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EDITORIAL TEAM

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LETTER TO THE READERS

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THE SUR FILE ON MIGRATION AND HUMAN RIGHTS

One of the principal reasons the Sur International Journal on Human Rights moved to its new format after the publication of the 20th commemorative edition was to ensure that it was always a relevant forum for discussion of contemporary human rights issues. This edition of the Sur File, which discusses Migration and Human Rights, could not be more pertinent.

In preparing this edition of the Sur Journal the topic of migration has been constantly in the news. The violence in, for example Syria, Iraq and Afghanistan and the extreme poverty and repressive governments of certain countries in sub-Saharan Africa continue to generate large flows of refugees and migrants. In the first 6 months of 2016, over 2,800 people have already died in the Mediterranean as compared to 3,771 in 2015. This suggests that 2016 will become the deadliest year on record in the Mediterranean.[1] Anti-immigrant sentiment is running high in Europe. As an example, after the recent referendum on UK membership in the European Union, which saw an ugly and divisive campaign that reinforced the idea of immigration being a threat to the country, videos of racist abuse filled social media while reports of hate crimes increased by 57 per cent. Meanwhile, a stalemate in the United States of America (U.S.) Supreme Court over the legality of President Obama's executive orders for deferred action against deportation of irregular migrants, leaves millions of immigrants in a legal limbo.[2] In Latin America, it is still not clear how the severe political and economic crises currently experienced by many countries will impact international migration flows. Unfortunately, there is a realistic fear that migrants and refugees may be doubly affected: in addition to the ongoing setbacks in the field of human rights in several states there is also the absence or lack of implementation of national laws that offer migrants and refugees the same rights as nationals. Paradoxically, the city of São Paulo, Brazil - a major

hub of international migration within Latin America - adopted a law implementing the Municipal Policy for the Immigrant Population,[3] a few days before hosting the VII World Social Forum on Migrations.[4] However, the implementation of this policy will face serious obstacles in a megalopolis that is marked by extreme inequalities, particularly in a country where the federal law on migration, which dates from the military regime, still prevails.[5]

The trend is clear and it is concerning: migrant populations are seen as a security issue with increasingly little regard for their fundamental rights or any attempt to understand the complexities behind the decision to migrate.

The Sur File on Migration and Human Rights seeks to address this trend. It does this with the modest hope that by collecting a group of experts from academia, international organisations and civil society we can contribute to resetting this worrying imbalance that is being played out on the streets and in the corridors of power across the globe.

The Sur File begins by asking the question **"who is migrating, to where and why"?** Responding to these questions are two of the leading academics on migration. Firstly, **Catherine Wihtol de Wenden (France)** sets out the key trends in migration today. In doing so, she debunks the myth that migration is a phenomenon that sees only migrants from the Global South moving to the North, noting that both regions have the same number – approximately 120 million - of migrants. **Saskia Sassen (The Netherlands)** then examines three new migratory flows – unaccompanied minors from Central America that head to the U.S.; the surge in Rohingyas fleeing from Myanmar; and the migration towards Europe originating mostly in Syria, Iraq, Afghanistan and several African

countries, notably Eritrea and Somalia. Analysing these flows enables us to understand the complex dynamics behind them, demonstrating that in nearly every case human rights abuses are amongst the principle reasons that cause individuals to migrate.

The second section of the Sur File, **"policy under scrutiny"**, addresses the day-to-day effects that misguided migration policies have on migrants across the world. **Messaoud Romdhani (Tunisia)** describes how the European Union-Tunisia Mobility Partnership and the European Agenda on Migration have neither stemmed irregular migration from North Africa to Europe nor reduced the death toll in the Mediterranean and calls on European and Global South civil society to unite against such policies. Meanwhile, **Jamil Dakwar (USA)** argues that the Security Against Foreign Enemies (SAFE) Act, currently being considered by the U.S. Senate, would essentially bring the resettlement of Syrian and Iraqi refugees to a grinding halt. This legislation further underlines how the immigrant population in the U.S. is increasingly vulnerable. **Deisy Ventura (Brazil)** examines the policy responses to international health crises which very often serve to incite or justify human rights violations against migrants. Using the recent Ebola outbreak as an example, she argues that the restrictions on international migration adopted during the crisis are illegal under international health law and counterproductive to the effort to combat the epidemic. For the first time, the Journal includes a video essay, directed by **João Wainer (Brazil)**, which looks at immigration in the city of São Paulo and examines the municipal policies that have been implemented to respond to the needs of the migrant population.

The final section of the Sur File, **"moving forward"** considers how the discussion on migration needs to be reframed with human rights at its core. The United Nations Special Rapporteur on the

human rights of migrants, **François Crépeau (Canada)** argues that European politicians must look to establish a long-term strategic vision that facilitates mobility through visa liberalisation. He suggests that the best way to change the discourse on migration is to make the issue personal, by sharing migrants' stories with decision makers and opinion formers. Echoing this sentiment **Zenén Jaimes Peréz (Mexico/U.S.)** sets out the methods and tactics used by United We Dream, the largest immigrant youth led advocacy organisation in the U.S. The organisation successfully forced the White House to pass two key executive orders that offered deportation relief to millions of Central American immigrant youths and their parents. The article's pragmatic guidance is useful for other advocacy organisations seeking to launch tough campaigns on other issues. Finally, **Pablo Ceriani (Argentina)** demonstrates how the language we use to talk about migrants, whether it be in the press or in a policy document, plays a critical role in how the migrant population is viewed and therefore the level of protection they are afforded.

CARTOONS

For the first time the Sur Journal features a series of cartoons, which complement the Sur File on Human Rights and Migration. Through a partnership with **Cartooning for Peace** we are proud to showcase the talents of some of the leading cartoonists in the Global South, all of which offer a critical reflection on the debate on migration in the European context. We are also delighted that **Latuff (Brazil)**, another influential cartoonist, complements this collection of talent with two of his cartoons one which comments on the issue of migration in Europe and the other in Brazil. Sur 23 also includes – in the article by Deisy Ventura - four cartoons by **Patrick Chappatte (Switzerland)**, one of the leading exponents in the history of the cartoon reporting genre.[6] Once again, we present a series of infographics, designed by Estúdio Kiwi (Brazil)

and researched by **Deisy Ventura** and **Natália Araújo (Brazil)** which offer a panorama of key facts and figures on migration.

CONVERSATIONS

Sur Journal was honoured to interview the retired Supreme Court judge of Australia, **Michael Kirby (Australia)** about his experience as the chairperson of the United Nations Committee of Inquiry (COI) on human rights in the Democratic People's Republic of Korea (North Korea). Kirby describes the COI's importance – not only for bringing greater international attention to the atrocious human rights conditions in North Korea but also because of the innovative methodology the COI used and which might be replicated in the future.

ESSAYS

This section of the Journal, which offers a space for deeper analytical reflections, begins with a contribution from **Makau Mutua (Kenya)**. He examines the concept of the rule of law and how it has been applied in the post-colonial African context. Mutua suggests the concept needs to be revised in order for sustainable development to take place on the continent. **Sandra Carvalho, Alice de Marchi Pereira de Souza and Rafael Dias (Brazil)** present a comparative study on the protection policies for human rights defenders in Brazil, Colombia and Mexico identifying the main challenges and calling for greater regional coordination on the issue. In her contribution, **Julieta Rossi (Argentina)** deals with the court judgment in the U.S. that undermined the sovereign agreement Argentina had reached with the majority of its creditors. The decision set a worrying precedent that the property rights of a few – the creditors - could be held to be more important than the rights of the many – those populations predominantly, though not exclusively, in the Global South.

Taking advantage of the opportunity to unpack a human rights victory against the private sector at the level of the South Africa Supreme Court, Lisa Chamberlain (South Africa) sets out the lessons that can be learnt from the case *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance*. She sets out how communities and the human rights lawyers that support them might apply these lessons in other access to information legal battles.

Lucia Nader and José Guilherme F. de Campos (Brazil) distil the results of hundreds of interviews and many hours of research into a few pages to help us better understand what innovation really means and what lies behind the fear of many rights based civil society organisations to innovate. In doing so, the authors take the opportunity to analyse these concerns – many of which will be familiar to our readers - and offer counter arguments to them, before suggesting five questions that are important for any organisation to consider before it begins innovating.

Addressing the state of civil society in Africa and the context in which it now finds itself, Kumi Naidoo (South Africa) takes a brief look at prior attempts to bring African civil society together before setting out how the new African Civil Society Initiative, his current challenge, is taking shape. Finally, Laura Dupuy Lasserre (Uruguay) commemorates the tenth anniversary of the United Nations Human Rights Council by reflecting on some of its successes – in particular the Universal Periodic Review mechanism as well as the important role which Global South countries have played in the council over the last decade. She does this while identifying elements of each that might be strengthened going forward.

NOTES

1 · For more information see http://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015 and http://missingmigrants.iom.int/.
2 · For more information see http://www.supremecourt.gov/opinions/15pdf/15-674_jhlo.pdf.
3 · For more information see http://www.prefeitura.sp.gov.br/cidade/secretarias/upload/direitos_humanos/PL%20142_2016_Pt(1).pdf.
4 · For more information see http://fsmm2016.org/.
5 · For more information see http://www.planalto.gov.br/ccivil_03/leis/L6815.htm.
6 · For more information see http://www.graphicjournalism.com/about-chappatte/.

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Additionally, we are especially grateful for the collaboration of the authors and the hard work of the Journal's editorial team and executive board. In particular, we welcome Néia Limeira to the team and thank her for her hard work helping to prepare this edition. Special thanks also go to the Center for Human Rights and Justice, University of Texas, Austin for our continued partnership and to Thiago Amparo. This issue is the first issue since Sur 20 without him as the executive editor. Thiago played a crucial role in devising the Sur Journal that we read today and therefore, we want to make a special mention of the legacy he leaves for both Conectas and Sur.

And finally, Ana Cernov, Camila Asano and the Communication Team from Conectas deserve great credit for their dedication to this issue. As ever we are very appreciative for the invaluable support and guidance given by the directors of Conectas Human Rights – Jessica Carvalho Morris, Juana Kweitel and Marcos Fuchs.

THE SUR FILE ON MIGRATION AND HUMAN RIGHTS

NEW MIGRATIONS

Catherine Wihtol de Wenden

• *Why are more people on the move than ever before* •
and where they are going?

ABSTRACT

With more people on the move than ever before – an estimated 1 billion – it is crucial to understand who these people are, why they are moving and where they are going. In this article, Catherine Wihtol de Wenden does just that by offering a panorama of contemporary migration patterns. The author sets out how migration became a globalised and – paradoxically - a regionalised phenomena, examining, for example, the flux of migrants from Latin America to North America and the migratory system that focusses on Russia. She then addresses several "new migratory situations" including the Chinese arriving in Africa and wealthy retirees from the Global North finding homes in the Global South. Refugees and undocumented migrants are given special focus given the author's belief that these categories of migrants are likely to increase or become more diversified in the near future. The article concludes by addressing three aspects which will continue to shape "new migrations": the increase in the world population and international migration; the relationship between urbanisation and migration; and finally, climate change.

KEYWORDS

Migration | Population | Urbanisation | Refugees | Irregular migrants | Climate change

At the beginning of the 21st century, international migration reached unprecedented levels. Unlike the past, however, it is not the Europeans who are migrating around the world. On the contrary, with its population in decline, Europe has become one of the top destinations for migrants. But, in fact, the entire planet is on the move, especially the Global South. New destinations have emerged, such as the Gulf States, the African continent and some Asian countries, whereas former countries of origin have now become host or transit countries, such as those in southern Europe, and more recently, Mexico, Turkey and Northwest Africa (Maghreb).

Over the past thirty years, migration has globalised. Since the mid-1970s, the number of migrants has tripled: there were 77 million in 1975, 120 million in 1999, 150 million in the early 2000s and 244 million today.[1] The tendency is for this process to continue, as the factors contributing to this mobility are unlikely to disappear. These factors include: differences in the levels of human development (which include life expectancy, level of education and level of well-being) along the main fault lines in the world; political and environmental crises that "produce" refugees and displaced persons; reduced transportation costs; the increased number of passports being issued, even in countries from which it used to be difficult leave; lack of hope in poor and poorly governed countries; the role of the media; greater awareness of the fact that it is possible to alter the course of one's life by migrating abroad; and, finally, climate change.

In terms of migration flows, the European Union continues to be the most sought after destination in the world, ahead of other major poles of migration, such as: the United States of America (U.S.) (in second place), the Gulf countries (third) and Russia (fourth). While the South-North flows are a predominant issue in debates on migration, the flows towards the South of the planet (close to 120 million, including the South-South and North-to-South flows) have now matched the number of those moving to the North (close to 120 million: South-North and North-North). Together, they add up to a total of 244 million international migrants – equivalent to 3.5% of the world population. To this, one must add close to 740 million internal migrants who are migrating within their own countries. Therefore, there are 1 billion migrants in the world; in relation to the global population, this means one in every seven people.

The redistribution of migration in the world can be explained by the new trends in migration: women account for 51% of international migrants. There are close to 40 million environmentally displaced persons. Refugee flows are estimated at 60 million. That is not to mention the unaccompanied minors, retirees moving to milder climates and North-North migration related to the economic crisis.[2]

1 • The globalisation and regionalisation of flows

This gradual mutation took place over a period of 20 years - a period marked by the globalisation of migration flows. The same causes - urbanisation and metropolisation, population pressure, unemployment, information and the transnationalisation of migration

networks - generated the same effects all over the world, namely the increase in the mobility of populations that had previously been sedentary. That said, due to the lack of means to leave, the poorest still remain where they are. Some places were particularly affected by the new flows such as the islands of the Mediterranean Sea and the Caribbean, as well as certain border areas - such as Thrace, between Greece and Turkey - as they differentiate the world of free circulation from the one whose borders are closed to the majority of migrants. New countries are attracting migrants, such as the emerging economies, or the BRICS (Brazil, Russia, India, China and South Africa). At the same time, a tremendous amount of internal migration is also underway. There are as many Chinese migrants within China as there are international migrants at the global level: close to 240 million.

Internal and international migration affects nearly all regions of the world. While the lines between categories of migrants and countries became increasingly blurred as they globalised, the globalisation of migration has – paradoxically – been accompanied by the regionalisation of migratory flows. At the global level, migration is organised geographically into complex systems of migration that revolve around the same region, in which complementarities are built between the zones of departure and arrival. These complementarities are related to geographical proximity; historical, linguistic and cultural ties; transnational networks built by migrants; and when "pull" and "push" factors related to labour come together to form a formal or informal space for circulation, which may or may not be accompanied by an institutional facilitation of travel. There are various informal and formal ways to regroup migrants, for example: "migratory pairs" in which migrants who are essentially from the same country all go to another country, as in the case of Algeria and France; "diaspora migration", when one group builds links with several host countries, such as Italian, Moroccan and Turkish migrants; or when the migration flow of people from one country is spread globally over numerous countries, as is the case of migrants from India (close to 30 million in the world) and China (close to 50 million). Even so, regionalisation still dominates the logic of the migration flows. This is why in any given region of the world, there are more migrants coming from the same region than from other regions of the world.[3]

This holds true for the Americas. The bulk of migration flows towards the U.S. (close to 43 million people born abroad) comes from Latin America and the Caribbean. In South America, host countries (Argentina, Brazil, Chile and Venezuela) receive migrants mainly from neighbouring countries, especially from the Andean region and Central America (Bolivia, Colombia, Ecuador, El Salvador, Honduras and Peru). In "Brasiguay", Brazilians go to develop land in Paraguay, while Paraguayan peasants go to work in Brazil. Historically, this was not the case - several decades ago the migratory contingent was essentially made up of Europeans on their way to the U.S., Canada, Argentina and Brazil. The same scenario exists in Europe: with some 30 million foreigners, Europe maintains migratory synergy with the southern coast of the Mediterranean and Sub-Saharan Africa up to the Equator. South Africa absorbs the bulk of flows from southern Africa. Previously, the Europeans were in these regions for exploration, colonisation, missionary and trade purposes (the 3 "Ms" in Africa: military, missionaries and merchants).

The Russian world constitutes another migration system; there are approximately 13 million foreigners currently in Russia. The centrifugal and centripetal movements that have intensified since the fall of the Berlin Wall in 1989 are reshaping the former USSR: Russia's ageing population and demand for labour attracts people from the independent Muslim republics that maintain strong cultural ties with Russia (Uzbekistan, Kazakhstan, Tajikistan and Azerbaijan) and from neighbouring China along its eastern border. Sovietism, the Russian language and the elimination of visas between the Commonwealth of Independent States[4] and the Russian Federation have led to the constitution of a privileged network of migration.[5]

Southeast Asia – which, together with India and China, has the largest supply of migrants in the world – is part of another migration system. Rich and/or ageing countries such as Japan and South Korea, but also Taiwan and Singapore, attract migrants from China. The Philippines, where one out of every ten inhabitants lives abroad, constitutes an abundant source of labour for both the region and abroad, namely the Gulf States, Europe and the U.S. Depending on the situation at the time, Malaysia and Thailand can be either host countries or countries of departure in the region. Australia and New Zealand, which had previously been largely populated by Europeans, are now fed by migration from Southeast Asia. Migration from India and Pakistan also "irrigates" the region, but continues, at the same time, to be as globalised as migration from China. Rich and sparsely populated, the Gulf countries attract their share of South-South migration from the southern coast of the Mediterranean (Egypt, the Maghreb and the Horn of Africa), Pakistan and the Philippines.

2 • New migratory situations

The regionalisation of migration flows combines with new transversal intercontinental migration flows. The most recent flow to emerge is that of Chinese migrants moving to Africa. Rich in raw materials (oil, minerals, fish and wood) and in need of infrastructure (telephone, Internet, buildings and public works), the Maghreb and Sub-Saharan Africa are now hosting Chinese businessmen and temporary workers who fill up on marine and underground resources.

North-to-South migration flows, for their part, are also generating new trends in migration. *"Britishland"*, where the British go to retire in Western France (Normandy, Bretagne and Aquitaine), is one example of this. Relatively well-off retirees are also migrating to Spain (the Germans and the British), southern Portugal (the British), Greece, Morocco, Tunisia and Senegal (the French). The same phenomenon can be found in the Caribbean, this time with retirees from the U.S. and Canada. Bulgaria has been seeking to play this role since it joined the European Union in 2004. These migration trends are an extension of international tourism, where comparative advantages such as the cost of living, the quality of services and the climate work in favour of sunny countries. Another type of intercontinental migration flows - of unaccompanied minors or youth in search of work or asylum - complete this increasingly fragmented portrait: Afghans seeking to enter the United Kingdom, prostitutes from Eastern Europe and the Balkans, who take great risk to do so.

Two large categories of migrants deserve special mention, which are likely to increase or become more diversified: refugees and undocumented migrants. The term "refugee" was defined by the Geneva Convention in 1951, which was drafted in the context of the Cold War and with the tendency to protect dissidents from the Soviet Union and the entire Communist bloc in particular. Initially limited to Europe, this category has gradually been extended to the rest of the world since 1967 and the volume of refugees increased significantly throughout the 1980-2016 period due to the major crises shaking the world: civil wars in Latin America, conflicts in the Middle East, ex-Yugoslavia, Algeria, the African Great Lakes region, the Ivory Coast, Kurdish regions, Iran, Iraq, Afghanistan, Sri Lanka, Darfur, Myanmar, Eritrea and Somalia, and now Syria...

The majority of these conflicts led to people being displaced to neighbouring regions, protected by non-governmental organisations: they are known as "internally displaced persons". Other conflicts produced asylum seekers who sought recognition for their status as refugees. Host countries, which used to grant this status generously in the past, have shown themselves to be much more hesitant due to restrictions on migration policies in general and the fact that the profiles of refugees have changed considerably in relation to the Geneva Convention: applicants are collective, not individual, and threatened not by their states, but by civil society (in the case of Islamic terrorism, for example), or flee their countries for more social than political reasons (gender, in the case of women, or sexual orientation, social class, ethnicity and religion). Therefore, at times, the recognition of the right to asylum has evolved based on a dual tendency – humanitarian and security – which has resulted in declining rates of recognition.

