa is one of the financial headquarters for this development. And yet, South African banks operate in a twilight zone of an emerging economy. Will South African

banks apply human rights standards to the projects they fund throughout the continent or will they too become participants in the exploitation of loosely regulated states?

A complicating factor for banks is the fact that national jurisdictions may have different human rights standards from an international or regional regime. In accordance with state standards for extra-territorial conduct, as well as current best practices by South African banks, the roundtable participants agreed that the standards of the state would take precedence *so long as* those standards meet the basic international best practices. Therefore, if the standards required by the host state are higher than international standards, those standards must apply.

4 • Conclusion

This article analyses some of the broad-based human rights considerations that impact on finance, as well as certain policy-oriented initiatives undertaken in South Africa towards the creation of standards for banks operating in the region. Activists, lawyers, academics and banks (both public and private) across the globe are wrestling with the exceptional characteristics and circumstances of modern finance in a business and human rights context that, as yet, barely recognises, let alone understands the demands that must be made of the finance sector to make it more conducive to the protection and promotion of human rights.

The Draft Johannesburg Principles initiative has brought together stakeholders in the South African context in an effort to determine the financial and human rights realities faced by the banks of major development projects in the region. The objective has been to integrate the demands of human rights standards with the vicissitudes facing banks. The resultant Principles are not an end in themselves, but rather are intended to generate further discussion and collaboration between human rights actors, bankers, government and academics, that might yield a human rights-founded approach to financing that makes sense of business and for the people operating them.

From the Wits roundtables the Draft Johannesburg Principles were formulated and disseminated for further discussion with, and input from, the financial sector in South Africa. The next stage of the project will be to host a series of engagements with banks and their representative bodies throughout 2015 and 2016 intended to reach agreement among participants formally to adopt the Principles. That fact notwithstanding, the Principles remain the subject of ongoing engagement and analysis. They speak to the protection from corporate abuse of human rights generally and ESC rights in particular, and they constitute a summary of the development of a framework for the practicable protection of human rights by banks. They constitute the distillation of the opinions of a range of stakeholders, and also seek to set boundaries and provide guidance for banks regarding the role that human rights considerations should play in their strategic thinking, policymaking and operational management.

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LATIN AMERICA'S PROTAGONIST ROLE IN HUMAN RIGHTS

Kathryn Sikkink

- *How the region shaped human rights norms post World War II and what it means for the future today* •

ABSTRACT

Latin American governments, social movements, and regional organisations have made a far bigger contribution to the idea and practice of international human rights than has previously been recognised. Most discussions of the global human rights regime stress its origins in the countries of the Global North. This article explores the role of Latin American states as early protagonists of the international protection of human rights, focusing in particular on the American Declaration of the Rights and Duties of Man, adopted 8 months before passage of the Universal Declaration. In light of this, Sikkink calls into question the idea that human rights originated only in the Global North.

KEYWORDS

Global South | Norm development | Human rights | Universal Declaration of Human Rights | American Declaration of the Rights and Duties of Man

1 • Introduction

Scholars looking at who sets the global human rights agenda often argue that attention to human rights issues is the result of the dominance of powerful states. Others argue that northern-based NGOs continue to be powerful gatekeepers who often block or reshape issues from NGOs and social movements based in the Global South.¹

There is a need for scholars of international norms to pay greater attention to the potential agency of states outside the Global North. But the very binaries of North/South or West/Non-West may obscure the process we hope to illuminate. Latin America, for example, complicates these binaries that associate the Global North with the West. Because Latin American scholars and politicians are from the Global South, and yet, as Fawcett has argued, were neither fully “Western” nor “Non-Western”, the West/Non-West dichotomy in some international relations scholarship has neglected Latin American contributions.²

Elsewhere I have made the case for the historical normative agency of Latin America with regard to democracy promotion and human rights, and more recently for Argentina as a “global human rights protagonist”.³ Another way to talk about these processes of norm diffusion is to think of “norms entrepreneurs” in and from the Global South.⁴ Eric Helleiner, for example, discusses Southern agency for the norm that international institutions should support economic development of poor countries.⁵ In a related vein, Dominguez has stressed that Latin American regional organisations have been “international rule innovators” rather than simply “price takers”.⁶

Here I argue that Latin American countries were protagonists of the idea of “international human rights”. I will illustrate this argument by looking at the role of Latin American states promoting these international human rights norms in the post World War II period, in particular drafting the first intergovernmental declaration of rights – the American Declaration of the Rights and Duties of Man (the “American Declaration”), a full 8 months before the Universal Declaration of Human Rights (the “UDHR”) was passed in the UN General Assembly on December 10, 1948. The UDHR is usually seen as the starting point of the global human rights regime, and the American Declaration has been largely ignored outside the hemisphere. While this argument relates to debates about Latin American and the “new regionalism” it goes beyond it in stressing Latin American contributions to the global normative and legal order, and not only to regional orders.⁷

Latin American countries have a strong tradition of support for the doctrines of sovereignty, sovereign equality, and non-intervention as a means by which weaker countries might find refuge from the less law-like interventions of the more powerful, especially the US.⁸ Latin American countries saw international law as one of the “weapons of the weak” to balance US power.⁹

At the same time as they defended sovereignty, however, Latin American legal scholars, policy makers, and activists have also long been at the forefront of the struggle for

international human rights and democracy.¹⁰ One reason why they promoted the international protection of human rights is that it would “eliminate the misuse of diplomatic protection of citizens abroad”, especially by the US.¹¹ But these Latin American diplomats and legal scholars were also committed to the ideal of rights: they were part of the Western and enlightenment intellectual tradition even as they operated from what we would now call the periphery or the Global South. Carozza, for example, has traced the origins of Latin American concern with human rights to the work of Bartolomé de las Casas in the colonial period and to Latin America’s embrace of enlightenment writers during the wars of independence.¹² Latin American revolutions of independence, like that in the US, were motivated by enlightenment ideas of rights, present at the very moment of state creation, rather than as a result of a later export or diffusion of ideas.¹³ However, although informed by enlightenment ideas, Latin American scholars and politicians, as mentioned above, were neither fully “Western” nor “Non-Western.”¹⁴ Liliana Obregon has traced the origins of a “creole” legal consciousness that blended elements of unique Latin American experiences and concerns with the international legal traditions of the time.¹⁵ The Latin American jurists and diplomats who promoted rights on the 20th century were jurists and diplomats *from* the periphery, but they were not at all peripheral to global debates on international law and institutions during their lifetime.¹⁶

2 • Historical Background

By the end of World War II a consensus began to emerge that human rights and democracy would need to be an essential part of the post war order. This consensus was particularly strong in Latin America, where an unprecedented wave of democratisation had taken place in the mid 1940s, bringing to power various governments of the centre-left with strong support from labour unions.¹⁷ Most scholars are familiar with the initiatives taken by the Allies during the war to stress the importance of human rights: in particular, Roosevelt’s “Four Freedoms” speech and the inclusion of human rights language in the Atlantic Charter.¹⁸ But with the important exception of work by Glendon and Morsink, scholars are much less aware of the important role Latin American delegations and NGOs played in promoting the idea of international human rights, first at the San Francisco meeting where the UN Charter was drafted, and later in drafting the UDHR.¹⁹

The initial US drafts of the Charter contained no reference to human rights, while the proposals which emerged from the Big Four meeting at Dumbarton Oaks – composed of the Republic of China, the Soviet Union, the United Kingdom and the US – to prepare for the San Francisco conference contained only one reference to human rights.²⁰ The failure of the Great Powers to include human rights language in the Dumbarton Oaks draft mobilised both the community of non-governmental organisations and a group of less powerful states, particularly in Latin America, but also including New Zealand and Australia. Latin American countries felt betrayed, both because they had not been involved in the Dumbarton Oaks discussion about a post-war organisation, but also

because the Dumbarton Oaks draft did not incorporate various ideals they supported, including human rights.²¹ To promote their concerns and formulate a collective policy, Latin American countries called an extraordinary meeting in the Chapultepec Castle in Mexico City in February 1945, the Inter-American Conference on Problems of War and Peace, ending just weeks before the opening of the San Francisco Conference. Delegates at the meeting raised a series of important issues about Great Power dominance, the importance of international law, regional agreements for security, and economic and social problems. Human rights issues figured prominently in the speeches and resolutions.²²

At the 1945 Conference in Mexico City, many Latin American states argued that World War II had created a worldwide demand that rights should be recognised and protected on the *international level*.²³ At an earlier meeting of the Inter-American Bar Association in Mexico City in 1944, resolutions had also emphasised the “necessity” of a Declaration of Rights of Man, and the importance of international machinery and procedures to put the principles in the declaration into action. Acting on these concerns, the delegates in Mexico City instructed the Inter-American Juridical Committee to prepare a draft declaration of the rights and duties of man.²⁴

Latin American delegations, and especially Uruguay, Chile, Panama, and Mexico, argued in favour of the international protection of rights at the San Francisco conference in 1945. There they were supported by a number of (US based) NGOs also present. Latin American countries made up twenty of the fifty states present at the San Francisco Conference.²⁵ Because there were many democratic countries with a shared worldview at this historical moment in Latin America, they became the most important voting bloc at San Francisco.²⁶ The British government gave this Latin American bloc credit for changing the US government position on human rights at San Francisco.²⁷ They were able to do this in part because they supported and reinforced a position already held by a minority faction with the US government that had lost influence in the drafting of the Dumbarton Oaks proposal. But without Latin American protagonism it is unlikely that the Charter would contain references to human rights.

The record of the success of the NGO lobbying effort and the pro-human rights position adopted by Latin American delegations find testimony in the Charter itself. The final UN Charter has seven references to human rights, including key amendments whereby promotion of human rights is listed as one of the *basic purposes* of the organisation, and the Economic and Social Council (ECOSOC) is called on to set up a human rights commission, the only specifically mandated commission in the Charter. In particular, the initiatives of the Latin American countries helped extend the economic, social, and human rights objectives in the Charter, in particular articles 55 and 56, upon which so much later human rights work of the organisation rested.²⁸

If the Charter, adopted at a high point of post war collaboration, had not contained references to human rights and specifically to a Human Rights Commission, it is quite

likely that the Universal Declaration of Human Rights would not have been drafted in 1948. The inclusion of the human rights language in the Charter of the UN was a critical juncture that channelled the history of post-war global governance in the direction of setting international norms and law about the international promotion of human rights. This language was *not* the language of the Great Powers, and was finally adopted by the Great Powers only in response to pressures from smaller states and civil society.