Could the environmentally displaced be considered refugees, given that they are also constitute a type of forced migration? Although the phenomenon is not new, it has only recently become a political issue related to global warming. Until now, coverage under the right to asylum has been basically inexistent. A specific status for the environmentally displaced would need to be created within the United Nations (U.N.) framework – not one that simply extends the coverage of the Geneva Convention to them, but rather one that puts them under the protection of the U.N. High Commissioner for Refugees. There are multiple causes of environmental displacement: in addition to desertification linked to climate change, natural disasters (cyclones, tornados, earthquakes and volcano eruptions), deforestation, the melting of glaciers, the submersion of flood zones (Maldives and Tuvalu islands, the Halligen Islands in Germany, Bangladesh), invasions of insects and mudslides can all cause displacement. The majority of the focal points of environmental crises are located in the South, in poor countries whose states rarely have the means to address them. According to climate experts (of the Intergovernmental Panel on Climate Change), the number of displaced persons could reach between 50 and 150 million by 2050, and even be as high as 200 million by the end of the 21st century.

Another group of displaced persons is that of stateless individuals who have either lost their nationality or never had one due to state succession, the redefining of borders or processes

to rebuild states that exclude certain minorities. Many of them can be found in Bangladesh and Myanmar. Their status is defined by the 1954 Statelessness Convention, but states seek to reduce the number of stateless persons by offering them access to nationality.

Migrants in an irregular situation are part of a global, though disperse, category. They include those who have entered a country illegally without the required documents (passports and visas), have entered legally, but prolonged their stay beyond the legal limits or have accessed the labour market without due authorisation to work (namely students or family members). Their number - which, by definition, is uncertain - is estimated to be between 11 and 12 million in the U.S. and 5 million in Europe. They are also present in Russia and countries of the South (the Maghreb, Turkey and Mexico), as these countries went quickly from being countries of departure to host countries without having immigration policies in place. This was the case thirty years ago in southern Europe, which conducted mass regularisations of "batches" of immigrants in irregular situations from 1985 to 2000 (Spain, Greece, Italy and Portugal).

At times, these people form "neither...nor..." contingents: neither able to regularise their situation given the legal criteria used (stable employment, family ties), nor can they be expelled, as they come from countries at war. They work in the informal market in sectors often neglected by native workers (the 3 "Ds" - difficult, dirty and dangerous): restaurants, construction, public works, factory work, cleaning, domestic services and providing care for the elderly. Though generally deprived of their rights, they can sometimes exercise some of them, such as access to education for their children and emergency medical care.

Their mobilisation in host countries has often led to an awareness of the need to shift migration policies from a strict policy to one with more flexibility, since they are often a valve which can be adjusted to reflect the realities of the labour market. They are also contributing to the emergence of the right to mobility as a human right of the 21st century and to a reflection on the global governance of migration as a whole: a multilateral management structure is needed that brings countries of departure, host countries, migrant associations, international organisations, non-governmental organisations, trade unions, churches and employers together to ensure that migration is beneficial to host countries, countries of departure and to migrants themselves, thus becoming a global public good. If the world were to stop moving, the gaps between the rich and the poor and between youth and seniors would become even greater. The U.N. has been supporting this process by holding annual global forums on migration and development since 2006.[6]

Since the early 21st century, the migration of elites has drawn special attention from host countries and countries of origin. The latter began to take interest in their emigrants, especially the most highly skilled and trained. Conscious of the risks of competition in the recruitment of brains for their leading sectors from all over the world, host countries opened their borders to skilled migration: point-based systems were adopted in Canada, Australia and Germany in 2005; "selective" immigration in France, since 2006, and bilateral agreements have been signed between neighbouring countries or

countries of the South. The countries that attract the highest number of elite and students are the U.S., Canada and Western Europe. Those watching their brains leave are Eastern European countries, Russia after the fall of Communism in 1991 and, in particular, countries of the South (Sub-Saharan Africa, the Maghreb, the Middle East, India and China). Are we seeing a *brain drain* (brains fleeing the country) or *brain gain* (a diaspora of knowledge that contributes to development through exile)? It all depends on the situation. The departure of a highly skilled worker from countries like India or China with over a billion inhabitants does not have the same impact as the departure of a doctor from a sparsely populated African country. Studies reveal that contrary to the longstanding belief that migration represents a loss for the country of origin, migration contributes to development due to both remittances and also its potential repercussions on the labour market of certain countries (Indian information technology specialists providing work in India; Chinese investors in China, for example). The more migration there is, the more human development there will be.

Conversely, development often induces migration, as was the case of rural exodus in 19th century Europe – a phenomenon that can be observed today in many countries of the South, especially in Africa. The monetisation of the economy, advances in information and education, the abandonment of fatalism, the hope of fulfilling one's lifelong dreams, the individualisation of migration routes and the availability of travel shifted internal migration to international migration. Sometimes, a gap emerges between the populations that do better, for whom migration is a source of well-being, and their countries of origin, which do not offer any opportunities for improvement in the short run. Restoring migrants' confidence in countries of the South appears to be a necessary condition for their return and for productive investments that go beyond the family environment.

Finally, there are the transmigrants, who complete this panorama of new migratory situations. Appearing in the 1990s-2000s at the time of the fall of the Berlin Wall, they formed the bulk of East-West migration in Europe. Anticipating their entry into the European Union, they began to develop various forms of circular migration, as they adopted mobility as a way of life. Initially they were travelling sales people from the East to the West, then seasonal or domestic workers in Eastern Europe on their way to Southern Europe, fake tourists seeking work or merchants selling wares occasionally in the markets. Eventually they began to constitute a new category at the turn of the 21st century, before their gradual access to the formal European labour market made them less visible. They carry out their lives "here" and "there", as one out of every two transmigrants live from the force of transnational migration ties. This kind of circular migration exists in other regions close to fault lines in the world, but there, the legal conditions are less favourable, as migrants are required to have visas. Those who have a privileged status (dual nationality, multiple entry visas, merchants and businesspersons, intellectuals) constitute networks for migrating back and forth between the two shores of the Mediterranean, which are buzzing with entrepreneurial and commercial activities. The more open borders are, the more migrants circulate and the less they settle definitively

in one place, as it broadens their living space. Conversely, the more borders are closed, the more irregular migrants tend to settle in one place, as they fear that if they return to their countries of origin, they will not be able to return to their country of destination. Circular migration is one of the main trends underlying new mobility today.

3 • Perspectives

Borders determine the nature of flows – regular or irregular, skilled or unskilled, internal or external – and emigration and immigration policies. For flows originating in the South, in countries of South-to-North emigration, borders define the conditions for nationals leaving the country (exit visas, now in disuse; travel documents in order) and conditions for entry (repatriation, promotion of return). In countries of immigration, borders establish the conditions for entry (whether a visa is required or not, selection of immigrants through a system of points or quotas), stay (access to the labour market and social and political rights, requirements for obtaining nationality) and departure (deportation and return policies). These rules also apply to South-South migration, though less rigidly, as many countries lack migration policies and seek, at the same time, to protect their nationals abroad (assistance and protection for emigrants, regulation of money transfers and facilitating emigrants' right to vote in elections in their country). Some regional systems allowing for the free movement of persons guarantee nationals the freedom to circulate in their respective member-states, to work and to settle, and access to social and political rights. Access to these rights may also be extended to immigrants established there on a long-term basis. The regime for migration flows originating in the North is completely different, as migrants from these countries are free to come and go in countries of emigration (free exit) and immigration (free entry). As for flows of migrants between countries of the North, access to fundamental rights is guaranteed, even though migrants must meet certain conditions in order to obtain nationality. In regards to North-to-South flows, while host countries of the South welcome permanency, migrants are rarely given equal access to the same rights as nationals: naturalisation is difficult, if not impossible; there is an absence of political rights for foreigners and access to property is sometimes restricted. One third of the population of the planet, in the North, benefits from the right to migrate to the North and to the South, whereas other two thirds cannot move freely from the South to the North and are also deprived of rights and guarantees when moving from the South to the South. Borders also influence the profile of migrants, as the elite, migrants in an irregular situation and East-West migration are the result of either open or closed borders. Borders also accentuate the lag between migration flows and policies, and hinder the formation of regional migration spaces that respond to their own rationale. In light of global inequalities, migration will continue, but with new configurations.

To conclude this article, three aspects of this issue are worth highlighting: the increase in the world population and international migration; the relationship between urbanisation and migration; and finally, climate change.

Population and international migration

In a world with 9 billion inhabitants by 2040, Asia will be home to more than half of the global population (57%). India, China, Indonesia, Pakistan, Nigeria, the U.S., Brazil and Mexico will be the most densely populated countries on the planet. In the North, the European continent will have to address the accelerated ageing of its population, especially in countries in Southern, Central and Eastern Europe. In the Global South, in countries of departure, which will be affected differently by the demographic transition, ties will remain between the transition and international migration.

The demographic transition may bring transformation to the economy of migration. This transformation will consist mainly of a shift from the altruistic and collective approach to migration of migrants of the past (whose goal was to feed their family and improve their living conditions) to an individualist approach (carry out their life plan). New migrants are confronted with new urban, consumerist values linked to the increase in the level of education and a way of life geared towards mobility thanks to their transnational ties.

Therefore, characterised by the greater availability of young adults with fewer children than their elders, migration is the flip side of another possible outcome: revolt (*exit* or *voice,* according to the Hirschman model).[7] The tendency of young migrants to give priority to their individual projects and to turn to the diaspora to accumulate human capital and diversify their remittances is accentuated by host countries' decisions to choose highly skilled migrants over labourers in order to reunite families. The new profiles of international migration are thus linked to demographic transitions.[8]

Urbanisation and migration

Among the factors that will influence the evolution of migration flows, the rapid urbanisation of the planet is high on the list. The number of megalopolises with more than ten million inhabitants, which was 16 in 2009, is expected to increase to 29 by 2025. These megalopolises will be home to 10.3% of the world's entire urban population. Three quarters of the cities that will exceed the 10 million inhabitant mark by 2025 are located in developing countries. Three of the ten largest cities in 2030 will be in India and five of the 25 biggest cities will be in China. According to U.N. estimates, cities that will have more than 20 million inhabitants by 2030 include: Tokyo, Delhi, Bombay, São Paulo, Dhaka, Mexico City, New York, Calcutta, Shanghai and Karachi. These cities constitute places where not only economic activities are concentrated, but also migrants who are part of the rural exodus and migrants in transit. They are where information is exchanged on travel networks and where prospective migrants find job niches that enable them to survive before their great journey. While the rural exodus affects the poorest, few of them cross borders; many, such as the environmentally displaced and internal refugees, remain limited to internal migration. But urban life is full of exchanges of information, travel opportunities and places where people compare national wages with those earned

abroad, as well as ways of life. Many internal migrants make their plans after passing through the city, which is sometimes turned into a metropolis.

Cities in Africa will grow the most, followed by cities in Asia, according to U.N. predictions.[9] In 2030, more than 80% of the world's urban population will live in Asia, Africa and Latin America. Countries with the largest urban populations will continue to have sizeable rural populations: in China and India, which together have 1.5 billion urban dwellers, more than one billion people will still be living in rural areas.

Women currently account for 50% of international migrants. Millions of women leave their country of origin every year. They tend to be more numerous than men in rich countries affected by the ageing of their populations, which require caregivers and nurses. The consequences of female migration are, in addition to the *care drain* (the exodus of health care professionals), the risk of family breakdown in countries of origin and their dependency on new flows – a kind of chain migration.

Climate change

The interest in migration due to climate change is recent. It is still difficult to determine who are the people migrating for environmental reasons. It is perhaps necessary to distinguish between climate and environmental migrants, as the impacts of climate change on migration are uncertain. In fact, according to specialists, while climate conditions do influence migration, their influence is limited in relation to other socioeconomic or political factors (in the case of refugees), as there is often more than one cause for migration. The migration they generate is more temporary than permanent, as people are displaced within the country and located in the South. As for the dynamics of environmental migration observed throughout the world, the volume of international migrants linked to the environment is still small. Among the affected regions, the Mediterranean basin – the most densely populated arid region in the world – is highly exposed to the impacts of drought, especially in Egypt, Yemen, Algeria and Morocco. Migration as an individual adaptation strategy will be confronted by the political and societal choices adopted by states. The poorest households will be affected the most and, to a lesser extent, those who benefit from remittances and who have the choice of moving somewhere else. In the Southern hemisphere, cyclones can make temporary migration permanent, when income is lost. In Bangladesh, Vietnam, China and Mozambique, the population, which is already more accustomed to environmental shocks, is moving due to the risks of flooding. They are more mobile there than in the Maghreb, where the population continues to be more sedentary. However, the poorest do not want to move or do not have the means to: for them, migration is the last resort, as they are aware of the absence of effective government action and the failure of collective solutions to reduce their vulnerability.

Sometimes, climate change can affect people's mobility indirectly – for example, when it causes a food crisis and reducing dependency on agriculture can reduce the effects of the crisis, as

can the generalised trend of urbanisation. What needs to be planned, then: local development or the development of mobility? While international organisations are unanimous on the need to prevent forced migration, the fact the Geneva Convention on Refugees does not take climate change into account leads us to other policies on the international scene, such as land-use planning, the regional approach and the issue of climate justice.

NOTES

1 • Editor's note: When no specific reference is given for quantitative data cited in this article, the data is from a compilation carried out by the author, based on numerous sources, for two of her main works: Catherine Wihtol de Wenden, *Atlas des Migrations - Un Équilibre Mondial à Inventer*, 4ª ed. (Paris: Autrement, 2016); and Catherine Wihtol de Wenden, *Les Nouvelles Migrations - Lieux, Hommes, Politiques* (Paris: Ellipses, 2013).

2 • Wenden, *Les Nouvelles Migrations*.

3 • For more on the concept of a migration system, as defined by Douglas S. Massey et al. in the early 1990s, see: Douglas S. Massey *et al.*, "Theories of International Migration: A Review and Appraisal," *Population and Development Review,* 19, no. 3 (1993): 431-466; and Catherine Wihtol de Wenden, *La Globalisation Humaine* (Paris: PUF, 2009).

4 • Editor's note: Created in 1991, this organisation is made up of Slavic States that used to be part of the USSR: Armenia, Azerbaijan, Belarus, Kazakhstan, Moldavia, Kirgizstan, Russia,

Tajikistan, Turkmenistan, the Ukraine and Uzbekistan.

5 • Anne de Tinguy, *La Grande Migration. La Russie et les Russes Depuis L'ouverture du Rideau de Fer* (Paris: Plon, 2004).

6 • Editor's note: the 9th Global Forum on Migration and Development will take place in 2016 in Dhaka, the capital of Bangladesh. See: Global Forum on Migration and Development, accessed May 20, 2016, http://www.gfmd.org/.

7 • Albert Hirschman, *Exit, Voice or Loyalty - Responses to Decline in Firms, Organizations and States* (Cambridge: Harvard University Press, 1970).

8 • Philippe Fargues, "International Migration and The Demographic Transition: A Two-Way Interaction," *International Migration Review*, 45, n° 3 (2011): 588-614.

9 • "World Urbanisation Prospects: The 2014 Revision," United Nations, Department of Economic and Social Affairs, Population Division, 2015, accessed May 20, 2016, http://esa.un.org/unpd/wup/Publications/Files/WUP2014-Report.pdf.

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THREE EMERGENT MIGRATIONS: AN EPOCHAL CHANGE

Saskia Sassen

• *Examining recent migrant flows offers a window into* •
the larger dynamics that catapult people into migrating

ABSTRACT

New types of migratory flows are emerging, and they should not be confused with long-established ones. Examining migrant flows at their outset allows us to better understand the complex dynamics behind them. They tell us something about a larger mix of conditions that will only continue to grow, from new types of war and violence to massive losses of habitat. They invite us to recognise these larger structural conditions rather than just the existence of these flows themselves. Here Saskia Sassen analyses three new, and each very different, migrant flows, specifically: (1) unaccompanied minors from Central America that head to the United States of America; (2) the surge in Rohingyas, a muslim minority fleeing from Myanmar; and (3) the migration towards Europe originating mostly in Syria, Iraq, Afghanistan and several African countries, notably Eritrea and Somalia.

While often it is households that play the crucial role in producing an economic calculus that allocates particular family members to the migration option, Sassen notes that these flows are different. They emerge from sharply delineated conditions operating, respectively, at the city level, at the regional level, and at a global geopolitical level.

KEYWORDS

Unaccompanied children | Persecuted muslims | War | Urban violence | Plantations | Loss of habitat

A key assumption organising my work on migrations is that they happen inside systems, even when generated by external forces.[1] In the case of the United States of America (U.S.), this can be seen in some of the migrations that followed its military operations –developed in the Pentagon, the U.S. Department of State and the White House. For instance, the U.S. invasion of the Dominican Republic after the election of the socialist Bosch, built the bridges with the U.S. that led to a whole new migration of mostly middle class Dominicans to the East Coast of the U.S.[2] Further, that migrations happen inside systems also helps explain why they start at some point, even when a household or a community has long been poor. Most major migrations of the last two centuries, and often even earlier, can be shown to start at some point – they have beginnings, they are not simply there from the start.

Here I focus on three flows that can be seen as a particular set of new migrations that emerged over the last two years.[3] New migrations are often far smaller than ongoing older migrations, but catching them at the beginning offers a window into larger dynamics that catapult people into migrating. Emergent migrations have long been of interest to me: this is the migrant as indicator of a history in the making. Once a flow is marked by chain migration, it takes far less to explain that flow. My focus is mostly on that larger context within which a new flow takes off.[4]

Here I examine three emergent flows. Each is easily seen as part of older ongoing flows. My focus is on the specifics of each of these new flows. One is the sharp increase in the migration of unaccompanied minors from Central America – specifically, from Honduras, Salvador and Guatemala. The second is the surge in Rohingyas, a muslim minority fleeing from Myanmar where it has long lived and coexisted peacefully with the mostly Buddhist population until a few years ago. The third is the migration towards Europe originating mostly in Syria, Iraq, Afghanistan and several African countries, notably Eritrea and Somalia. These are three very different types of flows, and the third one, in turn, contains multiple diverse flows. Yet each points to a larger context of origin marked by mostly extreme conditions that can be outlined, or at least made visible because it is not simply part of a chain migration where households may play the crucial role producing an economic calculus that allocates particular family members to the migration option.

These three new flows can be described as emerging from situations larger than the internal logics of households. They emerge from sharply delineated conditions operating, respectively, at the city level, at the regional level, and at a global geopolitical level. Let me add promptly that the city and regional levels are frequently embedded in a larger set of dynamics, but in the cases focused on here, there is also an immediate direct effect at these sub-national levels.

Extreme violence is one key condition explaining these migrations. But so are thirty years of international development policies that have left much land dead (due to mining, land grabs, plantation agriculture) and expelled whole communities from their habitats. Moving to the slums of large cities has increasingly become the last option, and for those who can afford it, migration. This multi-decade history of destructions and expulsions has reached extreme levels made visible in vast stretches of land and water bodies that are now dead. At least some of the localised wars

and conflicts arise from these destructions, in a sort of fight for habitat. And climate change further reduces livable ground. These are all issues I develop at length in *Expulsions*.[5]

In what follows I focus on key features of a variety of emergent flows, each marked by extreme conditions.[6] While emergent, these conditions could eventually become overwhelming – to existing immigration and refugee policy systems, to receiving areas, and to the men, women and children who constitute these flows.

1 • When Minors go Solo: Central America

Central America is one of the key regions where the flight of unaccompanied minors rose sharply over the last two years.[7] One major factor behind this flight of minors is the rapidly escalating urban violence of the last few years. In my reading, this urban violence is in good part due to the destruction of small holder rural economies due to land grabs to develop plantations, mining, and loss of life of the land itself due to the latter. Escaping to the cities was the only option for more and more rural people, but the cities themselves had little development generating jobs. Other major emigration hotspots, notably South East Asia and those arriving from Africa and Asia via the Mediterranean region consist largely of men, even as the shares of women and children are growing. While Central America has long been an emigration region, for both political and economic reasons, this flow of unaccompanied children is new. They are driven by extreme fear because of the extreme urban violence that has erupted over the last few years.

The available data show that an estimated 63,000 unaccompanied minors, most from Central America, crossed the southern border of the U.S. between 1 October 2013 and 31 July 2014, according to U.S. Customs and Border Protection.[8] This is nearly twice the number of child migrants who came during the same period the previous year. The estimate is that by the end of 2014, up to 90,000 unaccompanied children had crossed the border with the U.S.;[9] there is no count for those who may have died on this long trip or given up and stayed somewhere in Mexico, or were kidnapped to work in plantations or mines. In 2015 there was a fall in U.S. crossings as the U.S. government asked the Mexican government to control its southern border. But in the first few months of 2016 the numbers for unaccompanied minors crossing the U.S. border jumped sharply once again.

Gang and police violence are the main factors pushing youth out, according to statements by the children themselves, by researchers, social workers and other professionals in this field, and by government experts.[10] In 2014, 98 per cent of unaccompanied minors arriving at the border were from Honduras (28 per cent), Mexico (25 per cent), Guatemala (24 per cent), and El Salvador (21 per cent). This breakdown represents a significant shift: prior to 2012, more than 75 per cent of unaccompanied children were from Mexico.[11] In 2015, 35 per cent of unaccompanied minors arriving at the border were from Guatemala, 28 per cent from Mexico, 24 per cent from El Salvador, and 14 per cent from Honduras.[12]

Salvadoran and Honduran children come from some of the most violent regions in the world. They fear that violence more than the well-known risks of moving alone across Mexico and the U.S. border deserts. According to data collected by the Pew Research Center, San Pedro Sula in Honduras was the world's murder capital in 2013, with a homicide rate of 187 homicides per 100,000 inhabitants in 2013, driven by a surge in gang and drug trafficking violence.[13] Honduras's nation-wide murder rate was 90 per 100,000 in 2012, the highest in the world.[14] In 2011, El Salvador was not far behind, at 70, ranking it then second in terms of homicides in Latin America.[15] Even with a significant drop in the murder rate from 70 in 2011 to 41 in 2012, El Salvador is only surpassed by Honduras, Venezuela and Belize in the entire world. Further, Honduras, Guatemala and El Salvador are among the poorest nations in Latin America with 30 per cent, 26 per cent, and 17 per cent of their people living on less than $2 a day, according to the World Bank.[16]

This combination of elements contributes to explain high emigration among both children and adults. Most extreme is Salvador, with up to 18 per cent of the population leaving, which is twice as high as in Honduras and Guatemala. Except for very small countries such as Trinidad Tobago, so-called "emigration countries" rarely reach these levels. Central American migrations are rather well documented by researchers and the press. This is partly so because the migrations from south of the U.S. border have been going on for a very long time.

Smugglers prey on potential migrants, young and old. They are after business, and the proliferation of smuggling gangs has raised competition for the trade, so they paint a far rosier picture than Obama's immigration policy offers. They often tell minors that once they are there, as minors they will be processed to become citizens or regular immigrants, which is incorrect. Their misrepresentations have evidently contributed to the surge in emigration of minors - and even adults. This is new. Mostly, in the past, smugglers (often referred to as "coyotes") doing their trade crossing the U.S. border were not quite so business-like: they were hired for a given function at a given price and that was that.

The sudden high numbers, the lack of facilities to accommodate minors in a system geared to adults, and strong anti-immigration sentiment may have contributed to a major change in U.S. policy. The change led to a drastic fall of 60 per cent in the numbers of *apprehended* unaccompanied minors in September 2014 compared to a year earlier.[17] But in fact the number of departures from Central America may not have fallen much, if at all. What has changed are the rules of the game. Under pressure from the U.S., Mexico has begun arresting and deporting tens of thousands of Central Americans long before they reach the U.S. border. What has changed for these migrants is the treatment they are getting at Mexico's southern border: it is even more brutal than before. When we just examine departures, as distinct from entries into the U.S., the partial evidence signals that departures may still be high though they may eventually decline.

Here are the numbers. Between October 2014 and April 2015, Mexico detained 92,889 Central American migrants. During the same period, the U.S. detained 70,226

non-Mexican migrants, mostly from Honduras, Guatemala and El Salvador. But it had detained 159,103 non-Mexican migrants in the same period a year earlier, which was more than triple the number detained by Mexico before the new policy.[18] Data from Mexico's National Immigration Institute show that 51,565 "migrants" from Guatemala, Honduras and El Salvador were deported between January and April 2015 from Mexico's southern border back home, up from 28,736 during that period in 2014; deportation of Guatemalans rose 124 per cent, followed by Salvadorans at 79 per cent and Hondurans at 40 per cent.[19]

Active detention efforts by Mexico's guards at its southern frontier can be brutal. In an interview with the New York Times, Ruben Figueroa of the Mesoamerican Migrant Movement,[20] a migrant advocacy organisation, finds that this strong persecution by federal authorities has resulted in accidents where migrant minors have died and been injured in clashes between human smugglers and police. It has also led to imprisonment, to deaths, and to these unaccompanied children disappearing - some wind up in reasonable places such as church shelters or are taken in by generous households. Others are languishing as street kids. Yet others have disappeared without a trace. The Inter-American Commission on Human Rights has recently expressed its "concern over stepped-up actions reportedly being taken against migrant persons" that were put in place after Mexico initiated its Southern Border Plan last year under pressure from the U.S.[21]

The southern border of Mexico has become the terrifying Mediterranean for these Central American unaccompanied children (and also adults). They wind up in jail, they get beaten, they lose limbs, they die. But some, as seems to be the case in all these migrations, get through. U.S. data shows that as of June 2015, unaccompanied children keep arriving, even if in much smaller numbers; some enter undetected and uncounted.[22] It all suggests that the violence back home keeps being a reason to leave, and not even the long train ride on what is known as *La Bestia* ("The Beast") or the Mexican police are a full deterrent.

2 • South East Asia's Refuge-Seekers - The Andaman Sea

We are witnessing the shaping of a new extreme phase in South East Asia, a region that has long seen slavery and the smuggling of desperate refugees. The massive post-Vietnam war refugee flows have mostly sorted themselves out - in good and bad ways. This new emergent crisis arises out of a different mix of conditions; it is not a continuation of that earlier crisis.

Two very recent facts signal alarming developments. One concerns several small Muslim communities escaping evictions from their land and persecution for their being muslim. Most visible is the case of the Rohingya, whom the government makes a point of calling Bengali, signaling they should "return" to Bangladesh, "where they belong" even though they have been in Myanmar for many centuries.[23]

Here I focus mostly on the Rohingya. There are about 1.1 million living in Myanmar: they are not recognised as citizens. According to U.S. Department of State, at least 160,000 have been evacuated to neighboring countries since 2012.[24]

This active persecution coincides with Myanmar's opening and re-incorporation into the community of states. In some limited sense, it is becoming a more open society, as has been widely reported in the media. But the long term mistrust of the Rohingya, an old Muslim minority that has been part of Myanmar for centuries, has turned brutal.

In my reading of the facts, this somewhat sudden open anger at the Rohingya is at least in part connected to the massive land grabs for mining and agriculture. The country's opening and its enabling of foreign investors coincides with a somewhat sudden vicious persecution of the Rohingya by a particular group of Buddhist monks. That it is these particular Buddhist monks who have led this assault and, further, led them to rewrite some parts of the Buddhist doctrine so as to justify the expulsion of the Rohingyas from their land, and even the killing of Muslims, does point to a larger vested economic interests that are likely to go well beyond these monks.

Could this signal a deeper unsettlement? That Buddhists should become brutal persecutors of a small, peaceful Muslim minority may be only one of several other indicators pointing to a struggle for land. Could this violence signal something about the loss of habitat? There is considerable evidence in various areas of South East Asia about significant evictions of small farmers from their land to make way for mining, plantations, and office buildings.[25] Foreign firms have been among the major investors since Myanmar opened its economy to foreign investment. Indeed, freed opposition leader, Aung San Suu Kyi, has lost considerable support among the rural population precisely because she has not contested these land grabs (at least publicly) or openly supported the local movements against land-grabs.

One key first public reckoning came through press-reporting in the summer of 2015 about an estimated 7,000 people in dozens of overloaded vessels floating aimlessly for up to two months in the vast Andaman Sea.[26] This sea is bordered on the east by Myanmar and Thailand, and on the south, by Malaysia and Indonesia. These, and perhaps other, regional governments were aware of this surge in fleeing people but had made it clear they were going to push them back to sea if they dared to land. It was the press that sounded the alert about these ships with their human cargo piled up over each other, with no access to water or food. When the facts went public, Indonesia, mostly, took in about half of that estimated population, forced by the global uproar as the horrifying details went viral. The struggle to get countries to accept them was not easy. Their rescue added even more information about the horrific conditions. And that rescue still left an estimated 3,000 floating in that vast ocean in precarious vessels.[27]

These 7,000 are but one component of a desperate search for bare life on the part of a rapidly growing number of men, women and children. Even as those ships were brought to land, other ships crammed with Rohingya and Bangladeshis, were "'found off Malaysia's

coast Wednesday', an activist and an official said, as the international community called on Southeast Asian governments to open their borders and step up search-and-rescue efforts. Thousands of migrants are believed to be stranded at sea."[28] Malaysia turned back at least one boat that Wednesday, loaded with 800 plus people; yet another aimless floating human cargo in the Andaman Sea.

Under pressure from international bodies, Southeast Asian nations agreed on 29 May 2015, at a meeting in Bangkok to set up an anti-trafficking task force and to intensify search and rescue efforts to help vulnerable "boat people" stranded in the region's seas.[29] This was a first.

3 • Europe: At the Intersection of Eastern and Southern Flows

Europe has emerged as the destination of a broad range of new refugee flows. The Mediterranean has long been and continues to be a key route for long-established migrant and refugee flows. Here I only focus on a set of new flows that took off in 2014 and need to be distinguished from the ongoing older flows of, mostly, migrants. The Mediterranean, especially on its eastern side, is now the site where refugees, smugglers, and the European Union (E.U.) each deploy their own specific logics and together have produced a massive multifaceted crisis. One facet was the sudden surge in the numbers of refugees in late 2014, a possibility not foreseen by the pertinent E.U. authorities given that the wars they were escaping had been going on for several years. A second one was that the crisis became a business opportunity for smugglers that would expand over the ensuing year to reach an estimated $2 billion in income by mid-2015, which is now estimated to have grown to $5 billion.[30] One feeder was that the smugglers benefitted from keeping the flows going, persuading their potential clients/victims, that everything would be fine once they reached Europe. A third was the major crisis in Italy and, especially, Greece, two countries already burdened by their struggling economies, with Greece the destination for over a million refuge-seekers by early 2016 who had to be sheltered, fed, and processed.

And yet, the facts on the ground in Syria, Iraq, Afghanistan, Somalia, Eritrea, and others, were all familiar. If anything, the surprise should have been that the surge in refugees did not happen sooner. The UNHCR, among others had been recording the escalating numbers of the internally displaced and of refugees.[31] The conflicts in Iraq, Afghanistan and Syria were not going to end anytime soon. Nor will those in Somalia or in South Sudan, each with their specific character. The brutality of these conflicts, with their full disregard for international humanitarian law, indicated that sooner or later people would start fleeing the violence.[32]

For three decades Afghanistan has produced the greatest number of refugees, according to the UNHCR: It has 2.7 million refugees under UNHCR's mandate.[33] Now in the past year Syria has taken its place, and one new refugee in four worldwide in 2015 is now a Syrian. Syria is an extreme case. According to UNHCR, 7.7 million Syrians had left the country by September 2015, but those numbers keep growing.[34] Iraq has 3.4 million recognised

refugees.[35] Its situation deteriorated further when much territory, including its second city, Mosul, was conquered by Isis, adding to the disastrous effects and religious divisions that became extreme with the west's invasion of the country in 2003.[36] More than 1.2 million Pakistanis have been displaced by insurgencies in north-west Pakistan, according to the UN;[37] further, Pakistan has seen acute terrorist violence for many years and which continues.[38] Somalia remains the third largest refugee producing country at 1.1 million refugees.[39]

The humanitarian crisis is escalating and spreading. According to Human Rights Watch, over the last two years about 25 million people were driven from their homes, including almost 12 million Syrians, 4.2 million Iraqis, 3.6 million Afghans, 2.2 million Somalis, and almost half a million Eritreans.[40] Further, UNHCR has found that there are also far more unaccompanied children in the recent flows into Europe than were expected. To these flows we need to add the half million waiting in northern Libya, at any given time in the last two years, for ships to take them across the Mediterranean. According to UNHCR,[41] the number of global refugees is now over 60 million, with some tentative estimates reaching 80 million by early 2016. This is the largest ever since the humanitarian system was put into place. Left out of this count are many of the internally displaced and the growing number of undeclared or not yet counted refugees; this might be the case with some of those crossing the Mediterranean.

There are multiple histories at work in the flows to Europe. And yet, seen together there is a distinct logic that emerges: expulsion. And if anything this logic of expulsion is expanding. The civil war in Yemen that started in 2015, the resuming of the Turkish-Kurdish civil war in July 2015 (a war that has killed 40,000 people since 1984), and the rise of Boko Haram, the Islamist extremist group fighting a brutal war in northern Nigeria and Chad.[42] Significant is also the collapse of the political and economic order in Libya, which has produced a massive security vacuum. And land-grabbing in Sub-Saharan Africa is generating a whole new politics of food,[43] with the numbers of the disadvantaged growing rapidly. These trends are enormous challenges to the international and to the European system.

4 • Conclusion: In search of survival

The flows I have described are mostly refugee flows even if not formally recognised by the international system. They are to be distinguished from the 250 million plus regular immigrants in the world today, who are mostly modest middle class and, increasingly, high level professionals functioning in the global economy. Today's immigrants are not the poorest in their countries of origin. Nor are they generated by the extreme push factors feeding the three sets of flows described here. And these refugees, in turn, are also not usually the poorest in their countries, even if leaving their home countries leaves them without any resources; many have advanced educations and started out with resources.

These new refugees are one component of a larger population of displaced people whose numbers are approaching 80 million. They stand out by their sudden surging numbers and

by the extreme conditions in the areas where they originate. Extreme war zones, such as Syria and Iraq, and extreme destruction of local economies, are two key factors explaining this surge. Climate change is likely to have extreme effects in some of these regions due to what might be described as development malpractice – such as the International Monetary Fund and World Bank policies of the 1980s and 1990s that had disastrous consequences for so many of the local economies and societies in the Global South. It all amounts to a massive loss of habitat, and migrations will be one mode of survival.

NOTES

1 • See Saskia Sassen, *The Mobility of Labor and Capital* (Cambridge: Cambridge University Press, 1988).

2 • This is the migration that takes off after the invasion by President Reagan of the Dominican Republic after the election of a social democrat (Bosch) to the presidency. It is completely unrelated to the early 20th century of activists from the printer union who left the Dominican Republic for the U.S. to escape persecution from their own government.

3 • For a fully developed argument and empirical documentation please see the author's "A Massive Loss of Habitat: New Drivers for Migration," *Sociology of Development*, forthcoming; Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Cambridge, Mass: Harvard University Press/Belknap, 2014); and Sassen, "A Savage Sorting of Winners and Losers: Contemporary Versions of Primitive Accumulation," *Globalizations* 7, nos. 1-2 (Mar.-Jun. 2010): 23-50.

4 • See Sassen, *The Mobility*, 1988; Sassen, *Guests and Aliens* (New York: New Press, 1999); Sassen, *Expulsions*, 2014.

5 • See Sassen, *Expulsions*, 2014, chapters 1 and 2.

6 • See footnote 3 for sources of data and details.

7 • Let me note also that the number of apprehensions of Mexican nationals decreased by 18 per cent from FY 2014 to FY 2015, according to stats from the Department of Homeland Security found here ("Department Is Better Targeting Its Enforcement Efforts To Prioritize Convicted Criminals And Threats To Public Safety, Border Security, And National Security," US Department of Department of Homeland Security, Dec. 22, 2015, accessed May 30, 2016, https://www.dhs.gov/news/2015/12/22/dhs-releases-end-fiscal-year-2015-statistics), under sub-heading U.S. Customs and Border Protection (CBP) Enforcement Efforts at and between Ports of Entry.

8 • Danielle Renwick, "The U.S. Child Migrant Influx." CFR Backgrounder, Council on Foreign Relations, Sept. 1, 2014, accessed May 21, 2016, http://www.cfr.org/immigration/us-child-migrant-influx/p33380.

9 • Diana Villiers Negroponte, "The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border." Brookings, July 2, 2014, accessed May 21, 2016, http://www.brookings.edu/blogs/up-front/posts/2014/07/02-unaccompanied-children-central-america-negroponte.

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HIGH FENCES DO NOT MAKE GOOD NEIGHBOURS

Messaoud Romdhani

• *Repressive European Union immigration policies only serve to reinforce* •
smuggling networks and result in higher deaths in the Mediterranean

ABSTRACT

In order to combat irregular migration, so called "Fortress Europe" has resorted to tighter border controls and increased militarisation of the Mediterranean Sea. Such measures do not result in reduced numbers of migrants reaching Europe but rather in higher taxes, a higher dependency on unscrupulous smugglers and higher death tolls.

In this op-ed, Messaoud Romdhani briefly discusses how the European Union-Tunisia Mobility Partnership and the European Agenda on Migration have neither stemmed irregular migration from North Africa to Europe nor reduced the death toll at sea.

Romdhani comments that by blaming smugglers for irregular migration and the consequent drownings ignores the push factors that cause people to take the most important decision of their lives. It also diverts attention from the responsibility of European governments for the thousands of deaths in the Mediterranean each year.

KEYWORDS

Smuggling | Tunisia | Europe | Mobility Partnership | Migration | Securitisation

The Mediterranean Basin has long been considered a cradle for different civilisations connecting different people and cultures. Now however, increased surveillance systems aim to prevent migrants looking for a better life reaching Europe and refugees escaping wars, persecution and ecological disasters from reaching safety. This security apparatus has made this "middle terra" a graveyard for tens of thousands of people.[1]

Despite the restrictions to Europe's visa regime in the 1990s, which also saw both increased border controls and the militarisation of the sea,[2] flows of irregular migrants and refugees from North and Sub-Saharan Africa continue to try to gain access to Europe, often by boat. But what many people ignore are the high costs these people pay – both financial and personal - to get into these crowded boats, risking their own lives and filling the pockets of smugglers. And the paradox is: the more security measures that are taken against migrants and refugees, the more they are made dependent on smuggling and the more powerful smugglers become. This short opinion piece briefly discusses two key European Union (E.U.) policies – the E.U.-Tunisia Mobility Partnership and the European Agenda on Migration – demonstrating that the over emphasis on the securitisation of migration in fact leads to an increase in smuggling – rather than reducing it – resulting in ever more lives being lost at sea.

Overall, this policy of "fortress Europe"[3] has two big winners: big business that provides security services and the smugglers that are constantly increasing the amount they charge to evade the security measures that are being implemented. And the two big losers are the European tax-payers who have spent billions of Euros on a policing system that is bound to fail and human rights values. We must always remember that those bound for Europe feel that the continent respects human rights, democracy and the rights of minorities. Take young people in North Africa, for example: many suffer unemployment[4] and the absence of any real prospects. Europe is their Eldorado and it always has been.