The initial unwillingness of the Great Powers to include references to human rights in the UN Charter calls into question both a realist and a critical theory explanation for the origins of human rights norms. If human rights emerged primarily from the goals and needs of powerful states, as realists claim, then why did these powerful states not include human rights language in the Dumbarton Oaks draft?²⁹ Only China, the weakest of the four, pressed for inclusion of some human rights language. But China's effort to include an explicit statement against racial discrimination was rejected by the other Great Powers.

The two other key governmental actors, the USSR and the UK, shared the US concern to limit possible infringement on domestic jurisdiction.³⁰ Although the human rights provisions did not carry teeth at this early stage, states were very wary of the sovereignty implications of the human rights issue. If human rights policy was the result of powerful states, as realist theory suggests, it simply cannot help us understand why these powerful states came to support international human rights norms so reluctantly.

If, as critical theorists suggest, human rights was a discourse that powerful states used to reaffirm their identity as superior to the weaker nations, and to promote monitoring and surveillance, why did more powerful states resist the adoption of human rights discourses and less powerful states promote it?³¹ I believe that both realist and critical theory accounts have misunderstood and misrepresented the history of human rights ideas and human rights policies. Reading the history of the human rights policies reveals that human rights policies, especially multilateral policies, have often been embraced by the **less powerful** to try to restrain the **more powerful**. These less powerful groups are more likely to succeed, however, when they also have allies **within** powerful states.

Both states and NGOs demanded an international organisation that would have more far-reaching power to enforce international human rights norms. The Uruguayan delegation, for example, proposed that the Charter itself should contain a "Declaration of Rights", and "a system of effective juridical guardianship of those rights".³² Uruguay proposed to make it possible to suspend countries from the organisation that persistently violated human rights.³³ The final language, however, only called upon the UN to promote, encourage, and assist respect for human rights.

As a result, the Charter mandate on human rights is less firm than many states and NGOs desired, calling on the UN to promote and encourage respect for human rights, rather than to actually protect rights.³⁴ More far-reaching alternative visions were

presented and articulated at the San Francisco Conference, and the NGO consultants and a handful of democratic Latin American states were among the most eloquent spokespeople for those alternative visions. These alternative visions continued to be further elaborated in the drafting of the American Declaration of the Rights and Duties of Man, which began just as soon as the San Francisco conference ended.

3 • The American Declaration of the Rights and Duties of Man and the UDHR

Most histories of human rights in the world emphasise the Universal Declaration of Human Rights (UDHR), passed by the UN General Assembly of December 10, 1948, as the founding moments of international human rights.³⁵ The dramatic story of the drafting of the UDHR and has been told well and at length elsewhere.³⁶ Here I will stress a much less well-known story – the ways in which the UDHR was drafted in a parallel process with the American Declaration of the Rights and Duties of Man (“American Declaration”), in which, the American Declaration in many ways preceded the UDHR. The American Declaration was first approved by the Ninth International Conference of American States in Bogota, Colombia, in April 1948, eight months before the passage of the UDHR. The OAS did not yet exist at the Bogota meeting, and so the American Declaration was formally adopted later by a unanimous vote of the newly formed OAS, but still some three months before the UN General Assembly acted on the UDHR.³⁷

Because Latin American states adopted the American Declaration before the UN General Assembly passed the UDHR, the American Declaration was in fact the “the first broadly detailed enumeration of rights to be adopted by an intergovernmental organisation” .³⁸ But because the two documents were being drafted around the same time, these two processes were overlapping and complementary, and it is useful to discuss them together.

But what I want to stress here is the process of drafting the American Declaration *was always a step ahead* of the drafting of the UDHR. Because the American Republics had requested a draft declaration of rights from the Inter-American Juridical Committee at the Mexico City Conference in 1945 *before* the San Francisco conference, the American process had a head start over the process of drafting the UDHR that had to wait until after the San Francisco meeting and after ratifications of the UN Charter to get started. The Inter-American Judicial Committee worked rapidly to produce this complete draft declaration, including 21 articles and another 50 pages of full commentary, by December 31, 1945, only six months after the San Francisco Conference had concluded. The document was published in March 1946, before the UN Preparatory Committee tasked with drafting the UDHR had even had its first meeting.³⁹ The American states expanded the final American Declaration beyond this draft declaration, adding eight additional articles on rights and ten additional articles on the duties of states, but all the core civil, political, economic, social and cultural rights of

the American Declaration are present in the draft. The Juridical Committee's justifications for rights in this document gives an idea of how some Latin American jurists were thinking about the relationship between sovereignty and human rights in this period.

In view of the widespread denial of these political rights by totalitarian governments in recent years it may be well to reinstate the basic theory underlying them. The state is not an end in itself, it is only a means to an end; it is not in itself a source of rights but the means by which the inherent rights of the individual person may be made practically effective... Not only, therefore, are particular governments bound to respect the fundamental rights of man, but the state itself is without authority to override them.⁴⁰

This is as clear a statement as possible of the doctrine of popular sovereignty that was part of the legal tradition in Latin America. The Inter-American Judicial Committee then went on to say that the broad principles of distributive justice provide a justification for the inclusion of economic and social rights in the draft declaration as “the complicated economic lives of modern states has made the old doctrine of *laissez-faire* no longer adequate” .⁴¹

The American Declaration was completed before the second round of drafting of the UDHR, and it was very influential in the text of the UDHR, particularly for the articles on social and economic rights. In his detailed book on the drafting of the UDHR, Morsink wrote that the American Declaration “heavily influenced the drafting process and product of the universal one.”⁴²

The American Declaration includes 38 articles, of which 28 articles are devoted to an enumeration of rights, and 10 to duties. This attention to duties sets the American Declaration apart from the UDHR, which does not enumerate specific duties, although it does mention them in Article 29. Of the 28 articles on rights, approximately two thirds of the articles address civil and political rights, and approximately one-third address economic, social and cultural rights, including the right to health, to education, to work and fair remuneration, to culture, leisure, social security, and property. All of the rights in the UDHR also appear in the American Declaration, although the UDHR sometimes elaborates on these rights in greater detail. The American Declaration has a single right – that of petition – as well as the nine additional articles on duties, that are not in the UDHR.⁴³

This “heavy influence” of the American Declaration on the UDHR is not surprising because they had similar sources. When John Humphrey, the Canadian who served as the head of the UN Secretariat's Human Rights Division, wrote the Secretariat Outline (a draft bill of rights) for the Human Rights Commission to use its deliberations in producing the eventual UDHR, he used for models the score of drafts the Secretariat had collected from law professors and legal and social NGOs as well as from other inter-governmental organisations, including the Pan-American Union.⁴⁴ Although the Secretariat outline was modified significantly during

the debates, the influence of these diverse non-governmental and inter-governmental sources are clearly seen in the final version of the UDHR. Cuba, Panama, and Chile were the first three countries to submit full drafts of bills of rights to the Commission. Each of these contained references to rights to education, food, and health care, and other social security provisions.⁴⁵ Humphrey, a social democrat, used these drafts extensively in preparing the secretariat draft for the Commission to consider. “Humphrey took much of the wording and almost all of the ideas for the social, economic, and cultural rights from his first draft from the tradition of Latin American socialism by way of the bills submitted by Panama and Chile.”⁴⁶ The research showing the impact of Latin American countries on the inclusion of economic and social rights in the UDHR corrected a long-held belief that the economic and social rights in the UDHR were primarily the result of Soviet pressure.⁴⁷

In addition to their contributions to the economic and social rights in the UDHR, Latin American delegates made other important contributions. Latin American delegations, especially Mexico, Cuba, and Chile, almost singlehandedly, inserted language about the right to justice into the UDHR, in what would become Article 8. The probable source for Latin American proposals on the need for accountability in the American Declaration and the UDHR are the “amparo laws” that existed in some, but not all Latin American countries.⁴⁸ Since there is no equivalent of a full amparo law in common law countries, it is difficult to translate. *Habeas corpus* is related, but it is only for protection against unjust detention, while amparo or “tutela” laws offer protections for the full range of rights violations that may occur as a result of “acts of authority”. So, *habeas corpus* is like a “species” in a broader “genus” of protections, many of which are covered by amparo laws.⁴⁹ This is a clear example of normative innovation, where Latin American delegations took legal procedures from their own constitutional tradition, one that was not present in the constitutions of the large common-law countries, and used it to craft an essential article of the new human rights declarations. Far from an example of norm localisation or even vernacularisation, this is a clearer case of norm protagonism or innovation from countries in the Global South. This idea of a right to justice would later serve as the backbone of Latin America efforts to secure accountability through the Inter-American system. In this sense, there is genuine continuity from the normative and legal contributions that Latin American states made to the UDHR and the American Declarations and their later contributions in the 1970s and 1990s.

4 • Conclusion

Why has Latin America’s important role in the emergence of global human rights norms and law not been more broadly perceived or understood by international relations scholars, including even at times scholars from the Latin America region? There are a number of possible explanations. First, there was a paradox at the heart of Latin America defense of human rights that may have undermined its effectiveness. At the same time as many Latin American countries were advocating international human rights norms, practices

on the ground in many countries fell far short of the human rights ideal. This paradox was graphically present even at the Ninth Inter-American Conference where the American Declaration was first approved by the American states.

In the midst of the conference, an important populist political leader in Colombia, Jorge Eliécer Gaitán, was assassinated on the streets of Bogota, leading to intense protests and violence that temporarily suspended the conference proceedings. Gaitán, a leader of the left wing of the Liberal Party, was an eloquent speaker greatly admired by the poor of the city, who responded to his murder with riots, looting and killings, which in turn led to a violent response by the state security forces. This riot is known as the *Bogotazo* or “Bogotá attack”, in which thousands were killed and a large part of the city burned to the ground. The *Bogotazo* is now seen as the start of the period in Colombia known as *La Violencia*, or “the time of violence”, in which hundreds of thousands of ordinary Colombians would die.

So, we have this juxtaposition of a conference to set up a new regional organisation and to proclaim the rights and duties of man and the importance of democracy in the region, at the same time as the government hosting the conference and the people in the streets have trampled on the rights of man. The response of the world community, and indeed many in the region, may have been to dismiss the noble words inside the conference that would appear to be contradicted by the practices outside the conference. Or perhaps the events simply foreshadowed the pressing problems of security and violence that would dominate the Cold War period leading to the disregard of general declarations.