Looking at Tunisia specifically, more than 10 per cent of the Tunisian population live and work abroad, mostly in Southern Europe.[5] Disappointed that the 14 January 2011 revolution did not change living conditions in the way that they had hoped, thousands of young people took to the sea: according to statistics revealed by the Tunisian Forum for Economic and Social Rights (French acronym, FTDES), about 40,000 Tunisian migrants crossed the Sicilian Channel heading to Italy in 2011 alone. During the same year, between 1,500 and 2,000 migrants died or disappeared in the Mediterranean Sea.[6] This was at the time when North Atlantic Treaty Organisation (NATO) forces were waging a war on Libya, when more than 100 fighter planes, 20 frigates and several supporting vessels were patrolling the sea. As noted by Hein de Haas and Nando Sigona "the reality of deaths of an estimated 2,000 migrants in 2011 alone, at a time when the Mediterranean Sea had become one of the most militarised and heavily patrolled areas in the globe, is a stark reminder of the gap between E.U. rhetoric and actual practice on development and human rights."[7]

Tunisia is a gateway to Europe for many sub-Saharan Africans. Since the turn of the 21st century, increasing numbers have taken advantage of the absence of visa requirements for

many Sub-Saharan African nations, enabling many migrants to stay in Tunisia legally for three months before heading to Europe via either Sicily or Lampedusa.

The war in Libya in 2011 presented a real challenge as hundreds of thousands of migrants crossed the border from Libya to Tunisia.[8] Emergency measures were needed to provide food, accommodation and health provisions. Although the country ratified the Geneva Convention, it has not yet established a refugee protection system. The Choucha refugee camp in the south of Tunisia, which sheltered thousands of Sub-Saharan migrants closed in 2013: some 4,000 persons were granted refugee status by UNHCR – the only authority in the country that processes asylum requests - while others were forced to be repatriated to their country of origin because they were not granted a Tunisian resident permit. But for most Sub-Saharan migrants who used to work and stay in Libya, Tunisia was not the final destination. Many took to the sea for the shores of Italy, with fatal consequences. Following the tragedy of the 3 October 2013 shipwreck when 366 migrants died in the sea, Cecilia Malmström, the then European Commissioner for Home Affairs, described how Europe needs "to intensify efforts to fight criminal networks that exploit human despair" in order not to put "human lives at risk in small overcrowded and unseaworthy vessels".[9]

1 • Mobility Partnership

One such effort to respond to this ongoing flow of irregular migrants was the E.U.-Tunisia Mobility Partnership established in March 2014 that "aims to facilitate the movement of people between the E.U. and Tunisia and to promote a common and responsible management of existing migratory flows, including by simplifying procedures for granting visas."[10] Major civil society organisations in Tunisia have denounced the partnership as one that lacks transparency as it was negotiated with the total absence of civil society.[11] Currently, the Mobility Partnership is not deserved of its name. Rather than mobility, in truth it promotes the "effective policy of return and readmission".[12] Although this is claimed to be done "while respecting human rights and international instruments the protection of refugees"[13] it is unclear how this can be possible when Tunisia continues to lack an asylum law to determine refugee status and while the country detains irregular migrants both within immigration detention centres and also within the mainstream prison system.[14] Moreover, it hardly offers any prospects for Tunisian citizens to obtain legal entry to the E.U. Visas to the E.U are limited to only the most highly qualified citizens and professionals, who in reality already have the possibility of access to Europe. It does not offer any worthwhile prospects for the hundreds of thousands of unemployed youth, dreaming of a better life and looking for real opportunities in Europe. Consequently, their only option remains the desperately dangerous and clandestine voyage across the Mediterranean leading to an ever increasing death toll.

Indeed, the Mobility Partnership has failed to result in any reduction in the number of irregular migrants crossing the Mediterranean, with 2015 recording the highest ever number of sea arrivals (1,015,078) – and consequent deaths (3,771).[15]

2 • European Agenda on Migration

In order to address such "human tragedies" the E.U. resolved to "take immediate action" with its European Agenda on Migration, announced in May 2015.[16] However, the Agenda underlines how the E.U. continues to view the issue of migrants through a security rather than human rights lens. For example, its short term goal "to prevent further losses of lives at sea" will be achieved by increasing funding in various areas including for policing the Mediterranean via FRONTEX, the European border agency, and for Europol to develop it as an intelligence hub to "capture and dismantle boats" in the Mediterranean.[17] This emphasis on securitisation rather than taking a rights based approach is also seen in the four pillars which set out the Agenda's long term plan. Over emphasis on "reducing the incentives for irregular migration" and "securing the external borders" results in a lack of emphasis on providing legal paths to Europe. Indeed, any discussion of legal migration focuses largely on "attracting workers that the E.U. economy needs".[18] The consequence of continuing to restrict legal access will only result in an increase in smuggling activity. And while "dismantling smuggling and trafficking networks" forms, rightly, part of the equation, the focus on such a convenient scapegoat diverts attention from the E.U.'s own responsibility for deaths at sea.

Increasing border control and fighting smuggling networks will not stop migrants, refugees and asylum seekers from taking to the sea at the expense of their lives. It only forces them to look for other points to cross the sea and increases their dependency on smugglers. As noted by CEPS, a Brussels based think tank, "the most efficient way to tackle smugglers' activities is to provide safer, more flexible and cheaper ways for people to travel."[19] It is therefore crucial that the E.U. reassess its focus on the securitisation of migration in the Mediterranean in favour of a rights based approach.

A vigilant civil society in Tunisia will continue to pressure governments on both sides of the Mediterranean in order to have a fair and equitable partnership with Europe – and we call on European civil society to do the same. Any E.U.-Tunisia partnership must be one that respects international conventions concerning the fundamental rights of migrants, refugees and asylum seekers and which results in policies that offer improved access to Europe thereby offering a real alternative to smugglers.

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NOT SO SAFE
AND SOUND[1]

Jamil Dakwar

- *The U.S. Security Against Foreign Enemies (SAFE) Act is another reminder*
  that the immigrant population in the U.S. is increasingly vulnerable

ABSTRACT

Despite its historical role as a refuge for people from all over the world seeking protection and a new life, in recent years, the United States of America (U.S.) has started to roll back its human rights protections for asylum seekers. Jamil Dakwar describes how, in response to the Paris attacks and other events in Europe and the U.S., which raised alarm over the threat of terrorism, the U.S. Congress is considering legislation known as the SAFE Act that specifically targets Syrian and Iraqi refugees and excludes them from protection in the U.S. Dakwar notes how the growing Islamophobic hysteria that has characterised much of the U.S. presidential cycle is threatening to dismantle critical human rights protections and the domestic civil rights not only of foreign-born refugees seeking assistance in the U.S., but also of minority communities already living in the country. These restrictive and discriminatory immigration policies have also targeted asylum-seekers arriving in the U.S. from Central America with devastating consequences for families and young children. In explicitly denying protections for Syrian and Iraqi refugees fleeing appalling danger, this article explores how the SAFE Act violates several fundamental human rights laws and principles.

The United States of America (U.S.) was founded as an immigrant country. In the last 200 years, millions of immigrants from every continent have settled in the U.S. With the exception of Indigenous Peoples or Native Americans, everyone living in the U.S. is either an immigrant or the descendent of voluntary or involuntary immigrants. Yet every new wave of immigrants has faced fear and hostility, especially during times of economic hardship, political turmoil, or war. For example during depressions in the 1840s and then later in the 1930s, mobs hostile to Irish Catholic immigrants burned down a convent in Boston[2] and rioted in the streets of Philadelphia.[3] In 1882, Congress passed the restrictive Chinese Exclusion Act, one of the country's first immigration laws, and designed explicitly to keep out people of Chinese origin.[4] During the "Red Scare" of the 1920s, thousands of foreign-born people suspected of political radicalism were arrested and brutalised. Many were deported without a hearing.[5] In 1942, 120,000 Americans of Japanese descent had their homes and other properties confiscated, and were interned in camps without due process until the end of World War II.[6] During the same period, many Jews fleeing Nazi Germany were excluded under regulations enacted in the 1920s.[7] In the 1950s, a U.S. government program targeted Mexicans, exclusively, for deportation.[8] In the wake of 9/11, the U.S. government has used immigration enforcement as a justification to target members of Muslim, Arab, and South Asian communities for investigation, interrogation, and sometimes deportation. Though this tactic has been used in various ways, the most notorious was the National Security Entry-Exit Registration System (NSEERS) which was dissolved in 2011 after proving to be a completely ineffective counter-terrorism tool.[9]

In the last two decades, U.S. immigration laws and policies have been widely criticised for failing to meet the most basic international human rights norms with regard to the treatment of migrants and refugees. Immigrants have again become scapegoats of generalised fear-mongering that is so prevalent in today's post-9/11 U.S. The government sharply limits the right of immigrants to challenge the bases for their detention in the courts, unfairly discriminates against them in prisons, detains them for longer periods, and provides them no right to counsel in expulsion cases. Millions of immigrants have been deported.

While U.S. immigration policies have seen some improvements under President Obama, his administration has left in place, and even worsened, some of the Bush administration's most flagrant violations of immigrants' rights.

Under the Obama administration, the U.S.-Mexico border has been rife with human rights violations. Perhaps most disturbing has been the human rights violations affecting young children and families that have sought refuge in the U.S. from violent home countries. International human rights law demands particular protections for migrant children, including an explicit rejection of detention as a legal mechanism. It also requires access to counsel and a hearing to evaluate asylum claims. However, at the U.S.-Mexico border, most individuals, including many who are seeking asylum, are detained and turned away with a deportation order, and never receive a genuine opportunity to present their claims to an immigration judge.[10] Even those who do receive a hearing in an immigration court

typically have no attorney to represent them in some of the most legally complex cases in the U.S. This is a clear violation of human rights. Nevertheless, despite clear evidence that children who appear without counsel are overwhelmingly likely to be deported,[11] the U.S. government has refused to provide legal representation for even the most vulnerable migrants facing deportation to incredibly dangerous circumstances.

Though candidate Obama ran on a platform of immigration reform, as president, he has earned the title of "Deporter-in-Chief" for deporting more migrants than any president, ever. He has proven himself a staunch ally to the Border Patrol – 35 per cent of its officers would not have jobs were it not for Obama's rapid expansion of this out-of-control police force. And in the Obama administration's quest to double-down on border enforcement, it has deported more than 2.4 million immigrants; unapologetically locked up asylum-seeking Central American women and children in dismal and privately -run detention centers as a "deterrent;" and began 2016 by announcing a nationwide roundup of undocumented immigrants, including raids. Once in border patrol custody, these individuals are almost guaranteed not to receive adequate representation.[12]

Responding to pressure and harsh criticism for his tough immigration enforcement policies and in the wake of U.S. Congress' failure to pass immigration reform, President Obama took executive action that would have allowed nearly five million undocumented immigrants to "come out of the shadows" and work legally. Two executive orders, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans (DAPA), have sought to protect immigrants who have been living in the U.S. for five years and arrived before they were 16 years old, as well as parents of American citizens, from deportation – not to grant them citizenship, but just not to deport them. However, legal challenges brought by 25 states have resulted in a halt to DAPA, impacting millions of immigrant families and exposing them to the threat of deportation.[13]

The current political conversation, which has been dominated by anti-immigrant, xenophobic, and outright racist rhetoric and proposals – much of which has been fueled by rising Islamophobia, in particular – makes things worse for millions of immigrants. Anti-refugee laws, including quotas and denials of basic social services, as well as calls to ban Muslims from entering the country, have been debated in recent months as legitimate policy alongside mass deportations.

Despite those egregious violations, the U.S. does continue to provide some meaningful protection to refugees and asylum seekers. In 2013, the U.S. admitted 69,909 refugees and granted asylum to 25,199 individuals.[14] The U.S. also substantially increased grants of immigration protection for victims of torture, trafficking, domestic violence, child abuse, abandonment, or neglect, and other qualifying crimes. However, following the Syrian refugee crisis, more than 4 million Syrians have fled conflict and violence in their home country, and 6.5 million have been displaced internally. During the consequent mass migration to Europe, the U.S. pledged to resettle only 10,000 refugees. As of April

2016, the U.S. has only admitted around 1,736 Syrians for resettlement.[15] In comparison, Germany, much smaller than the U.S., has so far absorbed over 1 million refugees.

1 • The Introduction of the SAFE Act

Following the Paris attacks, which significantly increased the fear-mongering that has characterised the primaries to the U.S. presidential election, legislation was introduced to curtail refugee settlement programmes in the U.S., much of which discriminatorily singles out Syrian and Iraqi refugees. In November 2015, the U.S. House of Representatives passed the American Security Against Foreign Enemies Act (known as the SAFE Act).[16]

The bill would create a bureaucratic review process that would effectively shut down resettlement of refugees from Syria and Iraq. It mandates new certifications and undefined background investigations for all refugees who are nationals or residents of Iraq or Syria, and for many who are not. All refugees deemed to originate from Iraq or Syria – including anyone who has been in either country at any time in the last four and a half years – would only be admitted to the U.S. after the Director of the Federal Bureau of Investigation (FBI) certifies that the refugee has cleared an additional background investigation. This investigation would supplement what Attorney General Loretta Lynch testified to being the existing "significant and robust" security screening.[17] Beyond this additional required screening, the legislation would mire the refugee process in further bureaucratic red tape by requiring that the Secretary of Homeland Security, Director of the FBI, and the Director of National Intelligence unanimously certify that a potential refugee – who has already gone through an extensive security screening – is not a threat to the U.S. There has been no need expressed by federal intelligence or law-enforcement agencies for such an unprecedented clearance process, which could take years to operationalise and would add no public safety benefits for the U.S. population. In short, the bill would bring the U.S. resettlement process of Syrian and Iraqi refugees to a grinding halt.

While the Senate has yet to approve this problematic law, it has already caused great damage to the reputation of the U.S. as a welcoming nation and safe haven for refugees. Several states, including Texas and Indiana, have sued the federal government and refugee resettlement agencies to prevent them from bringing Syrian refugees into these states (the ACLU represented the refugee resettlement organisations and has successfully defeated these efforts so far).[18] Many argue that state hostility, along with the SAFE bill and other outrageous statements made by presidential candidate Donald Trump calling to bar Muslims from entering the country, clearly undermines U.S. leadership abroad, including in its fight against groups such as the so-called Islamic State. To his credit, President Obama and his administration spoke forcefully against the law and urged Congress not to go down this road of adding obstacles to settlement of refugees in the U.S.[19]

Civil society organisations (CSOs) in the U.S. are outraged over the SAFE Act. The ACLU, together with other CSOs, sent a forceful appeal to congressional representatives, warning

that these anti-refugee laws "would 'jeopardize the United States' moral leadership in the world.'"[20] In addition, the appeal notes that "Syrian refugees are fleeing exactly the kind of terror that unfolded on the streets of Paris. They have suffered violence just like this for almost five years."[21] Furthermore congressional representatives are reminded that:

> *Department of Homeland Security officials interview each refugee to determine whether they meet the refugee definition and whether they are admissible to the United States. Refugees undergo a series of biometric and investigatory background checks, including collection and analysis of personal data, fingerprints, photographs, and other background information, all of which is checked against government databases.*[22]

Aside from the legislation's troubling and deleterious effect on U.S. immigration policy, protections for religious minorities, and its moral authority and standing in the world more generally, the American SAFE Act is inconsistent with U.S. treaty obligations to protect refugees and uphold human rights without discrimination. The following sections of this article will analyse the ways in which the American SAFE Act contradicts international law:

1 – The bill contravenes the letter and spirit of the Refugee Convention[23]

In carving out an exception to its treaty obligations for a vulnerable community based on that community's religious and ethnic identity and those individuals' country of origin, this legislation flagrantly violates U.S. obligations under article 3 of the 1951 Refugee Convention which provides that "the Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin." The U.S. is a State Party to the 1967 Protocol relating to the Status of Refugees, and is thereby bound to the Refugee Convention and its obligations relating to the Status of Refugees. In 1980, Congress enacted the Refugee Act with clear intent to bring the U.S. into conformity with its international refugee obligations, including the application of the Refugee Convention "to refugees without discrimination as to race, religion or country of origin."[24] The legislative history of the Refugee Convention and Protocol highlights "the evolution of a consensus for the humanitarian, nondiscriminatory policy finally embodied in the Refugee Act."[25] The negotiating history and the authoritative commentary on the Refugee Convention also make it very clear that discrimination perpetrated by Contracting States and against different groups of refugees is a direct violation of the Refugee Convention.

While governments have the role of designing their own resettlement programmes, these programmes must conform to international obligations. Thus, U.S. resettlement programmes must be nondiscriminatory and select refugees for resettlement only on the basis of their needs, regardless of nationality, ethnicity, religion, or other related characteristics. Furthermore, the U.N. High Commissioner for Refugees has acknowledged states' legitimate concerns to maintain public security and combat terrorism, but has warned against "the erosion of long-standing refugee protection principles."[26] These human rights protections cannot be

disposed of during times of perceived political emergency; to the contrary, they are all the more important in moments of alarm, as in the current situation, when governments are tempted to bow to the fears—however misplaced or imagined—of their constituents.

2 – The Act contravenes the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

Article 5 of the ICERD, to which the U.S. is bound, requires States Parties to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law." Therefore, government policies that apply unequal legal standards to non-citizens based on their national origin clearly violate the ICERD.[27] Only legal provisions concerning issues of nationality, citizenship, or naturalisation are exempt from the effects of the Convention. However, under the SAFE Act, nationals or residents of Iraq or Syria will be treated differently from other asylum seekers and refugees in ways unrelated to nationality, citizenship, or naturalisation. This differential treatment between groups of non-citizens constitutes prohibited discrimination under Articles 1.1 and 1.3 of ICERD.[28]

The Committee on the Elimination of Racial Discrimination has called upon states to "[e]nsure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin"[29] and has stated that laws on deportation and removal should "not discriminate, in purpose or effect, on the ground of race, colour, descent, or national or ethnic origin."[30]

The differential treatment imposed by the American SAFE Act on Iraqi and Syrian asylum seekers and refugees does just that. The Committee has already concluded that "xenophobia against non-nationals, particularly migrants, refugees, and asylum-seekers, constitutes one of the main sources of contemporary racism and that human rights violations against members of such groups occur widely in the context of discriminatory, xenophobic and racist practices."[31] By excluding Iraqi and Syrian asylum seekers from critical human rights protections, the SAFE Act not only violates their rights to seek protection, but it contributes to discrimination and racism towards these individuals - including those who have been able to enter and seek protection in the U.S.

3 – The SAFE Act contravenes the International Covenant on Civil and Political Rights (ICCPR or the Covenant)

The U.S. is required to respect and ensure the rights guaranteed under the ICCPR to everyone within its territory and subject to its jurisdiction. This means that the U.S. must respect and ensure the rights laid down in the Covenant to anyone within its power or effective control, even if the individual is not situated within the territory of the U.S. The U.N. Human Rights Committee (HRC) has interpreted this obligation as not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who

may find themselves in the territory or subject to the jurisdiction of the State Party.[32] In the context of expulsion addressed in Article 13, the Committee has stated that "discrimination may not be made between different categories of aliens."[33]

Moreover, under Article 2(1) of the ICCPR, governments are prohibited from denying the fundamental rights enshrined in the Covenant on the basis of national origin. Article 26 of the ICCPR further provides that: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The U.N. HRC has said that the term "discrimination" as used in the Covenant should be understood "to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[34]

Furthermore the Committee noted that the application of the principle of non-discrimination in Article 26 is not limited to those rights which are provided for in the ICCPR, and that "when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."[35] The Committee has observed that not "every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[36]

What the SAFE Act proposes to do, however, is clearly discrimination as the separate and unfair treatment of an entire group of people, based on their national origin, denies these individuals of their fundamental rights under the Covenant. The Act has both the aim and effect of discrimination without justification.

4 – The SAFE Act contravenes the American Declaration of Rights and Duties of Man

The American Declaration guarantees, under Article II, the right to equality before the law. In a 1997 decision concerning the U.S. interdiction policy regarding Haitian refugees at high seas, the Inter-American Commission on Human Rights dismissed the U.S. government's argument that the right to equality under Article II applies to equality only with respect to the application of the substantive rights articulated in the Declaration and stressed that:

> [A] breach of Article II arises not only in the application of a substantive right but also in respect of any unreasonable differentiation in respect of the actual treatment of persons belonging

> *to the same class or category. Thus, the finding that the Haitians have a substantive right to asylum under Article XXVII does not preclude a finding of a breach of Article II in respect of unreasonable differentiation in the treatment of Haitians and nationals of other countries seeking refuge in the United States.*[37]

Here again, in denying Syrians and Iraqis protection and a chance to apply for asylum in the U.S. on the basis of their national origin, the SAFE Act explicitly violates the right to equality before the law.

5 – The SAFE Act contravenes guidance from the U.N. High Commissioner for Refugees

Following the terrorist attacks on 11 September 2001, the U.N. High Commissioner for Refugees presciently warned against scapegoating refugees and asylum seekers in the face of anxieties about international terrorism in his guidance on Addressing Security Concerns without Undermining Refugee Protection.[38] The High Commissioner's guidance stressed that "[a]ny discussion on security safeguards should start from the assumption that refugees are themselves escaping persecution and violence, including terrorist acts, and are not the perpetrators of such acts."[39]

Furthermore, the High Commissioner' 2001 guidance called on Contracting Parties to combat racism and xenophobia against refugees, noting that

> *Equating asylum with a safe haven for terrorists is not only legally wrong and thus far unsupported by facts, but it serves to vilify refugees in the public mind and promotes the singling out of persons of particular races or religions for discrimination and hate-based harassment...*
>
> *Since 11 September, a number of immigrant and refugee communities have suffered attacks and harassment based on perceived ethnicity or religion, heightening social tensions. While there are some asylum-seekers and refugees who have been, or will be, associated with serious crime, this does not mean that the majority should be damned by association with the few.*[40]

More recently, in response to the 2015 terrorist attacks in Paris, the High Commissioner expressed concern "about reactions by some States to end the programs being put in place, backtracking from commitments made to manage the refugee crisis (i.e. relocation), or proposing the erection of more barriers. We are deeply disturbed by language that demonizes refugees as a group. This is dangerous as it will contribute to xenophobia and fear. The security problems Europe faces are highly complex. Refugees should not be turned into scapegoats and must not become the secondary victims of these most tragic events."[41]

Similar dangers are emerging in the U.S., as exemplified by the SAFE Act and renewed calls by Donald Trump to ban Muslim immigrants in the wake of the mass shooting in Orlando, Florida by a U.S.-born Muslim man. These responses to a real or perceived national security threat present a serious threat to human rights protections not only of non-citizens seeking assistance in the U.S. but also of religious and ethnic minorities for whom the U.S. has always been home.

2 • Conclusion

The fate of the SAFE Act remains unknown, but the heightened anti-Muslim and anti-refugee rhetoric has made it clear that even well-established human rights protections for immigrants and minorities are threatened in the U.S. The upcoming U.S. presidential election has put the rights and treatment of vulnerable asylum seekers and minority communities in stark distress and the issues at stake – how we treat refugees and others seeking protection from violence – are unlikely to disappear soon. The Syrian refugee crisis and the humanitarian crisis in Central America will continue to confront the next presidential administration and the new Congress. The question for the U.S. government and population is how to respond. Will the fear-mongering and sensationalist political rhetoric that paints Muslims and all refugees as a threat be enshrined in law and allowed to dismantle essential international human rights laws and principles? Or can these human rights commitments remind the U.S. of its historical identity as a place of refuge, inclusion, and rebirth?

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THE IMPACT OF INTERNATIONAL HEALTH CRISES ON THE RIGHTS OF MIGRANTS

Deisy Ventura

• *The fantasy of "foreigners carrying disease" justifies measures that restrict* •
international migration and foster human rights violations

ABSTRACT

This article offers an overview of the impact of health crises on the rights of migrants. It demonstrates that the repercussions of the Ebola crisis on human mobility is not a novelty. The association between foreigners and disease accompanies the history of epidemics and is part of the process of constructing national identities in the West, which maintains the potential for inciting or justifying human rights violations. Deisy Ventura argues that the restrictions on international migration adopted during the Ebola crisis are illegal under international health law and counterproductive to the effort to combat the epidemic. Furthermore, the she considers the security-based approach to international migration and health to be the seed of a kind of totalitarian utopia - it spreads the illusion that only surveillance systems are capable of preventing disease from propagating internationally, without, however, guaranteeing the right to health in all regions of the world. Finally, Ventura invites readers to look at the interface between the health crisis and international migration through the prism of the debates that animate the field of global health.

KEYWORDS

Health crisis | Right to health | Human rights | Ebola | Human mobility | International health regulations | Global health

In 2014, at the peak of the Ebola epidemic in West Africa, various countries, including Australia and Canada, restricted the entry of people into their territory from the countries affected the most by the disease (Guinea, Liberia and Sierra Leone).[1] Large airline companies, such as British Airways and Emirates Airlines, suspended part or all of their flights to the affected region.[2] Void of plausible scientific or public health justifications, these measures ignored the World Health Organisation's (WHO) strong statement against the adoption of travel restrictions, except for people with the disease and those in direct contact with them, as such restrictions would obstruct the arrival of aid to the most affected countries, among other reasons.[3] The countries adjacent to the epicentre of the crisis closed their borders. In the case of the Ivory Coast, for example, this measure prevented thousands of Ivorian refugees in Liberia from returning to their country.[4]

In addition to restricting human mobility, the Ebola crisis caused an increase in discrimination against black migrants, including those from regions where the disease did not exist, as, for instance, in the case of Haitians in Brazil.[5] At the same time, the adoption of discriminatory measures towards health professionals who had worked in West Africa upon their return to their respective countries of origin, such as Spain, the United States of America (U.S.) and the United Kingdom,[6] was denounced. The privacy of patients or suspected cases, including migrants or refugees, was unnecessarily violated in many cases.[7]

This article seeks to identify, generally and briefly, the impact of health crises on the rights of migrants. The first section demonstrates that the repercussions of the Ebola crisis on human mobility is not something new. The association between foreigners and disease accompanies the history of epidemics and is part of the process of constructing national identities in the West. It is maintained so it can be potentially used to induce or justify human rights violations. The second section argues that the restrictions on international migration adopted during the Ebola crisis are illegal under international health law and counterproductive to the effort to combat the epidemic. Third, the article examines how the strengthening of a security-based approach to international migration and health is constructing a kind of totalitarian utopia, as it spreads the illusion that only surveillance systems are capable of preventing disease from propagating internationally. Finally, the conclusion invites readers to look at the interface between the health crisis and international migration through the prism of the conflicts that inflame the field of global health.

1 • Foreigners and disease

In his studies on the history of fear in the West between the 14th and the 18th centuries, Jean Delumeau elaborates a typology of collective behaviours during the great plague. He concludes that when confronted with an epidemic, the first and natural impulse, on both the individual and collective level, is to identify who is to blame as a way of making the apparently unexplainable explainable. Thus:

the ones who are potentially to blame, against whom the collective can turn its aggression, are first the foreigners, travellers, marginalised and all those who are not well integrated into a community, either because they do not want to accept their beliefs - in the case of the Jews - or because it was necessary to expel them to the edge of the group for obvious reasons - such as the lepers - or simply because they are from somewhere else and, as such, they are somewhat suspicious.[8]

The rejection of foreigners in general is based on a "vulgar synthesis of incomplete information" that forges "naively schematic" collective stereotypes capable of "haunting the popular imagination".[9] In the Middle Ages, a particular kind of xenophobia founded on cultural and political reasons rejected Saracens and Byzantines. This contributed to the development of a Westerner identity in opposition to "Easterners". Later, discrimination towards Iberians and Italians ended up highlighting the difference between political regimes, as part of the idealisation of the figures of the Western man and the French monarchy.[10] Therefore, throughout history, the examples of identities whose foundations are based on repulsion towards foreigners corroborates the idea that "foreigners do not exist as such; one is only foreign before a norm, a culture or a civilisation. In sum, foreigners only exist in relation to the other".[11]

This very brief historical overview confirms the modern idea that any attempt to "rationally calculate" the risk of contracting a disease must face an imaginary woven together by various representations[12] that includes both the popular view of immigrants as vectors of disease and the discourse of specialists who point to the epidemiological consequences of the migration of populations.[13] A milestone in the history of global health, the HIV/AIDS epidemic that erupted in the 1980s resuscitated the archaic fears from major epidemics such as the plague and syphilis and, with them, more repressive means of protection targeted primarily the most stigmatised groups, such as homosexuals, drug users, prostitutes and foreigners.[14] In a study on the response to HIV/AIDS in China, Évelyne Micollier reveals that the "social construction of the disease", especially in prevention campaigns, is built around the notion of the "foreigner" who carries the risk of contamination. In this notion, the Chinese include not only nationals from other states, but also Chinese people who are not from the Han ethnic group.[15]

In the West, a myth emerged that accuses Haitians of being responsible for the origin and the spread of the HIV/AIDS epidemic in the U.S. The myth was fed by the theory on the risk groups known as the "4H": haemophiliacs, Haitians, homosexuals and heroin addicts.[16] In a fundamental work on this issue, Paul Farmer demonstrated that this myth constitutes a process of "holding ethnic groups responsible" in which "the victims are blamed". This process can only be understood when one takes into account the relations of political, social and economic domination between Haiti and the U.S.[17] However, various episodes illustrate the force of this amalgam. In 1993, the Senate banned the immigration of people living with HIV/AIDS, with the support of 71% of the U.S. population. This was in direct response to the 219 Haitian political refugees with HIV/AIDS who had been awaiting authorisation to enter the U.S. for nearly a year in the Guantanamo Bay naval base (Cuba).[18]

Moving on to modern day Brazil, a case study on Haitian migration in Tabatinga (in the state of Amazonas) revealed that "health was undoubtedly the principle element crystallising the fear the Haitian migrants inspired in the local population". This fear was fed by the idea - promoted mainly by city councillors and the local media - that this "uncontrolled and dangerous" wave of migration would bring major health risks to the area.[19] However, the authors noted that this alarmism is contrary to reality, as the Doctors Without Borders team that assessed the migrants' health considered that their general state of health was no different from that of the local population.

The repercussions of the international Ebola crisis in Brazil made fears grow in spite the fact that no cases have been reported in the country. One must understand that the disease is not what gave rise to stigmatisation of foreigners: on the contrary, it came to fill the opening for rejection that already existed.[20] This is what the study of the media coverage on the Ebola crisis in Brazil revealed: it noted that the coverage reinforced the idea that Africa is a place full of health risks and Africans are agents that disseminate Ebola, thereby promoting and constructing "Africanness as a risk factor for health".[21]

However, the coverage of the Ebola crisis by the Brazilian press is not an exception, but rather the rule. The seven Ebola cases reported in the West (four in the U.S. and single cases in Spain, Italy and the United Kingdom), of which only one resulted in death, had much greater repercussions than the thousands of cases and deaths that occurred in Guinea, Liberia and Sierra Leone.[22] As of 5 May 2016, the WHO had been notified of a total of 28,616 confirmed, probable or suspected cases and 11,310 deaths.[23] Prior to the Ebola virus being declared as a Public Health Emergency of International Concern (PHEIC) by the WHO in August 2014,[24] outbreaks of diseases in Africa had received little attention since the 1970s. No matter how dangerous a virus may be, if it does not generate a significant market - which was the case of the Ebola virus - it tends to be neglected. This explains the absence of treatments and vaccines when an epidemic breaks out. However, "the market appears when the virus leaves a country where the West really wants it to stay".[25]

The economic determinants of the seriousness of a disease supports, in a way, the idea that "health means having the same diseases as our neighbours".[26] The reaction of a part of the political class and media in the U.S., which was opposed to the repatriation of U.S. health professionals who had worked to fight the Ebola virus, at the height of the crisis, appears to reflect such a view. The previous rejection of these professionals was probably due to the fact that they "were where they shouldn't be" - that is, they did not go along with the general indifference towards the health of the majority of the world population so that the enormous distortions in the current global health governance could be maintained.[27] During the campaign for mid-term elections in the U.S.,[28] some candidates resolved to exploit the health crisis politically.[29] Republican Donald Trump strongly attacked the Obama administration, arguing that "the U.S. cannot allow Ebola infected people back. People that go to far away places to help out are great-but must suffer the consequences!"[30]

The following series of cartoons by Patrick Chappatte, the rights for which were granted for free to this publication, is of great value to understand some elements of the complex impact of Ebola in the West.
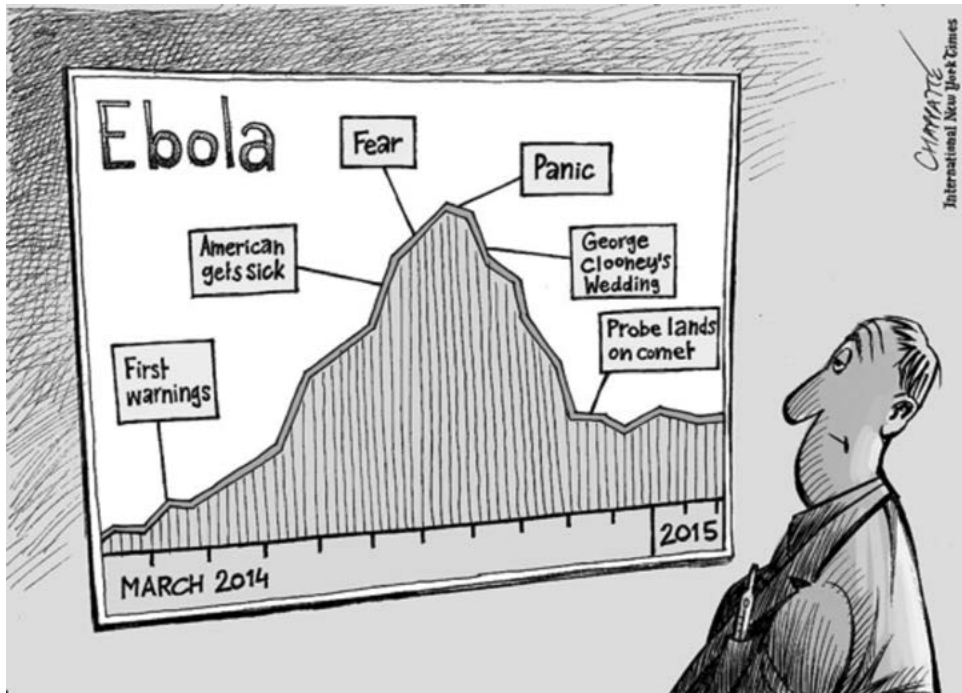
Figure 1 - Dealing With Ebola[31]
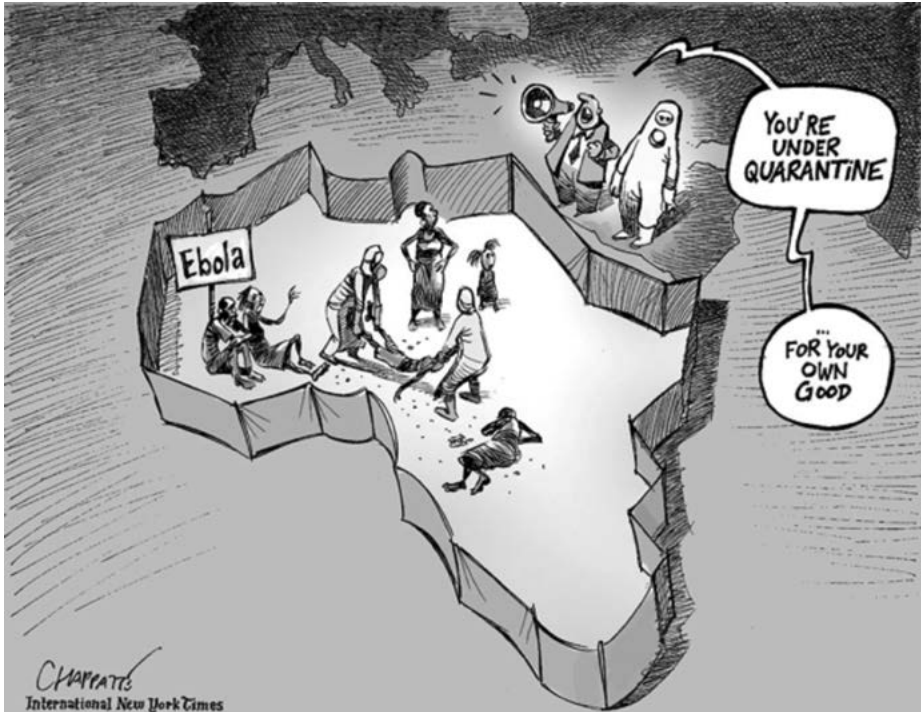
Figure 2 - Could it be Ebola?[32]

Figure 3 – The CDC's Ebola Update[33]

Figure 4 – The Year for Ebola[34]

In sum, in the epicentre of the Ebola epidemic, it is unanimous that the international response to this neglected disease was deficient.[35] Outside of the epicentre, paradoxically, the disease became exacerbated by a narrative that weaves together notions of security and crisis, sustained by a political and media spectacle.[36] However, the potential impact of this drama on human rights reached the justice system. The ruling on the unusual restrictions imposed by the government of the state of Maine on a U.S. nurse sent home from West Africa merits special attention. One of the restrictions was the order for her to maintain one metre of distance between herself and other people.[37] Even though the judge recognised the lack of scientific basis for his ruling, he based his decision on the recognition that people are acting out of fear and whether that fear is rational or not, "it is present and it is real".

2 • Illegal restrictions on human mobility

During the Ebola crisis, pressured by the panic that was spreading at a dizzying speed, more than 40 states did not abide by the WHO's recommendations on human travel and trade. Few countries notified the WHO of the measures they adopted and some of them did not even answer the organisation when it questioned them about it.[38] This led David Fidler to identify another epidemic: that of the non-compliance with norms, especially the International Health Regulations (IHR).[39] In force in 196 countries, the IHR stipulate that prevention and the response to the international spread of disease is to be commensurate with risks and avoid unnecessary interference with international traffic and trade (Article 2), and will guarantee "full respect for the dignity, human rights and fundamental freedoms of persons" (Article 3).[40] According to Article 42 of the regulations, all measures must be adopted in a transparent and non-discriminatory manner.

In the opinion of Khalid Koser,[41] travel restrictions can do more harm than the problems they are meant to resolve for at least three reasons. First, experience with previous health crises reveals that the crises rarely lead to an increase in human mobility. When there is an increase, the movements tends to take place within the country, as people seek to distance themselves from the epicentre of the outbreak. The displacements also tend to be temporary, until people are able to obtain more precise information on the disease. Secondly, the restrictions are inefficient in light of the current dynamics of the transmission of infectious or contagious diseases, which can be spread around the world in only a few days due to the rapid speed of human travel and international trade. This is why the IHR focuses on the adoption of public health measures to control vectors at the points of entry for travel by air, sea or land and the activation of communication channels between states, and not restrictions on the movement of individuals. Finally, travel restrictions and the imposition of measures of isolation upon return hinders the flow of health personnel to regions affected the most, precisely when it is needed the most, thereby affecting the provision of medical supplies and humanitarian aid. On a broader level, the restrictions do considerable

damage to the economy of the affected regions, as trade flows are cut off, and to the governments' capacity to manage the crisis.