But a second, and perhaps more important reason, is that many scholars of international relations have neither the training, the knowledge of other languages, nor the inclination to conduct field research in the developing world. So they turn to sources in the Global North. There is yet a new paradox here. For even scholars that critique how the Global North imposes norms upon the South often do so on the basis of research conducted almost solely in the Global North, using sources available here. The research design of these scholars reproduces the very situation they critique. In their efforts to stress how the countries of the Global North have silenced voices in the developing world and imposed Northern values upon them, they too have silenced the past by not investigating very carefully sources from the developing world itself. So, this short article is a plea of sorts for *attention to the possibility* of Southern protagonism at many stages of global norm development and global governance.

Doing this historical work tracing the origins of international norms helps shed light on current developments. In the case of Latin America, various developments on the international supervision of human rights and democracy in regional and international organisations can be seen as the manifestations of the ideas presented by Latin American states in San Francisco, and articulated in the American Declaration. Developments in the Inter-American system that now allows the OAS to suspend from membership governments that come to power through military coups are the concrete realisation of proposals that countries like Uruguay and Guatemala made in San Francisco in 1945. The International

Criminal Court is the embodiment of the idea that the international system should not only promote rights but should provide actual enforcement or juridical protection of those rights. Latin American involvement in these recent initiatives is thus not a puzzle or a result of Great Power leadership, but a continuation of much longer traditions and activism on behalf of the international protection of human rights and democracy.

NOTES

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FROM HYPER-MATERNITY TO HYPO-MATERNITY IN WOMEN'S PRISONS IN BRAZIL

Ana Gabriela Mendes Braga & Bruna Angotti

- *This study analyses the risks of the abrupt severance of ties between a mother and her baby after an intensive period together in prison*

ABSTRACT

There is a paradox to being a mother in prison in Brazil: there is an excess of maternity in the months where the infant stays with its mother and then the abrupt rupture of this relationship at the time of separation. The authors call these phenomena “hyper-maternity” and “hypo-maternity”, respectively. This is the main conclusion of the study that this article is based upon, which the authors conducted in six Brazilian states over a nine-month period. The main objective was to map out the perceptions of female inmates who were pregnant or had just given birth on being a mother in spaces where they were deprived of their freedom. Interviews were conducted with detainees, prison directors and workers, and on-site visits were made to prisons and mother-child units of the Brazilian prison system. In this article the authors reflect upon the excess of discipline with regard to maternity in prison and the vulnerability of mothers in prison.

**This article is based on the following study: Brasil. Ministério da Justiça. Secretaria de Assuntos Legislativos, *Dar à luz na sombra: condições atuais e possibilidades futuras para o exercício da maternidade por mulheres em situação de prisão* (Brasília: Ministério da Justiça, Ipea, 2015) (Série Pensando o Direito, 51), accessed March 20, 2015, <http://participacao.mj.gov.br/pensandoodireito/wp-content/uploads/2015/03/51-Dar-a-luz-na-sombra.pdf>.*

KEYWORDS

Women's prison | Maternity | Hyper-maternity | Hypo-maternity | Gender

I will never forget the day my son left. I looked out the window. I looked under the door. About 80 metres away, I could only see my mother's feet and hers [a daughter who is now 15 years old]. Then I thought to myself, "my mother's here. Now what?" I went down with my son's things, put them in my mother's arms and didn't even look back. I was already dead inside when I came back in. I still remember the clothes she was wearing. That was 11 years ago, but I remember as if it were yesterday - me handing my son over to my mother. When the guard said "go back in, Desirée", I didn't look back and I went. I just went.¹

The statement by Desirée Pinto² – twice arrested for offences related to drug use and the mother of four children, two of which were born in the São Paulo Penitentiary System – describes the moment of separation from her son, born in prison, at the end of the period established by the prison administration for the child's stay with the mother. This is but one of many accounts from incarcerated women on their separation from their children that we heard during the nine-month period (August 2013 to April 2014) in which the DLNS study³ was conducted.

Carried out as part of the *Pensando o Direito* (Thinking about Rights) project of the Secretariat of Legal Affairs of Brazil's Ministry of Justice in partnership with the Institute for Applied Economic Research, the DLNS study aimed to identify needs, detect obstacles and elaborate strategies to guarantee the exercise of maternal-reproductive rights in the Brazilian prison system. Through the use of empirical research methods such as on-site visits to prison establishments, focus groups with female prisoners, interviews with specialists, as well as research on legislation and review of literature, we were able to gain knowledge and information on prison maternity wards and contrast discourse and legislation with the reality in prison.

We covered six Brazilian states, made one international visit, conducted almost 50 interviews and had informal conversations with over 80 detainees. We also visited ten female prisons, two mother-child units, two prison nurseries and another two linked to civil society. This experience allowed us to identify what we consider to be one of the most perverse aspects of the way motherhood is dealt with in Brazilian prisons: the uninterrupted coexistence of mothers with their babies while they are still in prison and the sudden separation from them when the official period for the children's stay comes to an end.⁴

In this brief article, we address the issue above by examining the categories of "hyper-maternity" and "hypo-maternity" developed on the basis of the research results. To do so we present accounts and perceptions indicating that maternity in prison is permeated by ambiguities, such as excessive coexistence versus the absence of coexistence; isolation versus participation in daily prison life; improvements to the physical environment in the child's presence versus more rigorous discipline; and women in prison versus mothers. Prior to this, however, we will present a brief overview of the imprisonment of women in Brazil in order to give context for the reader.

1 • Brief overview of the Brazilian prison system for women

The imprisonment of women has increasingly become the object of research and discussion in Brazil. Whereas work on this topic was rare at the beginning of the 2000s, one can say today that the issue is in vogue. Academic research, journalistic materials, television reports and official studies have presented data and the dilemmas and status of women's prisons in the country.⁵ As for official data, in November 2015 the National Penitentiary Department released the National Survey of Information on Women's Prisons (known by its acronym *Infopen Mulheres*). This was the first *Infopen* report to focus exclusively on the female prison system.⁶ While there are still many gaps, especially in relation to quantitative data, we know more now than we did fifteen years ago.

The reason for the increase in the number of studies and publications in the area is undoubtedly related to the most striking piece of data in the report: the exponential growth of the female prison population, which jumped 567.4% from 2000 to 2014, whereas the male prison population grew 220.2% in the same period.⁷ This explosion is not only a national phenomenon, but rather a reality also found in other countries that have like Brazil invested in prisons as the preferred response to the war on drugs policy, such as the United States, Russia and Mexico. According to data from the International Centre for Prison Studies, between 2000 and 2013, the number of women in prison increased approximately 40% around the world, reaching a total of around 660,000.⁸

According to *Infopen Mulheres*, there are nearly 40,000 women in prison today – that is, they make up 7% of the country's total prison population.⁹ These women are held primarily in either one of the 103 women-only, state-level prison establishments, one of the 228 mixed units (prisons with male and female wards), police stations or temporary detention centres. Of this total number of women, 68% are in prison for crimes related to drug trafficking and 16% for property crimes, such as robbery or theft.¹⁰

It is important to highlight the large contingent of women held in pre-trial detention, which represents 30% of all women in prison. It is also worth mentioning that 67% of all female prisoners are black, young (50% are between 18 and 29 years of age) and from low-income backgrounds.¹¹ This supports the hypothesis that the criminal justice system targets socially vulnerable women.

Despite the increase in the amount of materials published on the issue, little is known about the number of women who are pregnant or have recently given birth and about infants in the system. No studies have been done to obtain quantitative data specifically on this. A recent count by the São Paulo Public Defender's Office¹² shows that one out of every five women imprisoned in the state has children (in or outside the prison) or is pregnant. Maternity is therefore an important issue to be taken into consideration when discussing the imprisonment of women, since, as we argue here, all pregnancy and maternity in prison is vulnerable when we look carefully at this fundamental issue. This rapid overview of

women's imprisonment will now be followed by some specific elements of the treatment of maternity in prison, especially in the places set aside specifically for this purpose.

2 • Mother-child units: an excess of “pink” discipline

The selection of prison units for the field visits¹³ was based on the existence of some kind of “special treatment” providing maternity care in prison, such as the existence of mother-child units, areas reserved for mothers and babies and daycare for the children of women prisoners.¹⁴ In Brazil a mother-child unit (or ward) is an area designated to house new mothers together with their infants during the breastfeeding phase. Each unit has its own specific characteristics, which will be highlighted below.

In the state of Minas Gerais, there is the *Centro de Referência à Gestante Privada de Liberdade* (CPRGL, or the Detention Centre for Pregnant Detainees) – a unit dedicated exclusively to pregnant women and new mothers (with infants of up to one year of age). In São Paulo the *Casa Mãe* (Mother's House) is a special ward of the Butantã prison and is for mothers and infants of up to six months of age. In Rio de Janeiro, there is the *Unidade Materno Infantil* (Mother-child Unit), which is autonomous from the women's unit and has its own budget and management. The state of Ceará uses the day care terminology (*Creche Irmã Marta* or Sister Marta Day Care) to refer to what would be its mother-child ward. We found this terminology in the state of Paraná as well (*Creche Cantinho Feliz* or Happy Corner Day Care), but there it is used to refer to the place where the children live. In this case, however, different from the day care model, the children do not leave at the end of the day; instead, they remain constantly in the centre. It therefore resembles more of a shelter than a daycare as such. Among the places studied, the only one that comes close to the daycare model – in which the children spend the day and return to their families for care in the evening – is the *Jardín Maternal* in Ezeiza in Argentina.

In all of the spaces we visited, under varying levels of supervision and mediation, we were able to speak with inmates, listen to their views on the prison structures designed for mothers and their babies and talk about their expectations in relation to motherhood. We were also able to interview managers and staff and visit the facilities, including the areas reserved specifically for mothers and their children. It was in these areas, in particular, that we obtained accounts of isolation, excessive discipline with regard to mothering and other reflections presented below.

In the majority of the spaces designed to house imprisoned mothers and their infants, we came across statements on the stagnation of life in prison and separation – even physical – from daily prison life once the baby is born. As mentioned repeatedly by the interviewees, “prison stops” when one has a child. In other words, if a prisoner was involved in some work- or school-related, cultural and/or religious activity, her participation is interrupted in order for her to dedicate herself exclusively to caring for the child and to avoid contact with other prisoners.

At the CRGPL in Minas Gerais, the prisoners praised the material support and the possibility of remaining with their children for up to one year, but they criticised the idleness and isolation during their stay in the unit, where they are subjected to strict control by staff and management. As for the unit in Butantã, the interviewees also highlighted that their children received good treatment, with access to hygiene products and quality meals. They also revealed, however, that the inmates call the mother-child area the “child lockup”, as although they are in a semi-open regime, they are not allowed to have contact with other areas of the prison. They are denied access to religious activities and courses and spend more time locked up than prisoners in the closed regime. On this subject, Marina,¹⁵ a prisoner at the Butantã unit, stated, “we stay here with no contact with anyone – like an animal!”