It is worth adding that limiting regular entry into destination countries fosters irregular migration. This kind of migration is indeed capable of contributing to the spread of diseases due to the complete absence of control over these people's presence in a given territory. Furthermore, the climate of rejection towards people from certain places of origin can lead them to not seek treatment for fear that the measures will affect their situation as migrants.

A panel of independent experts suggested that, based on the experience with the Ebola crisis, the WHO should be given the power to sanction states that do not comply with its rules, since undue restrictions cause serious social, economic and political damage to the countries most affected.[42] In opposition to this suggestion, however, it was argued that the serious flaws in the WHO's response to the Ebola outbreak incited states to ignore the organisation's recommendations, as if compliance with the IHR was part of a "political bargain" in which states would only be obliged to comply if the actions of the WHO itself and the most affected countries were flawless in relation to their own obligations.[43] In any case, the fact that countries such as Australia and Canada had adopted restrictions with no consequences reveals that developed countries possess enough political capital to avoid having to fulfil their obligations.[44 45]

On the other hand, the possibility of being able to impose sanctions would not resolve the biggest obstacle to complying with the IHR: the incapacity of numerous states - including the countries hit the hardest by the crisis - to fulfil the obligations they assumed under the Regulation due to economic and political constraints.[46] One must recognise that the full implementation of the IHR in West African countries, which would require substantial improvements to the health policies and services that are essential for a life with dignity, would have been much more effective in tackling the causes of a considerable proportion of international migration than restrictions on the circulation of people during the Ebola crisis.[47]

3 • A totalitarian utopia under construction

In September 2014, the Secretary General of the United Nations (U.N.) removed the WHO from its role as the coordinator of international action in the field of health by creating the first emergency health mission in history: the United Nations Mission for Ebola Emergency Response (UNMEER).[48] He did so with the consent of the Security Council and the General Assembly. The Ebola epidemic was from that point considered a threat to world peace and security. Since then, based on the "lessons of Ebola", the "global health security" approach to international responses to health crisis has been gaining ground has been gaining ground.[49] However, combating the spread of epidemics around the world by strengthening surveillance systems and, when an international response is

necessary, deploying U.N. missions focused on contention and militarisation appears to be contributing to the construction of a sort of totalitarian utopia.

It is totalitarian, for one, because it justifies judicial regimes of exception (such as the so-called anti-Ebola laws adopted in the countries affected the most by the epidemic), which undermine democracy and the rule of law. These regimes also sponsor human rights violations that go far beyond the limitations on the exercise of freedoms that could be demanded to prevent diseases from spreading (as is the case of closing real or political borders). It is also totalitarian because when serious health problems are neglected on a global scale - such as malaria, tuberculosis and those affecting the health of women and indigenous peoples, among many others - in order to give priority to the global health security doctrine and combating diseases that are socially constructed as more dangerous, the international response given to the Ebola crisis contributes to greater inequality at the global level.

Secondly, it is utopian. Without going into the vast debate on this concept, the expression is used here to simply refer to an "imaginary representation of a necessary and impossible society".[50] The strategy of containing diseases by isolating a territory is doomed to failure. Regardless of how large the investments in human and financial resources for surveillance are, the entire physical barrier can potentially be broken. Similarly, the "magic bullet" strategy[51] - that is, the search for treatment and vaccines that aim to eliminate the disease without tackling the social determinants that, depending on the case, strengthen both the origin and the extent of its propagation - is powerless against the constant mutation of the agents causing the infectious or contagious diseases.

There is a vast literature demonstrating the complexity of the origin of epidemics. Changes in the balance between humans and wildlife, alterations to ecosystems and the increase in exchanges between rural and urban areas, as well as international exchanges, are factors that contribute to the appearance of new diseases. Therefore, the connections between the ecological, epidemiological and socio-economic spheres are fundamental. Disease and epidemics need to be addressed from an integrated ecological view in which humans are treated as one inseparable element of a complex and interactive system.[52]

For all these reasons, even if restrictions on human mobility could be adopted exceptionally and legitimately by health authorities (and not other authorities), based on scientific proof and while seeking to reduce their negative impact on human rights,[53] they are far from being an effective response to the international spread of disease. By way of conclusion, then, one question remains to be answered: what would the response be?

4 • Conclusion

There is no doubt that the risks related to the circulation of people would be radically reduced if states were to give priority to addressing the causes of the persistence and/

or the rapid spread of diseases and were capable of both preventing and offering consistent national responses to outbreaks when they are declared.

With regards to resources from international cooperation, the priority should be not only international surveillance systems or programmes to combat specific diseases, but mainly building national health care systems offering universal and free access. This requires investing massive resources for prevention and basic health care in health infrastructure and the recruitment of well-trained, well-paid health professionals with stable careers.[54]

To take global health security seriously - and not just the security of certain developed states - other decisive factors must also be mentioned, such as: urgent and profound changes to the regulation of the production of food and medicines that are capable of subjecting these industries to the need to strengthen public health norms and policies, and a total ban on arms manufacturing and sales which allow existing armed conflicts to continue. These conflicts are largely responsible for the destruction of the rule of law and, consequently, the health systems of the poorest countries, as in the case of Liberia and Sierra Leone. Furthermore, the priority of international action should be the social determinants of health, namely basic sanitation, food, housing and education.

Therefore, the dichotomy that characterises the interface between international migration and health - with the representation of migrants as a threat to health on one hand and the recognition of the vulnerability of the health of migrants who are frequently exposed to difficult working conditions with limited access to rights and policies for inclusion, on the other -[55] must be urgently overcome. The international approach to the health of migrants and refugees must be guided by the conflicts at stake in the formulation of national and regional migration policies, but also in the major disputes waged in the global health field,[56] especially in relation to the inequalities that make it impossible for millions of people today to have a life with dignity in the place where they were born.

NOTES

1 • Reena Pattani, "Unsanctioned Travel Restrictions Related To Ebola Unravel The Global Social Contract," *Canadian Medical Association Journal* 187, no. 3 (2015):166-167, accessed May 8, 2016, http://www.cmaj.ca/content/187/3/166.full.

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3 • See: "Statement on the 2nd meeting of the IHR Emergency Committee Regarding the 2014 Ebola Outbreak in West Africa," OMS, Sept. 22, 2014, accessed May 8, 2016, http://www.who.int/mediacentre/news/statements/2014/ebola-2nd-ihr-meeting/en/.

4 • Alexis Adele, "A Long Wait For Home – How Ebola Kept Refugees Stuck In Liberia." IRIN News, March 18, 2015, accessed May 8, 2016, https://www.irinnews.org/analysis/2015/03/18-0. Repatriation began again at the end of 2015. See: "Ivorian Returns Resume From Liberia After Ebola Outbreak," UNHCR, December 18, 2015, accessed May 8, 2016, http://www.unhcr.org/5674384d6.html.

5 • A study by Denise Cogo and Terezinha Silva concluded that among the seven main events and issues related to Haitian immigration in Brazil covered by the media between 2010 and 2014, one finds the "international Ebola epidemic, brought up in mid-2014 in coverage on daily situations where Haitians were suspected [of having Ebola] or discriminated against in Brazilian cities". See Denise Cogo and Terezinha Silva, "Entre a Fuga e a Invasão: Alteridade e Cidadania da Imigração Haitiana na Mídia Brasileira," *Revista Famecos – Mídia, Cultura e Tecnologia* 23, no.1 (2016), accessed May 8, 2016, http://revistaseletronicas.pucrs.br/ojs/index.php/revistafamecos/article/view/21885.

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7 • In Brazil, the identity of one person suspected of having the disease and who was applying for refugee status was disseminated widely. See Deisy Ventura and Vivian Holzhacker, "Emergências Internacionais de Saúde Pública e Direitos Humanos: O Primeiro Caso Suspeito de Ebola no Brasil", Lua Nova, no. 98.

8 • Jean Delumeau, *La Peur en Occident (XIVe-XVIIIe siècles) - Une cité assiégée* (Paris: Fayard, 1978): 131. The author offers numerous examples of how foreigners were held responsible for the Black Death: in Lorena, in 1627, the plague was called the "Hungarian Plague" and in 1636, "Swedish"; in 1630 in Toulouse, the "Plague of Milan"; in Cyprus, Christians massacred Muslim slaves; in Russia, the Tatars were attacked; in 1665, the British accused the Dutch, etc.

9 • Charles-Victor Langlois, "Les Anglais du Moyen Âge d'Après les Sources Françaises," R*evue Historique* t. 52, fasc. 2 (1893): 298-315.

10 • Franck Collard, "Une Arme Venue D'ailleurs. Portrait De L'étranger En Empoisonneur," *Actes des Congrès de la Société des Historiens Médiévistes de l'Enseignement Supérieur Public* 30, no. 1 (1999): 95-106, accessed May 8, 2016, http://www.persee.fr/doc/shmes_1261-9078_2000_act_30_1_1762.

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12 • Delphine Moreau, "Dispositifs de Sécurité et Épidémie de SIDA", *Labyrinthe* 22, no. 3 (2005), accessed May 8, 2016, http://labyrinthe.revues.org/1038.

13 • Didier Fassin, "L'Alterité de l'Épidemie. Les

Politiques du SIDA à l'Épreuve de l'Immigration," *Revue Européenne des Migrations Internationales*, 17, no. 2 (2001): 139-151, accessed June 1, 2016, http://www.persee.fr/doc/remi_0765-0752_2001_num_17_2_1782.

14 • Moreau, "L'Alterité de l'Épidemie," 2001.

15 • Evelyne Micollier, "L'Autre: Porteur Originel et/ou Vecteur Privilégié du VIH/SIDA (Chine Populaire-Taiwan)," *Autrepart - Revue de Sciences Sociales au Sud* (1999): 73-86, accessed May 8, 2016, http://hal.ird.fr/ird-00445745/document.

16 • Also referred to as the "5H" when prostitutes (Hookers) are added.

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Paranoia and Public Health - The AIDS Epidemic's Lessons for Ebola," *New England Journal of Medicine* 371 (2014): 2348-2349, accessed May 8, 2016, http://www.nejm.org/doi/full/10.1056/NEJMp1413425.

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32 • Ebol-ISIS: a scary world © Chappatte in The International New York Times, Oct 11, 2014 (I141011).

33 • Ebola in the USA © Chappatte in The International New York Times, Oct 18, 2014 (I141018).

34 • The Year of Ebola © Chappatte in The International New York Times, March 25, 2015 (I150325).

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43 • David Fidler, "Ebola Report Misses Mark on International Health Regulations." Chatham House, July 17, 2015, accessed May 8, 2016, https://www.chathamhouse.org/expert/comment/ebola-report-misses-mark-international-health-regulations.

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Travel Restrictions," 2015.

46 • Ventura, "From Ebola to Zika," 2016.

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48 • See the main documents related to the UNMEER in "UN Mission for Ebola Emergency Response (UNMEER)," Global Ebola Response, 2014, accessed May 8, 2016, http://ebolaresponse.un.org/un-mission-ebola-emergency-response-unmeer.

49 • See, for example, David Heymann *et al.*, "Global Health Security: The Wider Lessons From the West African Ebola Virus Disease Epidemic," *The Lancet* 385, no. 9980 (2015): 1884-1901.

50 • Jean-Paul Deléage, "Utopies et Dystopies Écologiques," *Ecologie & Politique*, no. 37 (2008): 33-43.

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53 • This is what Article 32 of the IHR (ibid.) affirms: "In implementing health measures under these Regulations, States Parties shall treat travellers with respect for their dignity, human rights and fundamental freedoms and minimize any discomfort or distress associated with such measures".

54 • The debate on the *universal health coverage* must be followed carefully. Although it would appear that the WHO's proposal is to meet this need, it was harshly criticised by various countries, including Brazil, as it appears to serve the interests of the insurance market more than effectively guaranteeing the population's right to health. See, for example, Paulo Buss et al., "Saúde na Agenda de Desenvolvimento pós-2015 das Nações Unidas," *Cadernos de Saúde Pública* 30, no. 12 (2014): 2564-2565, accessed May 8, 2016, http://www.scielo.br/pdf/csp/v30n12/0102-311X-csp-30-12-02555.pdf.

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"SMUGGLERS WILL ALWAYS OUTWIT, OUTPACE AND OUTFOX THE GOVERNMENTS"

François Crépeau

• Interview with François Crépeau, United Nations Special Rapporteur •
on the human rights of migrants on the so-called "migration crisis" in Europe

In the week that saw 1,083 migrants die in the Mediterranean – the deadliest week of 2016 to date[1] - François Crépeau took the time to speak to the Sur Journal about the increasingly desperate situation in the region.

He attributes the current situation, in part, to the increasingly restrictive migration policies of the European Union and its Member States. Specifically, he noted the difficulty of obtaining visas, especially for individuals from the Global South, following the negotiation of the 1990 Schengen Convention and also the securitisation of migration policies which is now largely in the hands of ministries of interior and home affairs. In addition, the fact that the borders of Europe – and further afield – are witnessing a considerable degree of conflict and instability means that there are huge numbers of refugees leaving Afghanistan, Iraq, Libya and, in particular, Syria. These two factors lead to a high demand for smugglers who offer ever more dangerous border crossings to increasingly desperate people.

He notes that, for four years, Europe, North America, Australia and New Zealand failed to offer meaningful support for refugees through resettlement programmes. The so-called "migration crisis" therefore has multiple sources. But, according to Crépeau, the single most important factor is the lack of political leadership on the part of most European politicians.

Here he tells the Sur Journal what Europe should be doing and offers a cautious outlook for the recent EU-Turkey Statement, Europe's most recent response to the situation. He calls on the press and civil society organisations to be the voice of migrants and tell their stories to a public that is currently influenced by politicians who are content on selling negative images of migrants in order to secure votes.

Conectas Human Rights • During your recent mission to Greece, you were very critical of the European Union, describing how "The suffering of migrants in Greece is the result of a complete absence of long-term vision and the clear lack of political will of the EU."[2] How could Europe have acted differently, and how should Europe be acting currently, to improve the plight of the migrants trying to enter now and in years to come?

François Crépeau • When I refer to Europe, I mean both the authorities of the European Union (E.U.) and also the leaders of the different European countries in their respective capitals. This is not something that the E.U. can do alone, and it is not something that the European capitals can do alone either. Until very recently, external migration into the E.U. was still the concern of the individual Member States. What has not emerged is a consensus that European countries are already immigration countries, that Europe needs immigration and that this immigration should be managed both individually by each country, but also collectively from Brussels. It must be an alliance. That is the first thing.

Second, no common long-term strategic policy vision has been created in terms of migration to the E.U. and mobility across E.U. external borders. It needs to develop a vision and a strategy of where it wants to be 25, 30 or 50 years from now in terms of mobility: for example, a 25-year plan with various benchmarks, and a conference every 5 years to review these benchmarks if needed. For example, one could establish as a benchmark the doubling of the foreigners covered by visa facilitation or visa liberalisation within ten years.

The E.U. already has some good examples of measures that contribute towards mobility like the Blue Card (which is the equivalent of the American green card), the seasonal workers/agricultural workers directive, or the student and researcher directive: the last one is new, but the first two have yielded very disappointing numbers.[3] Short-term travel should also be considerably facilitated. The facilitation of legal mobility also happens to be one of the targets of the 2030 Agenda for Sustainable Development Goals.

This would create enormous economic opportunities. We have to get rid of the fear that everyone wants to come to Europe and stay. It is not true. People want to come and go. This has been the experience of the United States of America (U.S.) with Mexican migrants. As long as there was no barrier at the Mexican-American border, Mexicans entered the U.S. when the labour market was buoyant and, when there was an economic downturn, they returned to Mexico. We can also take the example of the United Kingdom (U.K.) and Ireland after 2005, when Central Europeans were admitted to move inside the E.U. The U.K. and Ireland received a million and a half Central Europeans within a few months. These were the boom years. These migrants occupied jobs, they created wealth, they paid taxes and they learned transferable skills. When the economic crisis struck in 2009-2010, many left the U.K., which minimised the unemployment rates in the U.K. They lost their jobs, but they did not stay in the U.K. They went elsewhere to try to find jobs or created their own jobs with the skills that they had acquired in the U.K. This is exactly the kind of mobility we need which the E.U. should be fostering and encouraging.

Conectas • What role should migrant sending and transit countries have in protecting the rights of migrants, given that they are often economically disadvantaged compared to the E.U. and often experiencing extreme political instability?

F. C. • What they can do is educate the citizenry better about the dangers of travelling with smugglers. We must understand however that, in many cases, these countries are very poor and do not have the possibility of creating a labour market that will sustain their youth. The countries of origin also need the hard currency, in the form of remittances, which migrants earn when they go to Europe or elsewhere in the world. Remittances help considerably the development of these states. The countries of origin should negotiate and put pressure on Europe and other Global North countries for more regular avenues for migration.

Conectas • One of the ways the E.U. has responded to the current situation is with the E.U.-Turkey Statement[4] that was announced in March 2016, the legal nature of which you described as "uncertain". What is your opinion of the "Statement" now, both in terms of how it has worked in practice and from an international law point of view?

F. C. • The E.U. and Turkey stated that, if Turkey meets various conditions – including accepting the return of any irregular migrant that is caught crossing from Turkey to Greece – Turkey will receive EUR 6 billion from the E.U. and there will be visa liberalisation for Turkish citizens. This would mean that Turkish citizens could come to Europe freely for short-term visits, including to look for work or business opportunities. Turkey also has the obligation to stop the migrants on its territory reaching Europe by limiting the activities of the smugglers and to better protect the refugees and migrants on its territory.

Firstly, we have learned that it is not an agreement. It is now referred to as the "EU-Turkey Statement". It is therefore not a legal agreement; it is a political statement.

Secondly, its implementation hinges upon Turkey obtaining visa liberalisation, which is based on Turkey meeting a number of conditions that the E.U. has set: it is not certain that Turkey will meet all of them.

The third issue is that the Statement is based on the idea that all refugees can be returned to Turkey. However, I must stress the importance of having individual assessments carried out which would ensure that vulnerabilities are identified and decisions are made on an individual basis depending on their protection needs. We already have a Greek judgment that found that a Syrian could not be sent back to Turkey because it had not been proven that Turkey was a safe country for that person.[5] This is an important example of courts upholding the rights of refugees to have individual assessments and upholding the principle of non-refoulement as other courts such as the European Court of Justice and the European Court of Human Rights have done in the past and hopefully will continue to do so in the coming months and years.

Therefore, my main preoccupation is how the E.U.-Turkey Statement will be developed and finalised while at the same time guaranteeing the protection of the human rights of migrants.

Conectas • There have been reports that following the E.U.-Turkey Statement, smuggling in the Aegean Sea has been reduced. However, you have noted that "'fighting the smugglers' is a red herring". Can you expand on why the securitisation of migration, a policy trend that we see across the world, is not the answer?

F. C. • If you have push factors, such as violence and poverty, and pull factors, such as underground labour markets, mobility is created. This mobility is helped by technological advances that did not exist ten years ago: smart phones. The most important possession of migrants last summer was the smart phone, with Google Maps and Facebook and the ability to be in contact with family and friends. If you put a barrier in between a push factor and a pull factor, the only thing you create is an underground market for criminalised gangs. And that is exactly what happened. Smuggling rings have taken over the mobility market as the states refuse to offer mobility solutions.

You can disrupt the smugglers for a time by destroying a boat here, patrolling a bit more there and erecting a fence at this point. But these smugglers are very resourceful, they are tech-savvy and they will find other crossing points. It will increase the financial and human cost for migrants. It will certainly increase the danger for the migrants, but in the end they will find other ways.

We have seen a reduction in the number of crossings to Greece from Turkey with the implementation of the EU-Turkey Statement. However, we have seen the number of people going through Libya and trying to reach Italy grow again. The smugglers are at work and they will always outwit, outpace and outfox the governments.

This is the historical experience we can derive from the Prohibition era in the U.S., or the current "War on Drugs": the U.S. reclaimed the market from the bootleggers by taking over the sale of alcohol and many states around the world are now legalising, regulating and taxing drugs, as well as offering safe injection sites.

What is needed is for states to reclaim the mobility market from the hands of the smugglers through offering safe, legal and cheap mobility solutions to the many, and to build an open but controlled mobility regime over a generation. This type of mobility is not science-fiction. Until the late seventies, most people did not need a visa or could obtain a visitor's visa easily. In the 50s, 60s and 70s, millions of North Africans and Turkish citizens entered Europe legally either without a visa or with an easily obtainable visitor's visa, which they changed into a work permit as soon as they found a job. Since mobility was not prohibited, there was no market for smuggling rings. No one died in the Mediterranean, as everyone took ordinary ferries. No one spent all their savings to secure an irregular passage. Very few lived in the shadows of an underground economy. And everyone's ID and travel documents were controlled at every border, as this was before the EU regime of free movement of persons.

Conectas • Despite a brief moment of reprieve in September 2015 following the tragic photograph of Aylan Kurdi lying on a Turkish beach, the media stokes a largely anti-immigrant rhetoric. What role do politicians have in fuelling this discourse – and from your missions have you seen any evidence to suggest a change to this trend?

F. C. • Politicians in democratic countries respond to electoral incentives. That is the nature of the system of representative democracy in which we live. Politicians listen to the electorate because their election is at stake. This is something that every marginalised group who has tried to further their interests on the democratic stage has understood - industrial workers at the end of the 19th century, women throughout the 20th century, aboriginals in the second half of the 20th century in Canada and Australia, or gays and lesbians more recently. These groups realised that if they spoke up and incentivised politicians to listen, they will start listening and they will change their behaviour, slowly, but surely.

Migrants however do not vote and cannot get elected. There is no electoral incentive to say anything smart or good about migrants because there are no votes to gain. On the contrary, several countries have seen the emergence of nationalist-populist political parties who have only one line. They only talk about immigration, national identity and are usually very conservative and sometimes, close to the extreme right. Migrants cannot contradict all the stereotypes that are made about them in the way that women dispelled the stereotypes that were made against women 50 or 60 years ago, or like gays and lesbians in the past decade have dispelled the stereotypes about them that were circulating in our society. Migrants do not do that because they fear being deported. Migrants do not raise their voice. They rarely mobilise, they rarely protest, they rarely go to court to fight for their rights because their objective is to stay in the country, earn money and send money home.

So, good politicians are in a bind. Politicians with principles and who care for human rights will often avoid making statements on migration issues. They say nothing because they do not want to say anything pejorative about migrants, but they also do not want to lose the next elections. They are in the business of winning elections. So very often they just remain silent. The politicians who want to win votes and who have less principles rant about migrants in order to try to win votes from nationalist-populist movements that have become a large part of the electorate. This is a problem because it means that these less scrupulous politicians are validating the nationalist populist discourse and that there is no public discourse emerging to contradict the nationalist-populist stereotypes and fantasies about migrants. In Europe, most do not have the courage to create a pro-immigration, pro-mobility, pro-diversity discourse that would tell the electorate that these nationalist populists are wrong on every count. It happens to an extent in the U.S. because besides the 11 million undocumented migrants, which are the focus of so much attention, there is a huge community of over 20 million Latino – mostly Mexican-Americans - who vote and who care about what happens to undocumented Mexicans in the U.S. But in Europe, you do not see this and that is very problematic.

Now, the media is interesting because you have the "yellow press", which is very interested in migration issues because they live on the outrage of their readership and anything bad you can say about migrants will encourage that outrage. But you have the good press as well, which is much better educated today than it used to be ten years ago. You now have journalists who have met the migrants, who have been to the Andaman Sea and met the Rohingyas, or to Greek camps in Idomeni, Samos or Lesvos, who have interviewed people and who know exactly what they are talking about. I expect that there will be much better questioning of politicians in the coming years thanks to the better educated media.

Conectas • How do you evaluate the way the Human Rights Council has treated the situation in Europe – noting that there has not been a resolution nor a special session on the issue?

F. C. • In the name "United Nations", the important word is "nations". It is the countries that decide what they want to talk about. Many countries around the world do not want the migration issue to be discussed in international fora. Many states that fall under the category of "countries of destination" and are often criticised for the way they treat migrant workers do not want the U.N. to take up that issue. Member States will argue that it is a question of territorial sovereignty, that cross-Mediterranean movements are a European affair, and that the U.N. should not meddle. So if the countries of the Human Rights Council do not want the Council to create an investigation or to create a special session, those countries will make sure that the Council cannot do it.

Conectas • Drawing on your experience of what you have seen during your many missions, what is the most effective way that international civil society – in particular from the Global South – can work toward ensuring both a greater empathy and understanding for migrants as well as contributing to better frameworks which more effectively protect their rights?

F. C. • What is most important is that this issue becomes personal. Migrants must be seen as human beings with rights, as people just like us who strive for safety and human security, free from fear and want. This is why many people in Europe have empathised with and welcomed migrants. That is what the NGOs, civil society and the media can do best: trying to make this personal. Tell stories. Show that if we were in their shoes, we would do the same for ourselves and our families. Bring individuals to decision-makers, to courts, to unions, to national human rights institutions, to ombudspersons, to the media. Bring these individuals to the people who can shape opinion. By making those stories known and by making the issue of migration personal – making it an issue between one individual and another - we can successfully develop campaigns that focus on celebrating diversity and thus make people think differently about migrants.

NOTES

1 • 25 May – 31 May 2016, see "Mediterranean Migrant Deaths Spike in May," International Organization for Migration, June 2, 2016, accessed June 17, 2016, https://weblog.iom.int/mediterranean-migrant-deaths-spike-may.

2 • "Greece: 'Europe's lack of political will creating serious suffering for thousands of migrants in Greece' – UN rights expert," The Office of the United Nations High Commissioner for Human Rights (OHCHR), May 17, 2016, accessed June 17, 2016, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19976&LangID=E.

3 • For more information see "Coming to the EU?,"

EU Immigration Portal, May 11, 2016, accessed June 17, 2016, http://ec.europa.eu/immigration/who-does-what/what-does-the-eu-do/coming-to-the-eu_en.

4 • For more information see "EU-Turkey Agreement: Questions and Answers," European Commission, March 19, 2016, accessed June 17, 2016, http://europa.eu/rapid/press-release_MEMO-16-963_en.htm.

5 • "Migrant Crisis: Greek Judges Tell Syrian Refugee Turkey is Unsafe," BBC, May 21, 2016, accessed June 17, 2016, http://www.bbc.com/news/world-europe-36345990.

*Interview conducted in May 2016 by Ana Cernov
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A FORCE TO BE RECKONED WITH

Zenén Jaimes Peréz

• *How immigrant youth moved the most* •
powerful person in the world, twice

ABSTRACT

The immigrant youth movement in the United States of America (U.S.) is an example of how an underestimated, underrepresented and undervalued community can become strong a political force when its members fight for a cause that unites them – in this case rights for irregular migrants. Zenén Jaimes Peréz sets out the history of the immigrant youth movement in the U.S. – composed 80 per cent of migrants from Latin America - and how it came to force President Obama to issue two executive actions which provided deportation relief and work permits to millions of individuals, specifically the Deferred Action for Childhood Arrivals (2012) and the Deferred Action for Parents of Americans in (2014). The author explains how the movement received guidance, coaching and support from past civil rights leaders and offers seven methods, tactics and practices used by the immigrant youth movement in achieving these goals. Peréz concludes by noting that while the movement has had considerable success and propelled many of its members into positions of influence, the challenges are far from over.

KEYWORDS

Dreamers | Immigrants | Undocumented youth | Organisation | Civil society | United States of America | Migrant rights

In the United States of America (U.S.) over 11 million people live without a legal immigration status, more than then entire population of Sweden.[1] This community, known as "undocumented immigrants", live in all parts of the U.S. and represent over one hundred national groups and languages. Many entered without inspection through an international border while many others overstayed their visa and remained in the country without permission.[2] Overall, individuals from Latin American make up nearly 80 per cent of the undocumented community and over 50 per cent are under the age of 34.[3] This "immigration problem" has vexed politicians for over 30 years and has led to the rise of immigration as a key polarising political question.[4] However, it was only until recently that undocumented immigrants themselves have organised and participated in the political discussions about their lives, in very successful ways.

Late in the afternoon on 20 November 2014, immigrant youth, their families, and their allies gathered around television screens to listen to a speech President Barack Obama would make regarding immigration policy in the U.S.[5] With great excitement, immigrant youth finally got the news they wanted to hear: President Obama was going to issue executive actions to give millions of undocumented immigrants a deferral from deportation and the opportunity to get a work permit through a programme now known as Deferred Action for Parents of Americans (DAPA).[6]

For the second time during his administration, immigrants across the country had forced the president to act following the failure of legislative immigration reform and the massive increase in deportations of immigrants during the Obama presidency.[7] The 2014 executive actions, although still tied up in a legal battle in the U.S. Supreme Court, mirrored the relief immigrant youth won from the president in 2012, when similar executive actions provided deportation relief and work permits to qualifying immigrant youth that arrived as children in a programme known as Deferred Action for Childhood Arrivals (DACA).[8]

Although the Democratic Party and the White House have tried to frame these executive actions as the president choosing to be confrontational and daring in the face of Republican obstructionism in Congress, the real story is different: President Obama was forced to do this.[9] Undocumented immigrant youth moved the president and the immigrant rights movement forward through a series of tools borrowed and adapted from past and current civil rights struggles.

This article briefly outlines the origins of the undocumented youth movement before diving into the seven methods, tactics, and practices used by undocumented youth to move immigration policy forward. This article will also describe the current work of undocumented youth to address the human rights abuses still faced by immigrant communities in the U.S.

1 • Origins of the undocumented youth movement: 2001-2012

The history of the undocumented youth movement is complex and still evolving. This section covers some of the key events from 2001 until June 2012, when President

Obama announced DACA, which has given over 700,000 undocumented youth administrative relief from deportation.[10] These key events and moments provide a framework for the current state of the movement today.

In August 2001, the Development, Relief, and Education for Alien Minors (DREAM) Act was first introduced into Congress with bipartisan co-sponsors by Senators Orrin Hatch, a Republican from the state of Utah, and Richard Durbin, a Democrat from Illinois.[11] To win over more Republican co-sponsors, immigration rights organisations went looking for a young academic achiever in Utah who was facing obstacles to higher education based on their immigration status. This kicked off a series of stories of "outstanding college-bound students" that immigration rights advocates introduced to Congressional representatives in the hopes of resolving their individual cases.[12]

By the early 2000s, undocumented youth had begun to organise in states such as California, Florida, New York, Massachusetts, and Texas. These young people pushed "tuition equity", state laws that eliminated higher tuition rates for undocumented students.[13] In states like California and Texas, where undocumented students already had tuition equity and had established a presence on college campuses, undocumented college student groups formed to support each other and advocate for the DREAM Act. This work allowed young people the space to practise and develop their organisational skills.

However, after the terrorist attacks of 11 September 2001, immigration and national security became conflated in new and troubling ways. In the harsher national climate, undocumented immigrants found themselves victims of racial profiling, detention, and deportation. In particular, undocumented youth fought for two individuals, Kamal Essaheb in New York and Marie Gonzalez in Missouri, who were in danger of being deported.[14] Undocumented youth were able to stop their deportations and cut their teeth in new campaigns to highlight the pain and suffering still faced by undocumented immigrants.

By 2004-2005, undocumented youth started to come together in national calls to discuss how to pass the DREAM Act, with the acknowledgement that at the time the DREAM Act would be one of the only possible legislative solutions for undocumented families. Groups of organisations led by undocumented youth planned actions like "Dream Graduations" and worked with more established policy-shops in Washington, DC to push the legislation.[15]

Following the defeat of the 2007 comprehensive immigration reform legislation – of which the DREAM Act was a part of – undocumented youth broke with the more established Washington, DC organisations and decided to advance the DREAM Act as a standalone piece of legislation.[16] This gave the initial push to found the United We Dream (UWD) Network in 2008, a broad organisation of undocumented youth seeking justice for themselves and their families.[17]

2010 proved to be pivotal year for the nascent undocumented youth organisations across the country. The Trail of Dreams from Miami, Florida to Washington, DC

and "Coming Out of the Shadows" events, where immigrant youth "came out" as undocumented, helped highlight the pain faced by undocumented immigrants nationally.[18] It also set the stage for the national push for the DREAM Act and on President Obama to protect undocumented youth from deportation.[19]

These efforts sometimes came in direct contrast to the strategy being advanced by more established immigration advocacy groups. These groups were still committed to the idea that comprehensive immigration reform was the goal everyone in the movement should work towards and often chastised undocumented youth for "leaving their parents behind" in their efforts for a standalone DREAM Act.[20]

In 2010, the DREAM Act was passed in the House of Representatives but failed in the Senate by five votes.[21] Despite the stinging defeat, undocumented youth gathered in Memphis, Tennessee for the United We Dream Congress to shift their strategy towards the president, who was still deporting immigrant youth.[22]

For the next two years, immigrant youth across the country together with United We Dream and other groups not affiliated with the organisation, led non-violent direct actions, interruptions, media, and legal strategies to protect immigrant youth facing deportation.[23] This activity reached fever pitch in 2012, a re-election year for President Obama where he faced an onslaught of criticism for failing to deliver immigration reform. In June, a wave of sit-ins took place inside Obama for America Headquarters in California, Florida and key election swing states.[24]

The actions against the Democratic Party were also coupled with policy advocacy and organising with Republican members of Congress. Undocumented youth negotiated with Senator Marco Rubio, a Republican from Florida, about advancing Republican-led version of the DREAM Act.[25] The possibility of Republicans leading any sort of immigration reform, particularly by a Latino Republican with high hopes for the presidency, prompted the White House and the Democrats to respond seriously to the demands being made by undocumented youth.[26]

Additionally, United We Dream and other undocumented youth organisations entered into strong partnerships with legal authorities on immigration. Together, these groups were able to provide sharp rebukes to the president's initial claims that it was not within his executive authority to issue an executive action that would provide administrative relief to undocumented youth.[27] These partnerships helped strengthen the legal arm of undocumented youth.

On 15 June 2012 President Obama finally announced DACA. After 25 years of defeats, undocumented youth won a significant victory - they pressured President Obama to deliver relief. This victory gave immigrant youth the strength, power, and resolve to continue fighting for the millions of people still in danger of deportation and set the stage for the 2013 push for comprehensive immigration reform and the subsequent efforts for DAPA and a halt to deportations.[28]

2 • The 7 methods, tactics, and practices used by undocumented youth to move justice forward

The story of the undocumented youth movement so far helps provide a snapshot of the activities undertaken by young people across the country to change policy. Although undocumented youth have had to "fly the plane as they build it", all of these activities and actions were by no means random. Along the way, undocumented youth received guidance, coaching, and support from past civil rights leaders and advocates that built much of the framework for organising mass movements in the U.S.

Indeed, many of the organising principles and tactics like "coming out" were borrowed from the LGBTQ rights movement and the influential Student Non-Violent Coordinating Committee (SNCC) that advanced black civil rights in the 1960s. The following seven methods, tactics, and practices provide the framework for how undocumented youth found success in fighting for immigrant justice.

1 – Stories are power

From the very beginning, sharing personal stories proved to be the most important tool for undocumented youth. Prior to this widespread practice, immigration advocates relied on complex legal and economic arguments to make their point. It was not until undocumented youth started to share their stories that there was a human face put on a policy issue. The country could no longer ignore the problem. Although the initial stories focused on "high-achieving" undocumented youth, or "the Dreamer", the movement is now sharing the stories of undocumented immigrants that have been the victims of racism, discrimination, and criminalisation.

Story sharing was also transformational for undocumented youth. In sharing their stories publically they faced possible detention and deportation. To date, the national "Coming Out of the Shadows" events continue to give undocumented youth the space to share their complex and evolving human stories.[29]

2 – People most affected are at the forefront

United We Dream and several other undocumented youth organisations were founded for the express purpose of making sure that the people most affected by the broken immigration system in the U.S. are at the forefront of making decisions. The presence of undocumented immigrant youth in meetings with other immigration advocates, policymakers, and the public transformed the perception of this community from hopeless and afraid, to agents of their own decisions.

At United We Dream, the decision making power for the organisation is still rooted in this concept. Most of the staff are recipients of DACA or are U.S. citizen children of

undocumented immigrants. Additionally, the National Leadership Committee of United We Dream, the elected body of individuals selected by local chapters and affiliates of undocumented youth organisations, sets the direction, vision, and framework for the staff.[30] This structure ensures that decisions and strategies for the work are deeply rooted in the experiences of people that have faced the broken immigration system first hand.

3 – Young people are at the core

Prior to undocumented youth "coming out" and building their own organisations, many established immigrant rights advocacy organisations did not provide the space for young people to grow and develop their skills. In fact, many of these organisations were hostile to young people making key policy decisions.[31] United We Dream and other undocumented immigrant youth organisations flipped this by ensuring that young people are driving key organisational decisions at the local, regional, and national level and have substantial space in the decision making process while still working inter-generationally in their communities.

4 – The work moves across issue areas

The undocumented youth movement does not exist in its own silo. The movement is coming of age as several other youth movements, communities of colour, and marginalised communities are also advocating for their rights in the U.S.[32] Undocumented immigrant youth have not only transformed immigration policy, they have also had a key stake in several questions affecting their lives and the country from education reform to the criminal justice system.

This principle is clearly reflected in the enormous amount of collaboration between undocumented immigrant youth and LGBTQ rights organisations. In 2012, a group of undocumented LGBTQ youth came together to found the Queer Undocumented Immigrant Project (QUIP).[33] A programme of United We Dream, QUIP's mission is to organise LGBTQ immigrants and allies to address social and systemic barriers that affect themselves and the broader LGBTQ and immigrant community. This project helped transform both the immigration and LGBTQ advocacy spaces, which previously did not communicate or work together.[34]

5 – Building community and identity

Undocumented youth organisations do not only serve to organise for policy change, they are also places to build a common and shared identity. Often, United We Dream events become the place where undocumented youth meet and become friends with others that have had similar experiences and share their outrage against injustice.[35] This common identity, created both intentionally and *ad hoc* throughout the years, helps build the community of leaders that ultimately drive campaigns, actions, and policy forward.

6 – Organising is at the grassroots level

Although undocumented youth leaders and organisations have gained national prominence in the last six years, United We Dream and other organisations still hold the central mission of organising at the grassroots level. This theory of organising is rooted in a style pioneered by the black civil rights leader, Ella Baker. The Ella Baker model is based on the idea that communities have the answers and resources they need to create the change they want.[36] The role of the organiser is to empower communities at the grassroots level with the tool and resources to articulate and implement the answers they hold.

This model was put into practise in the two year fight for DACA. Undocumented youth faced detention and deportation despite claims by President Obama that young people were not being deported. These young people knew what they needed: deportation relief and the ability to work freely. The role of the United We Dream organiser was to help undocumented youth articulate this solution with non-violent direct action.

7 – There must be a seat at the policy making table

In the beginning stages of the undocumented youth movement, organisers and leaders worked completely from the "outside". Undocumented youth led actions, rallies, and coming out events while advocates and lawyers from the Democratic Party and other established organisations met with elected representatives and other policymakers. Undocumented youth realised quickly that this was inadequate. An intentional shift followed where undocumented youth organisations learned how to push from the "outside" as well as the "inside". For the first time in history, undocumented immigrants met with senators, representatives, and even the president to make their case and push their own policies forward.