Complaints of isolation also appeared in the state of Bahia, where even though the prison has a special area for pregnant women to go to during the day, detainees refuse to use this area as a nursery. When we asked the women prisoners about their preference for the yard over the nursery, one of them told us that “the women feel very isolated and it is awful to have to choose between one or the other... in the unit, there are courses, prayers.” The complaint that the nursery space is limited and isolates them from prison life was unanimous in the interviewees’ statements.

In the *Creche Irmã Marta*, in the state of Ceará, the idle and prolonged coexistence of the infants and their mothers, who generally spend 24 hours a day in the mother-child space, generates tensions. According to the unit’s psychologist, the inactive time spent in the daycare, together with the low number of prisoners, generally leads to conflict between the mothers there. No activities are held in the daycare and it is rare that mothers are able to leave their child with others while they go to an event in the prison. The space is different from inside the prison, where there is greater freedom to circulate, because it is separated from prison life.

Loneliness and the obligation to spend 24 hours non-stop with their babies without any possibility of interacting with other people, except other mothers, were also elements that came out clearly in the interviews. On this issue Butantã inmate Marina said, “in this environment, we are isolated – I’m depriving my baby of lots of things – thank goodness there is this nice tree in the window.” As for Lucinéia, another Butantã prisoner, she highlighted the confinement while claiming that in the *Casa Mãe*, they stay with their children in a “24-48 [hour] regime”, with one hour a day to go outside. The comparison with life outside, where there is the possibility of engaging in other activities, also appeared in some narratives, such as this one from Marina: “when we’re on the outside, we have things to do – clothes to wash, food to cook. There’s nothing here. It’s 24 hours a day of taking care of the baby or watching something useless on TV.”

Taking care of infants is a lot of work and they need special attention, as is clear from this statement by Marina, “I take care of him all the time! (...) once you’re a mother, you don’t eat, you gulp your food down... you don’t sleep, you nap... you don’t take a shower, you wet your body....” The desire to have time to themselves, be with

other prisoners and continue with the activities they were doing before they gave birth appears in the statements of the majority of the interviewees.

In addition to their isolation, the ambiguity in relation to the mother-child areas can also be seen in relation to discipline. Even though they are spaces with less bars and therefore, “look less like a prison”, as one of the interviewees from Rio de Janeiro pointed out, they are areas with very strict discipline, especially in regard to childcare.

At the CRGPL maternal care is disciplined by a series of regulations that, if not followed, can lead to a notice being issued, which is followed by a judgment from the establishment’s disciplinary committee. An account from one interviewee exemplifies the ambiguity between the desire to stay with her child and the strict discipline in the ward: “I am happy to be with my baby, but here, everything is motive for a notice. Being in prison alone is easier.” To which she added, “any little thing that happens, they say that you’re going to have to give up your child. We live under constant pressure.” Things that generate notices in the unit include, for example, working for other prisoners, sleeping with the baby on the same bed instead of using the crib and feeding the child differently than the protocol established by the unit.

In Ceará we perceived resistance among the prisoners to the daycare due to the strict discipline imposed in the mother-child unit. According to the inmates, there are limits on the use of cigarettes, time schedules and measures to control interaction between detainees. The local prison administration justifies this rigour by referring to the care children and newborns need, as well as the particular characteristics inherent to small children. The use of cigarettes is also strictly prohibited in the mother-child unit in Rio de Janeiro, which, according to the director, makes many of the prisoners “desperate to leave their baby and go back to prison.”

Researcher Raquel Santos¹⁶ calls the situation where mothers care for their children in restricted and constantly guarded environments “guard-controlled maternity”. Even though the mother-child areas offer more spacious and better physical conditions to guarantee the infants’ basic rights, they constitute spaces of discipline in which the mother and child usually spend all of their time.

3 • The break: transcending punishment

In addition to the isolation, loneliness and excess of discipline in the mother-child areas, another issue that drew our attention and led us to identify the paradox in the women’s prison system – that is, the excess of maternity versus its complete absence – was the moment when the child is removed from its mother’s care at the end of the authorised period of stay. This issue permeated the most distressful conversations we had in the field. Faced with the real possibility of being separated in the near future, the interviewees were resistant to talking about it.

“I wake up every day with the fear that today will be the day they take my daughter away. When five o’ clock comes, I’ m relieved. I have one more night with her” ,Lucinéia from Butantã told us. The anxiety of being suddenly cut off from her child was visible in this woman, who had already packed her daughter’ s belongings in a bag, as the time to say goodbye was drawing near.

In Rio de Janeiro, in a collective conversation with twenty pregnant women in the cell they shared at the time, the talk about separation was full of crying and anguish. One of them mentioned that she had heard of children and mothers who came down with an “emotional fever” after the separation. Others were emphatic when they stated that six months was a very short period of time for imprisoned women to be with their babies and that cutting the relationship off was “very, very painful” ,as one of them emphasised.

Hyper-maternity versus hypo-maternity

One of the main conclusions of the DLNS study is that all maternity in prison is vulnerable and at risk, whether it be due to social, physical or psychological factors. Researchers Simone Diniz and Laura Mattar point to the existence of situations where maternity is more vulnerable, with women mothering their children with less rights in comparison to others, which makes their experience and perception vary. Among the maternities identified as the most vulnerable by the authors are those of “women offenders, especially women in prison, as they have gone against ‘the so-called feminine nature’ – that is, a passive person and caregiver, never a lawbreaker.”¹⁷

With regards to psychological aspects, having to live with the expectation that their child will be taken from them, mixed with the uninterrupted living with the child during the first few months after birth and the sudden severance of the mother-child relation at the end of that period, often without psychological support, are clearly factors that increase vulnerability, as we were able to observe. The common complaint of all new mothers who stayed with their children in small spaces and with few options for engaging in other activities, permeated by the expectation of a sudden end to the relationship, led us to formulate what we call the *hyper-maternity versus hypo-maternity* paradox.

During the period in which mothers live with their infants in the prison unit, the women engage in *hyper-maternity*, as they are not allowed to participate in other activities or work, as we mentioned earlier. Their removal from daily prison life generates not only isolation and feelings of solitude, but also the end of work activities, of the possibility of a remission of their sentence and of continuing with schooling. The uninterrupted permanence of the child is the standard during the authorised period of stay. This period is permeated by strict discipline and close supervision of mothering activities.

The repeated accounts of isolation, discipline and severance leads us to the conclusion that motherhood is an additional punishment for women in prison. Even though

they momentarily occupy areas with better physical and structural (mother-child) conditions, they end up being confined even more, under a disciplinary regime that is more rigid than that of the other women.

We draw on the work of Michel Foucault to analyse the excess of discipline in question here. According to Foucault, the power to discipline is that which goes beyond the legal system and the sentence to penetrate bodies, desires and souls. In his analysis, prison must be resituated “...at the point where the codified power to punish turns into a disciplinary power to observe; at the point where the universal punishments of the law are applied selectively to certain individuals (...) at the point where the law is inverted and passes outside itself, and where the counter-law becomes the effective and institutionalised content of the juridical forms.”¹⁸

In our view maternity takes place in more isolated and rigorous spaces in which disciplinary power is manifested via the deprivation of freedom, and where disciplinary techniques are perceptible and serve to generate what we call double punishment. The legal sentence imposed combined with even greater confinement and more rigid supervision of daily prison life is subjecting new mothers to situations of *hyper-maternity*.

When the period of living together ends and the child is removed from its mother’s care (handed over to the family or sent to a shelter), the transition from *hyper-* to *hypo-maternity* occurs, which is the immediate severance of the link, without any transition and/or adaptation period. We call the severance “*hypo*” (lowering) – and not *nullified – maternity* because the marks from the interrupted maternity and the absence generated by the child’s earlier presence remain in the imprisoned women’s bodies and minds. The numerous accounts of medicines taken to dry up their milk, “emotional fever” or “desperation” when they hear other children crying, prove that maternity remains in the body. The expectations and fear of being separated definitively from their children present in the statements of women who had not yet experienced this moment, but feared it even during their pregnancy, together with Desirée Mendes’ experience, recounted at the beginning of this article, are striking examples of the brutality of this severance. The sudden severance in the relationship does not erase their previous experience; instead, it becomes yet another mark in the production of precarious lives¹⁹ in which the Brazilian prison system has been strongly investing.

We were able to observe an even more serious hypothesis than *hyper-maternity*, which is indeed coming closer to what could be called *nullified maternity*: cases where the mother or the birth family has renounced its family rights and the child has been sent to a shelter and, in some cases, put up for adoption. In these cases imprisonment definitively eliminates all possibility of female prisoners resuming motherhood or of rebuilding family ties. Law nº 12.962/2014 guarantees the visiting rights of children and adolescents whose parents are in prison and explicitly prevents the criminal conviction of the father or the mother from resulting in the loss of family rights. It also establishes that the child or adolescent should remain in its birth family. Even so, during our field visits, we heard various accounts of mothers in distress who had no knowledge of where their child had been sent and feared losing them to an adoptive family.

4 • Conclusion: vulnerable maternity, discipline and punishment

This experience in the field allowed us to analyse prison policies for imprisoned women while reflecting on the role of these policies and their imprisoning traps, which reinforce gender roles. The simple argument of adapting prison spaces and building structures to accommodate mothers and their children can end up strengthening the discourse on and disciplinary practices for this group. Using an empirical approach to examine how the legal provisions have been implemented proved to be fundamental for rethinking public and legislative policies in terms of their impacts, based on the perspective of those subjected to these policies, in addition to the normative level.

Based on the accounts of the imprisoned women and our field research, we briefly presented in this article the analytical categories of *hyper-maternity* and *hypo-maternity* as tools to help understand the ambiguities permeating the issue of maternity in prison. This is especially true for analysing the discourse on the access to rights, which is shrouded in strict disciplinary practices.

Foucault has pointed out that the most dangerous use of power is positive, which does not annul, but rather shapes subjectivities.²⁰ In this sense part of the Brazilian prison system may have advanced in terms of protecting the life and health of women thanks to investments and improvements in the physical conditions for mothers in prison. However, it continues to dangerously exert its positivity by limiting the freedom, autonomy and possibility for a healthy relationship between women in prison and their children.

NOTES

1 • Excerpt of the interview recorded by the research team in March 2014 in São Paulo.

2 • Even though the identity of the imprisoned women (or former prisoners) interviewed for the study is not usually revealed, Desirée Mendes Pinto's name was because she became referenced in press interviews and debates on the imprisonment of women and maternity. In the study, we refer to her as a specialist, since she is, in practice, a specialist on the issue. She explicitly authorised us to identify her in publications on the study.

3 • DLNS stands for "Dar à Luz na Sombra" (Giving Birth in the Dark), which is the study's title in Portuguese.

4 • According to article 83, § 2 of the Brazilian *Lei de Execução Penal* (Criminal Enforcement Law), the minimum period imprisoned mothers are allowed

to live with their children is six months. However we observed a distortion of this legal provision. In the majority of the units visited, six months is the maximum amount of time women are allowed to live with their children.

5 • This is the case, for example, of the DLNS study presented here; the book by Debora Diniz (Debora Diniz, *Cadeia – Relatos sobre mulheres*, Rio de Janeiro: Civilização Brasileira, 2015), the master's thesis of Sintia Helpes (Sintia S. Helpes, "Vidas em jogo: um estudo sobre mulheres envolvidas com o tráfico de drogas", Dissertação de mestrado, Instituto Brasileiro de Ciências Criminais, 2014), among others.

6 • This data does not include up-to-date information on the prison population in São Paulo, as the

government of the state of São Paulo did not provide the data required to conclude the study. Therefore, for this state, data that was not specifically collected for the *Infopen* was used, which may result in alterations to the results (Brasil, Ministério da Justiça, Departamento Penitenciário Nacional, *Levantamento nacional de informações penitenciárias – Infopen Mulheres – junho 2014*, Brasília: Ministério da Justiça, Depen, 2014), accessed November 17, 2015, <http://www.justica.gov.br/noticias/estudo-traca-perfil-da-populacao-penitenciaria-feminina-no-brasil/relatorio-infopen-mulheres.pdf>).

7 • Brasil, Infopen Mulheres 2014, 5.

8 • Available at: <http://www.prisonstudies.org/news/female-imprisonment>, accessed November 17, 2015.

9 • Brasil, Infopen Mulheres 2014, 9.

10 • Ibid., 5.

11 • Ibid., 24, 22.

12 • Defensoria Pública do Estado de São Paulo. *Mães em Cárcere. Dados Estatísticos 2014* (São Paulo: 2014), accessed november 17, 2015, http://www.defensoria.sp.gov.br/dpesp/repositorio/0/dados%20estat%C3%ADsticos%202014_geral.pdf.

13 • We visited: I) the *Centro de Referência à Gestante Privada de Liberdade* (CRGPL, Detention Centre for Pregnant Detainees) in Vespasiano, Minas Gerais; II) *Penitenciária Feminina do Paraná* (the State of Paraná's Women's Prison) and the *Cantinho Feliz* daycare, located in the *Complexo Penal de Piraquara* (Piraquara Prison Complex in the state of Paraná); III) *Penitenciária Feminina do Complexo da Mata Escura* (the Women's Prison in the Mata Escura complex) in Salvador, Bahia; IV) Instituto Penal Feminino Desembargadora Auri Moura Costa (Judge Auri Moura Criminal Institute for Women) and the *Creche Irmã Marta* (Sister Marta Day care) in the Aquiraz prison complex in the state of Ceará; V) *Penitenciária Talavera Bruce* (Talavera Bruce Prison), *Unidade Materno-Infantil* (UMI, or Mother-Child Unit), *Presídio Nelson Hungria* (Nelson Hungria Prison) and the *Penitenciária Joaquim Ferreira de Souza* (Joaquim Ferreira de Souza Prison) in the *Complexo Gericinó* (Gericinó Facility) in Rio de Janeiro; VI) *Penitenciária*

Feminina “Dra. Marina Marigo Cardoso de Oliveira” (the Dr. Marina Marigo Cardoso de Oliveira Women's Prison), known as “Butantã”, in São Paulo; and VII) *Centro Federal de Detención de Mujeres Unidad nº 31* (Federal Women's Detention Centre, Unit no. 31) and *Jardín Maternal* day care in Ezeiza, the Province of Buenos Aires, Argentina. We will not discuss the Argentinian case in this article, since the maternity-prison relationship differs from practices in Brazil.

14 • Due to technical and time restrictions, we visited six of the 26 Brazilian states. The work of Rosângela Peixoto Santa Rita (Rosângela P. Santa Rita, “Mães e crianças atrás das grades: em questão o princípio da dignidade da pessoa humana” (Mestrado em Política Social, Universidade de Brasília, 2006)) and official reports and documents were also used to select units for the visits. The reflections presented here are not exhaustive, nor do they fully reflect Brazil's regional diversity and the differences between existing models in the country. Instead, they are conclusions we have drawn from our experiences in the units we visited.

15 • The names of the prisoners interviewed were modified to ensure they remain anonymous.

16 • Raquel C.S. Santos, “Maternidade no cárcere: reflexões sobre o sistema penitenciário feminino” (Mestrado em Política Social, Universidade Federal Fluminense, 2011), 60.

17 • Laura D. Mattar e Carmen S.G. Diniz, “Hierarquias reprodutivas: maternidade e desigualdades no exercício de direitos humanos pelas mulheres,” *Revista Interface: comunicação, saúde, educação*, 16, no. 40 (2012): 113.

18 • Michel Foucault, *z*(Petrópolis: Vozes, 2004), 184.

19 • Term coined by philosopher Judith Butler, (Judith Butler, “Vida Precária,” *Contemporânea - Revista de Sociologia da UFSCar* 1, no. 1 (jan./jun. 2011): 13-33, accessed March 20, 2015, <http://www.contemporanea.ufscar.br/index.php/contemporanea/article/view/18/3>).

20 • Michel Foucault, *História da loucura: Na idade clássica*(São Paulo: Perspectiva, 2007), 118.



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INSTITUTIONAL OUTLOOK



**“NGOS CERTAINLY FEEL THAT
IT IS HELPFUL TO BE PART OF
OUR GLOBAL
ACCOUNTABILITY ALLIANCE”**

Karenina Schröder

“NGOS CERTAINLY FEEL THAT IT IS HELPFUL TO BE PART OF OUR GLOBAL ACCOUNTABILITY ALLIANCE”

Karenina Schröder

- *What benefits an international accountability charter brings to NGOs and how organisations from the Global South are contributing to the agenda*

The INGO Accountability Charter (the “Charter”)¹ is intended as a firm commitment of large international civil society organisations – including Amnesty International, Greenpeace and BRAC – to transparency, accountability and excellence in what they do. The Charter provides the only global, fully comprehensive and cross-sectoral accountability framework for INGOs.

Recognising that the international NGO sector was increasing in size with a plethora of competing guidelines and regulations, its founders responded by incorporating a wide range of the existing codes into a common framework. It aims to provide a more streamlined and coherent approach so that INGOs are able to respond confidently to donors, governments and other stakeholders with regards their accountability efforts.

First signed in 2006 by 11 civil society organisations, the Charter now has 24 members. Members must report annually on a series of commitments which each organisation must adhere to – such as respect for human rights; transparency and professional management. These reports are reviewed by an Independent Review Panel which may, if necessary, request further information from the member organisation. The Panel specifically looks for institutional commitment of the reporting organisation and continuous progress on fulfilling their commitments to transparency, independence, effectiveness, participation, sound financial management etc. The reports and external assessment thereof are all published on the Charter’s website and are accessible to the general public.

The Charter’s day-to-day running is managed by its Secretariat which, since 2010, has been hosted by the International Civil Society Centre in Berlin.

Karenina Schröder, the Secretariat's Executive Officer, talked to Conectas about the origins of the Charter, the ways in which it has evolved, and the increasingly important role that Global South organisations are playing in establishing international accountability standards.

• • •

Conectas Human Rights • How did the original idea of the Charter come about?

Karenina Schröder • In 2006, some of the largest global brands founded the Charter for a number of reasons.

Firstly, they felt that they needed to improve their own accountability systems. Not having shareholders to look at the impact and value of what they were doing, meant that the founders wanted to make sure that they themselves had more rigid systems to ensure that they were really generating the best possible outcome for the people they serve.

Secondly, and in particular for the advocacy INGOs such as Greenpeace and Amnesty, who were quite strong proponents in the early days, the more that these organisations demanded good governance, transparency and accountability from businesses and from governments, the more important it was for them to get their own house in order.

And finally, when the Charter was founded there were several hundred accountability schemes. While it is good that the issue is so high on the agenda, there is also a problem with having so many. It means that for many organisations, they need to report on a multiple basis to different donors and according to different accountability requirements at the national, regional, global or thematic area. Therefore, a cross-sectoral global complementary code such as the INGO Charter could also serve as a baseline to which each organisation adds different pieces that are particularly relevant to their regions or to their specific partners.

Conectas • How has the Accountability Charter changed since it was first set up? What have been the biggest changes?

K. S. • In a nutshell: it is more independent, more global and much more professional.

Originally, it was an organisation that was completely governed by its members. The autonomy of the organisation was significantly increased with the introduction of the Independent Review Panel. We have increasingly taken on external directors with two coming from the Global South. This helped the organisation to also become more global.

As we professionalised, it became harder for some of our members to comply with the necessary requirements and we lost some of the smaller members. At the same time we took every possible step to ensure that we remain lean, focus only on key issues and allow our

members to grow their accountability at their own pace and capacity. That is the beauty of an Independent Review Panel assessing each organisation individually and not just against fixed indicators.

Conectas - The only requirement to become a member is that an organisation must have a complaints mechanism in place. What is the reasoning for this, how does it work and why is it important?

K. S. - Unless you have very good systems in place to listen to your stakeholders, how can you ever be held accountable? I was surprised to find that this was by no means a given in organisations. A number of organisations - and in particular the advocacy organisations - were not very strong in collecting feedback from their stakeholders at the beginning. The service delivery and humanitarian organisations were slightly more advanced in this regard. However, all of them found it hard to meaningfully engage on the feedback. The digital age now allows (and many start using it) a completely new, much more direct and in-time relationship with their stakeholders.

Organisations increasingly understand that this mechanism is not just about receiving criticism. It is actually about inviting feedback from and having a constant conversation with your stakeholders on what you can do collectively. It allows them to tap into peoples' knowledge, networks and energy to achieve greater impact for the cause.

The complaints mechanism also allows organisations to correct something very quickly if things go wrong. So if a project that you've launched with the best of intent has some side effect that you have not anticipated, a really good stakeholder feedback system will immediately enable you to adapt your project. In the digital age, it is a means of rapid response to enable the organisation to adapt and to continuously improve what it is doing.

In terms of how this works practically, it very much depends on the context in which the organisation is working. Some organisations have ombudsmen. There are organisations that have little boxes where you can put a small piece of paper. Others have text-messaging feedback. There are also panels in the communities to get feedback. There is feedback through the radio as well. So a vast amount of tools and practices have been developed over time, which are always very sensitive to how women and children can raise their voices in communities and potentially non-benevolent political situations are taken into account.

Conectas - What are the kinds of trends that show up in the annual reports?

K. S. - We have ten commitments which our members must report on - ranging from stakeholder inclusion to transparency to ethical fundraising. For each of these commitments, we ask three questions: 1. Do you have a policy in place in relation to the commitment?; 2. Is that policy well known in practice by staff?; and 3. Do you have evidence that it works well?

We are doing increasingly better on numbers 1 and 2, and still not well enough on number 3. However, we have sharpened the understanding of what these commitments mean. So while people used to think that inclusion just referred to gender – and would just report on how many women were employed and how many women an organisation was reaching through its various programmes – we have successfully broadened the discussion so that inclusion means looking at who is potentially *excluded* from the programmes – on the basis of, for example, ethnicity, age or disability. We have successfully managed to encourage member organisations to devise policies that are positive and far-reaching. Our members invest in implementing these policies and so we also hope to see, in the future, more evidence of these policies working well.

Conectas - The majority of your members still tend to be Global North-based organisations. Is it a challenge for you to reach organisations in the Global South? Have any of your southern members been able to offer tips to your northern members?

K. S. - We have recently welcomed two organisations from the Global South - BRAC from Bangladesh and the Taiwan Fund for Children and Families. However, it is not so easy for us to gain the same kind of visibility and credibility in the Global South where we have just not been so present in the past. We are addressing this through our project called the Global Standard for CSO Accountability.

Through this programme we have reached out to nine organisations – the majority of which are from the Global South based in India, Kenya, Uganda, Colombia, and the Philippines – that do similar work to us. This is really our answer to this missing link to the Global South as it is a southern-led exercise to look at what is at the core of CSO accountability standards.

Over the course of the next three years we will develop a collective CSO accountability standard. PricewaterhouseCoopers donated time to look at the various accountability codes that these nine organisations are using to establish how much overlap there is. What we have seen is that organisations in different locations have developed relatively similar ideas regarding accountability mechanisms. It will be great to see if we can develop this into one collective basic standard with certain sub sets for specific regions and contexts.

Conectas - We are seeing increasing restrictions on the rights of INGOs in a number of jurisdictions worldwide. Does the INGO Charter hope to have an impact on how those organisations are viewed in these jurisdictions?

K. S. – We definitely see this shrinking civic space. We see it as a huge challenge. One challenge is if we ask our organisations to be extremely transparent, how does that play out for them in reality in, for example, Russia? It is a problem. We need to be aware of what can we demand from whom. We want to make sure that being part of the Charter helps an organisation to fight some of the challenges that are presented in non-benevolent surroundings. The organisations that we are working with in India and Uganda are telling

us that very often CSOs in their countries are being accused by governments of being unaccountable, corrupt and performing badly. On these grounds, they get a bad reputation. Against that background, these NGOs certainly feel that it is helpful to be part of our global accountability alliance. They can then fight back by saying “actually, we meet the requirements of a Global CSO Accountability Standard that has been globally agreed as being a good reference standard for accountability.” At the same time, if the Charter is perceived as something that is international and not national, there may immediately be a suspicion that this has something to do with interference from the outside. This is a hot topic and not easy to resolve. We are very sensitive to developments and we are eager to learn from our Southern partners on how best to proceed so that global solidarity can play out in their favour.

Conectas - What does the future look like for the INGO Charter? Where do you see the organisation heading in the next five-ten years?

K. S. - The challenge for us is to look at how the digital age allows for a completely new version of accountability. We used to live in an age where the organisations defined with their members what they wanted to do, they presented this to the outside world, they reported on progress and then someone external evaluated. In the new era you crowd source your strategies and you look at a much broader constituency to take strategic decisions, you constantly co-create what you implement, because you permanently ask all your stakeholders how they like it, whether you should change it, if they have a better idea, or if they have another network to connect to. You then co-evaluate whether this is actually adding value or not. As the organisation Keystone Accountability always says: “Accountability is not only the right thing to do – it is also a very smart thing to do.”

NOTES

1 • The full text of the Charter is available here: http://www.ingoaccountabilitycharter.org/wpcms/wp-content/uploads/INGO_CHARTER_web.pdf, accessed October 1, 2015.

• • •

*Interview conducted in July 2015 by Juana Kweitel
and Oliver Hudson (Conectas Human Rights).*



KARENINA SCHRÖDER – *Germany*

As Executive Officer of the INGO Accountability Charter (the “Charter”), Karenina facilitates the acceptance and implementation of the Charter in the ICSO sector. Previously Karenina served on the board of Transparency International Germany for six years and was responsible for the strategic organisational development and was the coordinator of its Advisory Council. She also founded and managed the working group “Transparency in the Non-Profit Sector” and the “Academic Working Group of Transparency International Germany”.

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“NGOS CERTAINLY FEEL THAT IT IS HELPFUL TO BE PART OF OUR GLOBAL ACCOUNTABILITY ALLIANCE”

EXPERIENCES



RECLAIMING CIVIC SPACE THROUGH
U.N. SUPPORTED LITIGATION
Maina Kiai

RECLAIMING CIVIC SPACE THROUGH U.N. SUPPORTED LITIGATION

Maina Kiai

• *A UN special rapporteur explains how innovative legal action can protect fundamental human rights* •

ABSTRACT

With the issue of shrinking civil space an ever lurking menace, the author discusses how new approaches are needed – not only to protect the civil space that still exists but increasingly to regain that which is already lost. Maina Kiai explains how the traditional tools alone – such as reporting – are no longer fit for purpose. Consequently, his mandate has developed a new litigation project which aims to support the rights to freedom of peaceful assembly and of association through litigation in domestic and regional courts. The project actively seeks to support cases related to these rights and focuses on providing technical assistance and advisory services to litigants, attorneys and civil society organisations. Moreover, the author’s office submits amicus curiae briefs in relevant cases to add critical analysis and an international voice. The author presents his experience of lodging one such brief in Bolivia and encourages readers to get involved in the project.

KEYWORDS

Civil space | Litigation | Freedom of peaceful assembly | Freedom of peaceful association | Bolivia | NGOs

It is almost *passé* these days, as depressing as that sounds, to declare that civic space is shrinking across the globe. It is certainly true that in the last decade we have seen an unprecedented wave of repressive laws and practices sweep across the world, all designed to prevent people from organising, speaking out, and engaging in democratic rights and duties. But we are well past talking of “shrinking” in the present or future tenses. Data from the International Centre for Not-for-Profit Law (ICNL) indicate that between 2004-2010, more than fifty countries considered or adopted restrictive measures for civil society.¹ In many places, the deed has been done. There’s not that much space left to take.

Indeed the trend is so common and has spread to so many countries that it risks becoming the new norm. We are on the precipice of an era where countries will be bold in their repression, leaving ordinary people meek in asserting their rights.

Even more depressing, perhaps, is the fact that many of our traditional tools for combatting this trend are no longer working quite as well. Reporting, documenting, public pressure, guidelines, recommendations – none of these have been particularly effective in reversing the overall drift towards repression. I feel this currently in my work as UN Special Rapporteur on the rights to freedom of peaceful assembly and of association. My duties include both a monitoring and reporting component – name and shame, if you will – and a technical assistance component, which means working behind the scenes to help states improve their enforcement of human rights norms. It is plain that some governments are not moved by either approach.

One reason for our collective failures is that these approaches stem from another era, back when we could still talk about protecting civic space. But what do you do when that space is already gone? How do you get it back? I believe part of the answer lies in stepping up enforcement efforts. At this point, real pushback will require more creativity, innovation and a multiplicity of approaches.

1 • A new way forward: litigation in domestic and regional courts

It was against this backdrop of stepping up enforcement efforts that my mandate began a new project in 2014, designed to advance the rights to freedom of peaceful assembly and of association through litigation in domestic and regional courts. The project actively seeks to support cases related to these rights and focuses on providing technical assistance and advisory services to litigants, attorneys and civil society organisations. An important part of the project is the submission of *amicus curiae* briefs in relevant cases to add critical analysis and an international voice.

The thrust behind this endeavour is simple: Get international human rights law and standards into local courts, so that they can filter into domestic law and – perhaps most critically – enjoy better enforcement. The UN system is notoriously impotent when it comes to enforcing the human rights it espouses; it simply does not have the tools, and its

Member States are not going to make them available anytime soon. National and regional courts or human rights commissions are often in a better position to do this.

This is not to say litigation in domestic and regional courts is a panacea. It has its inherent shortcomings: courts in many countries can be hopelessly corrupt or politically obedient, litigants may be fearful of reprisals, proceedings may only focus on a single litigant or narrow legal provision, and even following a positive judgment, real on-the-ground change can be slow. But litigation does present advantages unique among rights-promotion tools. When used in the right context, for example, it can ensure concrete remedies: accountability, compensation and some closure. Litigation can also shine a light on repression by forcing the government to address issues head-on in a public setting, whether through written procedures or open hearings. Independent courts and strong rulings can provide backing for activists, halt abuses and command societal change.

When opportunities do arise in the right context, it is crucial that attorneys, litigants and judges have adequate tools to help them to succeed. I have found that the legal profession worldwide often faces hurdles accessing and making use of international laws, standards and principles. This is where my mandate is trying to step in, whether through technical assistance, expert declarations or amicus briefs. Indeed, sometimes my mandate's involvement could be as simple as providing lawyers with ready-made arguments, including ones we have made in previous cases.

Until this date, my mandate has filed three amici curiae before domestic and regional courts. Besides the mandate's first amicus brief submitted in a case before the Constitutional Court in Bolivia, described below in more detail, in August 2015, an amicus brief was filed in a case before the Supreme Court of Mexico challenging the constitutionality of the "City Mobility Law", which I argued unduly restricts the right to freedom of peaceful assembly.² In November 2015, the mandate also filed a third party intervention – with the Human Rights Centre, University of Ghent (Belgium) – urging the European Court of Human Rights to adopt strong protective standards for the right to freedom of peaceful assembly in four cases against Azerbaijan.³

Given the worldwide patterns in restricting behaviour by authorities, I am convinced that the arguments in these cases will prove useful to litigants in many other cases around the world. To facilitate access and use of them, we upload all the amicus briefs we have filed on our website.⁴

2 • Bolivia: a first foray

My mandate submitted its first amicus brief in May 2015, before the Constitutional Court of Bolivia in Sucre. The case in question challenges Article 7.II.1 of the NGO Act (Law No. 351) and Article 19 (g) of its implementing Supreme Decree 1597. In September 2015 – this law was in the headlines after the government used it to declare 38 NGOs "irregular".⁵ The accused organisations face sanctions, including the loss of their legal personality, a

measure that would *de facto* shut them down. This situation clearly illustrates the far-reaching effects of the law and its impact upon the lives of associations.

Events were not quite as dramatic at the time we submitted the brief in May 2015, but there were clear signs that trouble was coming. And by August, both the Bolivian President and the Vice-President had made statements illustrating that NGO's were no longer considered relevant, and civil society was warned not to act against the policies of the government.⁶

The NGO law itself dates back to March 2013, when Bolivia adopted the legislation despite many analyses indicating that it contravened international law (see below). It was implemented in June 2013, by the equally contentious Supreme Decree.

In late 2014, the Ombudsman filed a petition with the Constitutional Court of Bolivia, challenging the constitutionality of Article 7.II.1 of the NGO Act (Law No. 351) and Article 19 (g) of Supreme Decree 1597. The first provision conditions acquisition or confirmation of legal personality upon an association's contribution to economic and social development. The second stipulates that legal personality of associations can be revoked when associations do not comply with sector policies and/or norms.

3 • Analysis of the Challenged Bolivia Provisions

My mandate submitted an amicus brief earlier this year arguing that the Bolivia provisions unjustifiably restrict the right to freedom of association under international law, standards and principles.⁷ The foundation for this assessment is Article 22 of the International Covenant on Civil and Political Rights (ICCPR), which protects the right to freedom of association. Bolivia has been a party to the ICCPR since 1982.

The amicus brief notes that restrictions to the right to freedom of association are only permissible under the ICCPR when they are (1) prescribed by law; (2) for a legitimate aim; (3) necessary in a democratic society. Any restrictions to the right must be judged against this three-pronged test. Both of the articles challenged in the Bolivia case fail to meet this test.

First, they are not “prescribed by law” – primarily because they are too vague and broad. Both the UN Human Rights Committee and the Inter-American Commission on Human Rights have stated that laws must be clear in the obligations they set out.⁸ The vague notions referred to in the Bolivian laws, such as “contribution to social and economic development” and “sectoral policies and/or norms”, are anything but clear. In theory, one can argue that all human rights causes should be considered as contributing to social and economic development, but there is no guarantee the relevant Bolivian official will interpret it that way. The same goes for “sectoral policies”, which are constantly changing and virtually impossible to objectively document. The provisions simply leave too much room for abuse of power and arbitrary interpretations by state officials.

Even if the restrictions were properly prescribed by law, they do not serve a legitimate aim. To the contrary, they could be interpreted as an attack at the very foundation of the right to freedom of association. The law seems aimed squarely at hindering the work of associations that do not support the government's social and economic development platform. But the right to freedom of association explicitly applies to associations that do not toe the government line; in fact this is when enforcement of the right is most critical.⁹

Finally, even if the Bolivia provisions were prescribed in law and legitimate, they would not be necessary or proportional. Their effect – not obtaining or revoking legal personality from associations which hold different ideas than the politicians of the day – are simply too sweeping, particularly when you take account of the wide margin of discretion afforded to the authorities enforcing the law.¹⁰

The Constitutional Court of Bolivia is expected to rule on the case in early 2016. It is of course difficult to predict how the court will rule, but I am concerned by the recent statement by the Bolivian Minister for Decentralisation, who was quoted in news reports as saying that NGOs should observe national laws, regardless of what the UN thinks about them – likely a reference to my mandate's amicus brief.¹¹

4 • The way forward

The Bolivia case was just the first in what I hope will be a series of judicial interventions by my mandate. A number of cases are currently under review. Each case represents recurring challenges faced by associations and protesters worldwide, such as limits to access to legal personality for associations; burdensome registration procedures; barring access to foreign funding; limiting protest areas; authorisation regimes for peaceful assemblies, penalising participants to it and so on.

Each case is a small step towards reclaiming civic space, but the biggest impact will come when we reach a critical mass of interventions. Finding appropriate cases, though, depends on our networks and partnerships – and that means you. Special Rapporteur mandates are vast, often covering the entire globe, and resources are limited. We need you, as partners, to alert us to cases which might benefit from an intervention, flag the legal challenges you face, re-use international-law based arguments in your domestic jurisdictions, and to let us know the outcome of these cases.

If you have a case that might be relevant to the mandate, please get in touch with us via our website¹² or by contacting our litigation project coordinator Heidi Rombouts.¹³ Or if you simply want to inject international law into a current case on assembly or association rights, have a look at our previous briefs. For the moment there are only a handful, but the library will grow. They will all be publicly available on our website, so that lawyers and litigants can learn from our approaches, successes and failures. Indeed we hope that these filings will be viewed as model briefs to be recycled and reused around the world – each of them a catalyst to help enforce and reclaim civic space.

NOTES

1 • Douglas Rutzen, "Aid barriers and the rise of Philanthropic protectionism," *International Journal of Not-for-Profit Law* 17, no. 1 (March 2015): 5.

2 • United Nations Special Rapporteur, "Mexico: Special Rapporteur weighs in on case challenging constitutionality of protest laws," August 24, 2015, accessed October 9, 2015, <http://freeassembly.net/rapporteurpressnews/mexico-amicus/>.

3 • One such standard we urge the Court to adopt is recognition that the exercise of the right to freedom of peaceful assembly should not be subject to authorization by national authorities, as this it turns the right into a privilege to be dispensed by authorities. See United Nations Special Rapporteur, "Third Party Intervention Urges European Court to Establish 'Clear and Strong Protective Standards' on Assembly Rights," November 12, 2015, accessed October 9, 2015, <http://freeassembly.net/rapporteurpressnews/azerbaijan-intervention/>.

4 • United Nations Special Rapporteur, "Using litigation to advance the rights to freedom of peaceful assembly and of association," accessed October 9, 2015, <http://freeassembly.net/litigation>.

5 • The reasons for declaring these NGOs "irregular" included the fact that they had not completed the process of renewal and revision as stipulated by Law 351. See "Gobierno declara 'irregulares' a 38 ONG, entre ellas, el Cedib y la Cinemateca," *Correo del Sur*, September 6, 2015, accessed October 9, 2015, http://www.correodelsur.com/politica/20150906_gobierno-declara-irregulares-a-38-ong-entre-ellas-el-credib-y-la-cinemateca.html.

6 • Luis Mealla, "García advierte que si ONG se entrometen en el país, 'se van'," *La Razón*, August 11, 2015, accessed October 9, 2015, <http://www.la-razon.com/nacional/Vicepresidente-Garcia->

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7 • In August 2015, Human Rights Watch submitted an amicus brief in the same case, coming to the same conclusion. (Human Rights Watch, "Bolivia: Amicus brief on NGO regulations," August 5, 2015, accessed October 9, 2015, <https://www.hrw.org/news/2015/08/05/bolivia-amicus-brief-ngo-regulations>).

8 • United Nations, Human Rights Committee, "General Comment no. 27," UN Doc CCPR/C/21/Rev.1/Add.9 (13), 2 November 1999; Inter American Commission on Human Rights (IACHR), *Second Report on the Situation of Human Rights Defenders in the Americas* (Washington, D.C: IACHR, 2011), 234-35, recommendation 19.

9 • United Nations, General Assembly, "Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," UN General Assembly, UN Doc. G.A. Res. 53/144, 9 December 1998, articles 2, 5 and 7 and explicitly article 8 on criticism to governmental bodies and agencies.

10 • The full brief can be found on our website in both Spanish and English, via the following link: <http://freeassembly.net/rapporteurpressnews/bolivia-amicus/>.

11 • “Ministros dicen que ONG alineadas a planes del Gobierno serán respetadas,” Página Siete, August 26, 2015, accessed October 9, 2015, <http://paginasiete.bo/nacional/2015/8/26/>

ministros-dicen-alineadas-planes-gobierno-seran-respetadas-67917.html.

12 • <http://freeassembly.net/litigation/>.

13 • Heidy.Rombouts@freeassembly.net.



MAINA KIAI – Kenya

Since May 2011, Maina Kiai has been the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association. A lawyer trained at Nairobi and Harvard universities, he has spent the last twenty years campaigning for human rights and constitutional reform in Kenya – notably as founder and Executive Director of the unoffi Kenya Human Rights Commission, and then as Chairman of Kenya’s National Human Rights Commission (2003-2008).

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VOICES



**RAPE CULTURE AND SEXISM
IN GLOBALISING INDIA**

Kavita Krishnan

THE KNIVES ARE OUT

Shami Chakrabarti

RAPE CULTURE AND SEXISM IN GLOBALISING INDIA

Kavita Krishnan

• *How politics, economics and caste ideology* •
shape women's rights in India

ABSTRACT

Following the 2012 gang rape of a woman in Delhi, the spotlight was turned on women's rights in India. A 2014 BBC documentary reignited the debate as it – and much of the international debate – was quick to suggest that this violent and misogynistic act was an expression of Indian culture and tradition. Here the author argues that such an explanation is incorrect. Rather, Kavita Krishnan suggests that there are more complex contemporary forces in play that actively work to maintain women's subordinate role in society – specifically caste, politics and capitalism.

KEYWORDS

India | Sexism | Women's rights | feminism | capitalism | India's Daughter

In India and in the West, there is a tendency to see gender violence and misogyny in India as an expression of “culture” and “tradition”. This is an inaccurate and distorting lens through which to look at gender violence and misogyny.

In an interview in the 2015 documentary *India's Daughter*, directed by Leslie Udwin, Mukesh Singh, one of the men convicted for the 16 December 2012 gang-rape and murder in Delhi, justifies the rape on the grounds that the victim had overstepped the lines of prescribed gender roles and feminine morality. His lawyer echoed the same victim-blaming sentiments, boasting that he would burn his daughter alive if she were to behave in a dishonourable way. These interviews were widely condemned across the globe as expressions of a brutal and uncivilised culture of rape and honour crimes. The film itself explains such attitudes as products of poverty, deprivation and a culture of masculine privilege in India.

Mukesh Singh and his lawyer Manohar Lal Sharma invoke “Indian culture” as the source of their victim-blaming remarks. A range of other influential Indian figures of authority, including members of parliament and assemblies, leaders of the Hindu political right, heads of most religions and sects, police officers, and even a head of the national women’s commission, have also expressed opinions very similar to those expressed by the rape convict and his lawyer.¹ And all of them invariably invoke “Indian culture” as the basis for their beliefs, blaming “western” influence for rape.

In spite of their claims, their victim-blaming remarks are not a straightforward expression of an “Indian culture” or “tradition”.

When politicians and other powerful figures seek to define “Indian culture” in terms of misogynistic traditions, they are not expressing a pre-existing culture, they are trying to create and craft such a culture. It is a myth told for political purposes.

“Honour crimes” (feminists prefer the term custodial killings), especially the murder of women and their lovers or husbands, are often defended by invoking “tradition”. However, the “tradition” of punitive killings of self-choice couples is not really a mere vestige of an outdated tradition.

In the Indian state of Haryana, for example, the so-called “honour killings” – ordered by *khaps* (dominant caste clans) – are a modern phenomenon. They are an attempt by landed clan leaders to invoke tradition in order to retain control over land, property as well as political hegemony. Such control is under strain from challenges by oppressed castes as well as young women who are making claims to the land and property.

“Tradition” and “culture” is invoked by ruling class politicians to consolidate the support of dominant classes, castes, and religions. But it is also invoked to create a fictitious unity of men across classes. The class divide between the powerful section that owns land and factories, and the landless working class, is disguised by a unity of clan/caste identity. And

one of the most powerful ways in which this identity is forged, is by the notion of a shared “honour” that lies in control over sisters and daughters.

Misogynistic culture is therefore not static and unchanging. It is shaped by modern anxieties and economic, social and political motives. The “Indian culture” invoked here is therefore a myth, narrated to unite working class and landless men with landed men and capitalists.

What we need to ask is, not “Why is Indian culture so brutal to women and why does India defend rape and honour killings” but instead “in whose interests, and through what processes, is an “Indian culture” being produced, that simultaneously blames women for rape, and justifies surveillance and denial of women’s autonomy in the name of protection of rape?” Why, in India (and elsewhere in the world too), are we seeing loud pronouncements of victim-blaming and rape culture from influential politicians?

Capitalism needs to draw women into the labour force as cheap, under-paid labour, and it also needs women’s unpaid work in the home to bear the bulk of the burden of social reproduction (bearing children, replenishing labour power daily by providing food, care and psychological comfort for the exhausted worker, and caring for the past and future labour-force - children and the aged).

In India therefore, the current spate of sexism and culture of justifying rape and surveillance on women, is best explained as a means of disciplining women’s labour in a neoliberal capitalist economy, rather than as a mere vestige of a backward culture.

In the late 1980s, India’s ruling class imposed neoliberal economic policies (popularly called LPG - Liberalisation, Privatisation, Globalisation) on India.² Those policies, the rulers claimed and still claim, would lift India out of poverty, create jobs, and empower women.

Women have, in the past few decades in India, come out in increasing numbers to seek paid work. However, women’s workplace participation rates are still low, and women are still mostly employed in the ‘3-D jobs’ (jobs that are ‘Dirty, Dangerous, Demeaning’). While women are being drawn into exploitative wage labour, they are also called upon to bear increased burdens of household labour.

It is not just oppressive families, then, that seek to hold women down to these roles. The very processes of capitalism and globalisation that seek to draw women out into wage labour, also seek to hold women down to their domestic roles in maintaining social reproduction.

In India today, ideologies of domesticity and the “Indian family” are under strain, thanks to women being drawn into wage labour and women’s increasing assertion of their autonomy within their natal and marital homes. Yet, the ideologies continue to be invoked by the government as well as by factory owners producing for global capital.

The ideology of gender, family and national/religious “culture” are invoked in contemporary Indian political, economic and social narratives to justify gender, caste, class hierarchies and religious divides. That is why the fight against caste, gender and communal violence in India cannot merely be a fight against “backward culture” or “regressive mindsets,” as is popularly understood in mainstream media in India and the West. Those battles, along with those of India’s workers and peasants, need to integrate with each other and confront capitalism and neoliberal policies; and battles will have to be fought together, for freedom and autonomy in fields, factories and families.

NOTES

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THE KNIVES ARE OUT

Shami Chakrabarti

• *The UK government's plans to withdraw from the European Convention on Human Rights and scrap the Human Rights Act will seriously undermine rights protection in the UK and beyond* •

ABSTRACT

Following the recent general election in the UK, the Conservative Party is promising to abolish the Human Rights Act – which allows UK citizens to defend – in British courts – their rights set out in the European Convention on Human Rights. There is even the threat to withdraw from the Convention itself. As an alternative, the Conservative Party is proposing a British Bill of Rights. However, details remain vague and there are serious concerns that it will fall far short of the current human rights system – one that has proven time and time again to offer real protection to real people. Shami Chakrabarti describes why the arguments being used for the abolition and withdrawal are misguided and why doing so would be a disaster for the protection of human rights, not only in the UK but also internationally.

KEYWORDS

UK Human Rights Act | European Convention on Human Rights | Liberty | Magna Carta | British Bill of Rights

The dust had barely settled from the United Kingdom's general election in April 2015 when the knives came out for the British Human Rights Act (HRA). The speed at which the new Conservative government jumped on an issue, which had only merited a few sentences in the party manifesto, simply reinforces how poorly thought through calls for its abolition are.

The HRA enshrines the European Convention on Human Rights (ECHR) into British law. This means that human rights claims can be raised in British courts. Prior to the HRA's enactment, those in the UK could only raise rights issues in the European Court of Human Rights (ECtHR) in Strasbourg, making the process both incredibly time-consuming and expensive, closing the door to many. Liberty client Janet Alder is just one example of a claimant who suffered under that system. Although she was ultimately successful, Janet's struggle to get justice for her brother who died in police custody lasted an unacceptable 13 years.

Thankfully, this is no longer the case. Time and time again the HRA has enabled ordinary people – soldiers, journalists, bereaved families, victims of domestic violence, slavery and rape – to hold the powerful to account in UK courts. Simply put, the HRA protects everyone. Can the same be said of the so-called British Bill of Rights – the vague alternative proposed by the Conservatives? The danger of replacing “Human” with “British” is clear; rights for some but not all – who on that list above will miss out? And when and where will victims get justice? These are just two of the many questions that have not been answered.

We are told that replacing the HRA with a new British Bill of Rights will restore parliamentary sovereignty; ensure that the UK's Supreme Court is actually supreme; correct the “mission creep” which has moved human rights into areas never envisioned by the drafters of the European Convention in the late 1940s; ensure human rights law only applies in serious cases; and ultimately inject some much needed common sense into rights protection. So important is the issue that Prime Minister David Cameron hijacked the 800th anniversary of the great Magna Carta to remind the UK that it falls on us “to restore the reputation of [human] rights” .

Far from laughing in the face of Magna Carta, the HRA builds on its tradition of liberty, offering far more meaningful protection than its lauded medieval forbearer. It is a dark irony that British government ministers lined up to celebrate Magna Carta while seeking to put its present day equivalent out to pasture. And it is something all the more sinister for the British Prime Minister to stand before the nation and use the anniversary to declare that “the good name of human rights has sometimes become distorted and devalued” when that distortion has often emanated from his own party.

Both the Prime Minister and the Lord Chancellor (the UK's Minister of Justice) have said they are prepared to withdraw the UK from the European Convention – Churchill's post-war legacy – altogether to achieve their aims. They level two main criticisms at the Convention. It will come as no surprise to learn that they are completely wrong.

The government claims that withdrawing from the European Convention will end the ECtHR's ability to require the UK to change British laws. The Court has no such ability - British law can only be changed with the approval of Parliament.

In addition, the British government also claims the ECtHR has developed "mission creep", with human rights moving into areas never envisioned by those who drafted the Convention. But it can only be right that the ECHR is seen to be a living instrument, capable of developing over time rather than remaining stagnant. When the Convention was drafted homosexuality was still illegal in much of Europe whereas marital rape and corporal punishment were not, and such scientific developments as DNA could never have been envisioned, let alone its mass retention on a police database. Far from being a problem, this "mission creep" is one of the Convention's great strengths.

Not only is this crusade against imaginary problems pointless, it is incredibly dangerous on a global scale. The international impact of the UK's departure from the ECHR cannot be overstated. The UN special rapporteur on torture Juan Mendéz said that a UK withdrawal would be "a very bad example for the rest of the world" and that it could increase the risk of individuals facing cruel, inhuman or degrading treatment. He stressed that to be making these moves during the current European migration crisis was "pernicious" and "an ungenerous and cold-hearted way of dealing with a crisis".

The Council of Europe's Human Rights Commissioner has said it could be the "beginning of the end of the ECHR system". Last year, survivors and relatives of the victims of the 2004 Beslan massacre in Russia - who are raising rights violations at the ECtHR which occurred both at the time of the massacre and in the subsequent trials - also warned that British withdrawal would be greeted with delight by Putin who would see it as an opportunity to flout Russia's human rights obligations. They appealed to the British government to "understand that we all live in the same world", explaining that the UK leaving the ECHR would be disastrous for Russians. David Cameron also takes the dubious accolade of being cited by the former Kenyan president Uhuru Kenyatta - who is facing war crimes for thousands of deaths and displacements following the 2007 Kenyan elections. In defending Kenyan sovereignty in a speech to the country's parliament he cited the Conservatives' plans to quit the ECtHR. The UK has a proud history of highlighting human rights issues and promoting the rule of law internationally, as well as calling global attention to serious abuses - its withdrawal from the ECHR would dramatically undermine this credibility.

The current UK system of rights protection is not completely invulnerable, but it stands up incredibly well to attacks. Respect for rights and parliamentary sovereignty are near-perfectly balanced, yet the British government says it wants to inject some common sense into the system. Well, common sense is not allowing a powerful politician to decide which cases are important; it is not preventing rights protection from evolving with scientific and technological advances; it is not forcing victims in the UK to go to Strasbourg to enforce

their rights while simultaneously cutting legal aid; and it is not endangering the lives of citizens of other countries by taking the ECHR out of the equation entirely.

A small group of British politicians think human rights do not matter, but more and more people at home and abroad know that's not the case. The HRA received support from all political parties when it became law, and all but a minority oppose its repeal. The growing consensus is that the alternative is simply untenable. We have a fight on our hands, but together we can save our Human Rights Act.



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