3 • What still needs to be done

Despite winning relief for millions of undocumented immigrants, undocumented youth are still working to advance human rights for immigrant communities. President Obama's tenure in office has been marked by an intimate intertwining of the immigration and criminal justice system. The Obama administration has overseen the deportation of almost three million immigrants using the mantra "Families, Not Felons".[37] This intertwining has occurred during a heightened nationwide discussion of the effects of mass incarceration of communities of colour.[38] Undocumented youth are now setting their sights on addressing this glaring oversight by sharing the stories of the "Dreamers", parents, and communities that face detention and deportation – often due simply to a conviction that can be as small as possession of marijuana - and the massive amount of money spent on the detention of immigrants, including women and children.[39]

Additionally, the fight for undocumented youth has not ended with DACA and DAPA. The 2014 DAPA victory has not been realised due to a legal challenge by the Texas Attorney General and 26 other states.[40] The Republican challengers claim that the president overstepped his executive authority in creating the policy.[41] The victory is now being considered before the U.S. Supreme Court, where eight justices must decide whether five million undocumented immigrants can apply for deportation relief and work permits.

Many of the early activists with United We Dream and other undocumented youth groups are also now in positions of influence and leadership within the Democratic Party and the presidential campaigns of Hillary Clinton and Bernie Sanders.[42] Their lives and careers were transformed by their participation in the movement itself, making them powerful agents of change today. However, tension between maintaining an outside political identity and participating within the party structure itself continue to cause much discussion and conversation among undocumented youth groups throughout the country.

Notwithstanding these challenges, undocumented youth have pushed the needle forward on immigration policy while building a new plank for youth of colour to engage in politics. The methods, tactics, and practices outlined above have been instrumental in moving the undocumented youth movement to the place it occupies today. These tools have twice won administrative relief from the President of the U.S. and pushed comprehensive immigration reform legislation to its furthest point in 25 years. These tools will adapt, evolve, and grow as the undocumented youth movement continues to mature.

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LANGUAGE AS
A MIGRATION POLICY TOOL

Pablo Ceriani Cernadas

• *Critical remarks on the concept of "economic migrant"* •
and how it leads to human rights violations

ABSTRACT

Pablo Ceriani Cernadas critically examines, from a human rights perspective, the process of constructing and utilising certain concepts in the field of international migration. He first highlights the contradiction between various terms and the reality they are supposed to explain or define. Secondly, he shows how these concepts play a dual role: how they conceal other aspects of this reality and also how they legitimise the policies and decisions that are presented as the necessary reaction to events portrayed in a partial, if not distorted, manner. Behind these concepts and the policies they seek to legitimise lie multiple, serious violations of the human rights of migrants, asylum seekers and refugees.

This analysis of discursive practices and migration policies gives special attention to a concept used widely by the international press and various social and political actors: the "economic migrant". In recent years this concept has become especially prominent, given, in particular, the highly publicised migrations of tens of thousands of children and adolescents from Central America to the United States of America (U.S.) in mid-2014 and, a year ago, of the displaced populations of Syria and other countries of the Middle East and Africa towards Europe.

KEYWORDS

Migration policy | Economic migrant | Human rights | Mediterranean | Central America | Mexico

"The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible. (...)

This was done partly by the invention of new words, but chiefly by eliminating undesirable words and by stripping such words as remained of unorthodox meanings, and so far as possible of all secondary meanings whatever. To give a single example. The word FREE still existed in Newspeak, but it could only be used in such statements as 'This dog is free from lice' or 'This field is free from weeds'. It could not be used in its old sense of 'politically free' or 'intellectually free' (...)

The B vocabulary consisted of words which had been deliberately constructed for political purposes (...)

No word in the B vocabulary was ideologically neutral. A great many were euphemisms."
(George Orwell, *1984*)

"I want to appeal to all potential illegal economic migrants wherever you are from. Do not come to Europe."
(Donald Tusk, President of the European Council, March 3, 2016)

"You have to understand, that no one puts their children in a boat unless the water is safer than the land."
(Warsan Shire, *Home*)

• • •

1 • Introduction

This article reflects on the discursive strategies that characterise the contemporary narrative on migration, especially migration policies. More specifically, it will analyse the role of the production of euphemisms while highlighting those related to migration control mechanisms, such as the detention and expulsion of migrants. Next, it explains the error in classifying the mobility of people into two categories - refugees and economic migrants - which are incomparable. It will also look at the biased and reductionist nature of the term "economic migrant", a term used to describe a complex and multidimensional reality. Then, it will briefly point out how this concept is linked to an obsolete vision that excludes notions such as "forced migration" and the so-called "need of international protection", concepts

which are in urgent need of revision. It will also shine light on what the "economic migrant" concept is hiding: namely, the diversity and magnitude of the basic rights violations that are driving millions of people to leave their respective countries.

The central problem with the "economic migrant" concept – that the lack of rights-based explanations contributes to the justification and legitimisation of the responses that states are increasingly giving to migration in nearly all regions of the world – will then be examined. These responses have notable impacts, such as the denial of the human right to leave a country, the increase in the dangers of transit and particularly the multiplication of measures to arbitrarily detain and deport migrants, asylum seekers and even individuals recognised as refugees.

In this context, it will be argued that the categorical classification and separation between migrants and refugees or between economic migration and forced migration, together with other concepts, has led, on one hand, to a situation where the rights of migrants are increasingly being left unprotected. On the other hand, paradoxically, it brings the human right to asylum and one of the principle ways in which it is realised - refugee status - into question.

By way of conclusion, an attempt will be made to view this issue from the opposite paradigm - that is, while looking at the possible positive short and long-term effects of a change in the narrative on the international mobility of people. The point of departure is the idea that in order for the governance of migrations to truly be coherent, efficient, comprehensive and, especially, respectful of human rights principles and obligations, substantial changes to discursive practices are absolutely necessary.

2 • Migration policies: fertile ground for euphemisms

The "economic migrant" concept is another example of a distinctive feature of migration policies in recent years: the use of euphemisms. Euphemisms are used to elaborate discursive forms with certain political and communication objectives, which have consequences on at least two levels: first, the legitimisation of a certain approach to migration policy, which usually has a bias towards security; second, as a result, the infringement of the rights and guarantees of individuals who migrate or attempt to migrate.

According to Gallud Jardiel, in the political arena, euphemisms are *adulterated notions* whose objective may be to serve as a form of social manipulation.[1] Sánchez highlights that this linguistic tool for manipulation is intended for the "massive persuasion of citizens (...) used as an instrument to hide reality".[2] Some euphemisms seek to render invisible, camouflage or describe something differently to conceal or distort all or part of its reality. It is a discursive construction that attempts to generate a reaction vis-à-vis a fact or phenomenon that would be different if the situation was called or explained differently.

These characteristics of euphemisms in the political sphere can be clearly seen in the area of migration policies. In the words of Van Dijk, "the very well-known rhetorical figure of the euphemism, a semantic move for mitigation, plays an important role when talking about immigrants".[3] This linguistic manipulation is used to great effect through the elaborate language used in many countries to refer to migration control mechanisms, especially the two main ones used to respond to irregular migration: the deprivation of liberty and expulsion from a country.

When we observe the mechanisms designed to deprive a person of liberty for migration reasons, we find words such as: *detention, retention, securing, housing, stay, precautionary arrest, confinement, lodge, accommodate*, etc. As for the places where these measures are applied (in addition to cases where migrants are held in police stations and prisons), one can identify names such as: *Reception Centre, Migrant Holding Station, Temporary Detention/Accommodation Centre, Shelter, Immigration Housing Facility, Immigration Transit Accommodation, Removal Centre, Foreigners Guesthouse, Family Residential Centre* or even *Alien Detention Centre*, among others. The same creativity can be observed in other languages: *Centro de recepción, Estación migratoria, Centro de aprehensión/acogida temporal, Albergue, Centro de internamiento de extranjeros, Zone de Rétention, Local/Centre de Rétention Administrative, Centro di Accoglienza, Centro di Identificazione ed Espulsione*, etc.

International human rights law is very clear in this area. According to the Inter-American Commission on Human Rights, the concept "'deprivation of liberty' means: Any form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority (...) This category of persons includes not only those deprived of their liberty because of crimes or infringements or non-compliance with the law (...) but also those persons who are under the custody and supervision of certain institutions, such as: (...) centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty."[4]

Therefore, without prejudice to the term used by each country, there is no doubt that when migrants find themselves being held in an establishment by virtue of the decision made by a public authority as part of a migration process and are not allowed to leave at will, they are deprived of their liberty. As a result, all the standards, principles and obligations related to the right to freedom and the prohibition of arbitrary detention must be applied without exception. Due to space limitations, we will not analyse in detail the deprivation of migrants' liberty, which is one of the most serious symptoms of the profound crisis in the area of the human rights of migrants and asylum seekers. It must at least be said that even though the main problem is the detention of millions of people for administrative reasons, these practices are getting worse. In the majority of cases, detention occurs without providing even the minimum substantive (principle of legality, for example) and formal (guarantees of due process) guarantees.

The widespread use of euphemisms to (not) refer to the detention of migrants is intimately linked with this disturbing trend. These euphemisms mask reality in two ways: legally, as they attempt to avoid presenting these practices as the deprivation of liberty; and factually, by not describing the incident as it actually occurred. Thus, they seek to legitimise detention either by portraying it as a measure of protection (or, at least, not one of coercion) or by using other discursive strategies to justify it (e.g. migration as a threat). Finally, they ignore the rights and guarantees that should be ensured in these cases. The reasoning behind this is simple: if someone is not deprived of liberty, then why should the norms and principles established for such circumstances be applied?

Something similar occurs with the measures regarding the forced transfer of a migrant to another country, from a country of destination or transit, or even international waters. Here, we find terms such as *deportation, repatriation, expulsion, voluntary return, assisted return, and removal*, among others. They are various ways to name what constitutes, in practice (especially in legal terms), the application of a punitive measure that impacts the fundamental rights of an individual. First, their freedom is affected when they are moved forcefully, but several other rights, depending on the case, are also at stake, such as their family life, housing, labour rights, the rights of children, and even the right to physical integrity and life.

The imposition of these sanctions also involves the denial or failure to respect guarantees of due process, which must be ensured in all proceedings involving the imposition of a sanction or penalty on an individual by authorities. In some cases, deportation is practised without any kind of process, which violates the right to asylum and the principle of *non-refoulement*.[5] In another paper, we analysed the role that euphemisms play in legitimising the detention and expulsion of tens of thousands of migrant children and adolescents from Mexico to Central America.[6]

In the following section, we will examine a euphemism that has received a growing amount of attention in recent years and contributes to the legitimacy of these practices: "economic migrants".

3 • The "economic migrant" concept: legally non-existent, reductionist and erroneous

Throughout 2015, while the attention of the global media was focused on the movement of millions of people from various African countries and the Middle East towards Europe, several debates emerged on how to classify the people who migrated in these circumstances. In the political, academic and journalistic discussions of these displacements, which were strongly influenced by the armed conflict in Syria, the attempts to explain the difference between "refugees" and "economic migrants" played a central role. Due to the impact of the measures adopted since then, some reflections on this subject are necessary.

For the International Organisation for Migration (IOM), "economic migrant" refers to "A person leaving his or her habitual place of residence to settle outside his or her country of origin in order to improve his or her quality of life…[it is] used to distinguish from refugees fleeing persecution or de facto refugees who flee due to generalised violence or the massive violation of human rights…[it] is also similarly used to refer to persons attempting to enter a country without legal permission and/or by using asylum procedures without *bona fide* cause."[7] When asked about the distinction "between a refugee and an economic migrant", the United Nations High Commissioner for Refugees (UNHCR) affirmed that "migrants abandon their countries voluntarily in search for a better life. For a refugee, the economic conditions of the country of asylum are less important than his safety".[8]

Each with their own nuances, various specialists, communicators and politicians have elaborated and/or disseminated a similar description in relation to these two "categories" of people who migrate. We will see below why "economic migrant" is a concept that does not legally exist, is reductionist and erroneous, and represents an obsolete and anachronistic vision. We will then look at the negative consequences of its use, particularly in the field of policies on migration and asylum.

3.1 – A category that does not exist from a legal standpoint

There is no legal definition or basis for the concept of "economic migrant". This is not a minor issue, as it has been used extensively in comparison or in opposition to another concept that does, in fact, have a legal definition that is based on the 1951 Convention Relating to the Status of Refugees and its implementation.

While there is no doubt that the elements that shape the "refugee status" could be defined more precisely, the comparative use of the two concepts is inappropriate and has no *raison d'être*, given that they are notoriously different in nature, origin and purpose. These concepts were not created during the same historical period, nor in the same way; whereas one arose from an international convention (without bias surrounding its use beforehand), the other originated in the framework of communication practices and strategies.

As the concept of "refugee" has a clear legal definition, there is a set of principles, rules and standards, emanating from International Refugee Law (IRL) and International Human Rights Law (IHRL), that applies to it. One should ask, then, which elements define economic migration in order to identify the norms that regulate it, the rights of these individuals and the states' obligations to them. The problem, which will be discussed further below, is that despite it not being a legal category, the concept "economic migrant" has been used to explain and justify measures that have profound implications for international law.

3.2 – A reductionist and erroneous concept

The biased nature of the "economic migrant" concept is due to the fact that it attributes a person or a family's decision to migrate to only one factor - the economic one - thereby

rendering the multidimensional character of these displacements invisible. Numerous reports and analyses conducted by governmental organisations and bodies of the United Nations (U.N.), the European Union or the Organization of American States (O.A.S.), as well as social and academic experts, have reiterated time and again that migration is due to a combination of interrelated factors. This does not exclude the possibility that, for every case, there is one or several factors that play a determining role in the decision to migrate.

In the current context, attempts are being made to explain the mobility of tens of millions of people by pointing to merely "economic" reasons, despite the existence of an extensive list of factors that largely exceeds this variable. That said, the importance of economic factors in current migration flows should indeed be noted, but in quite a different way. In fact, their influence can be more clearly seen by observing the dominant economic system and its impact on the structural factors behind migration processes (war, social and institutional violence, poverty, inequality, needs of the informal labour market, human exploitation and trafficking networks, etc.). The importance of economic factors lies less in the personal motivation of the individual who migrates and more in the asymmetries between countries and regions, which, in turn, influence institutional (in)stability and the failure of sustainable and inclusive human development policies in the countries of origin. These motives are intrinsically associated to other factors (armed conflicts, corruption, social violence) that, together, lead to displacement.

Therefore, conceptualising migration as "economic" is not only irrelevant in legal terms, but also strongly biased and erroneous. It reveals a short-sighted vision that - as will be analysed shortly - serves to achieve certain objectives. Migration is a structural phenomenon that undoubtedly responds to multiple causes which, combined, can be found, without exception, in the cases of people who are currently migrating in situations of vulnerability (a concept that has a legal basis).

From a human rights perspective, *vulnerability* in the context of migration refers to circumstances that are defined by the violation of basic rights. The causes that lead to migration and determine how one migrates (in an irregular, precarious and risky manner), as well as the migrants' living conditions in the country in which they transit or reside, are the ones that create or increase this vulnerability, which can be measured by the rights effectively exercised or, better said, that are denied or reduced. Vulnerability is not in a person, nor in the specific condition of each individual - nationality, sex, age, ethnic origin, etc. - but rather in the restrictions on their human rights, which are often imposed on the grounds of these factors.

Attributing migration - which takes place today in dramatic contexts such as that of the Mediterranean Sea, Mexico, etc., - to economic factors is wrong, to say the least. The reality in the countries of origin entails much more complex and serious circumstances in which a high percentage of the population is deprived of their most basic human rights. The reports of specialised bodies on the countries of origin of people going to Europe clearly demonstrate this.[9] Some directly state how the deprivation of rights is leading to the displacement of

massive amounts of people.[10] In the Americas, reports of U.N. and O.A.S. bodies[11] and studies conducted by social actors and academics[12] converge to corroborate the complementary nature of the motives for displacement in the region - especially of children and adolescents - and the multiple rights affected in the countries of origin, transit and destination.

In these circumstances, which affect the most basic aspects of human dignity, how can displacement possibly be classified as "economic" solely due to the fact that the situation of each person does not fit the definitions in Article 1 of the 1951 Convention? Let us reflect on a hypothetical case: a person migrates immediately after having been systematically deprived of his or her basic rights (work, health, adequate housing, education, etc.) and, in such circumstances, of various fundamental civil and political rights. All of this is due to his or her ethnic origin. However, his or her life or physical integrity is not in imminent danger of persecution by the state or a third party. Would this person be considered an economic migrant? Can one really say that this person crosses countries, deserts and oceans, or suffers different kinds of abuse only to be able to change his or her television, obtain a wage increase or some other economic benefit?

It is a question, then, of understanding this multidimensionality that clashes with concepts of the migration narrative that reduce the phenomenon to only one aspect and hide the intrinsic relation between factors that bring the denial of the human right to development to a sizeable percentage of the world population to light. The interdependency of affected rights as the cause of migration is thus ignored by conceptual categories that cut out any kind of rights-based language, prevent these causes from being addressed appropriately and fully, and legitimise restrictive migration policies.

3.3 – An obsolete vision

The problems linked to the forms of distinction between "refugees" and "economic migrants" expose the need to revise other concepts related to the international mobility of people in the current context.

In the words of Zetter, the dynamics of population displacement in the modern world are very different from the circumstances in which the 1951 Convention and its 1967 Protocol were adopted. The growing complexity and indiscriminate logic of violence, conflict and persecution - together with factors such as poverty and poor governance - cause involuntary migration. Therefore, it is often a combination of factors that are at the heart of displacement. However, many people who migrate do not fit within the categories fixed by norms that define the challenges and needs of protection in a very restricted way. This points to conceptual issues on the evolution and the scope of the interpretation of protection for forcibly displaced persons.[13] For Delgado Wise, uneven development in the neoliberal context generates a new kind of migration that can be characterised as forced, due to structural conditions that have promoted the massive migration of excluded and marginalised people.[14]

Furthermore, according to Cielis and Aierdi, "many migration movements are categorised as voluntary or economic when they should be considered forced in light of the said [IHRL] instruments...it is urgent to come to a consensus on an inclusive definition of forced displacement that takes into account the violation of economic, social and cultural rights...we understand that there are enough elements in IHRL to believe that a displacement initiated due to a serious violation of human rights could be considered forced; that this violation of rights affects not only civil and political rights, but also economic, social and cultural rights."[15]

In fact, the restrictive interpretation of *forced migration* - limiting it to the status of refugee - is linked to a biased and uneven view of human rights. The historical debate between civil and political rights, on one hand, and economic, social and cultural rights, on the other, has responded to priorities that help preserve the existing levels of asymmetry in the distribution of wealth and power at the international level and within countries. The discussion in this article aims to plot another modality for expressing this debate as a response to the different ways of addressing the violation of some rights but not others, to the invisibility of the interdependency between the rights and the practices that violate them, and the different reactions - including discursive ones - to migration that contribute to the infringement of those rights.

This also raises the need to revise the concept of a "person in need of international protection". Lately, the use of a limited interpretation has become widespread, which refers solely to a person who may be recognised as a refugee or obtain a subsidiary or complementary status. On the contrary, however, the modalities of "international protection" must reflect the variety of regulatory arrangements, rights and guarantees recognised under international law. IHRL would serve, then, as a sort of cross-cutting umbrella and, at the same time, a minimum standard that must apply in all cases, without exception and without excluding the possibility of using a "specific protection" based on IRL, humanitarian law and other international legal instruments as a complement for each case.

We analyse below the political and practical implications of this discursive resource that is part of the contemporary narrative on migration.

4 • Economic migrants: the legitimisation of restrictive migration policies through discourse

A key problem deriving from the use of concepts such as "economic migration" and others mentioned above is that it conceals a complex and multidimensional reality in which human rights, human development, humanitarian law and refugee law are going through a major crisis. This simplification of discourse is not fortuitous - for many reasons - as it seeks to dismiss any possibility of addressing this issue - and the people forced to move – through a human rights based approach. The implications of this partial approach can be seen in the policies, measures and practices adopted in response to this phenomenon.

The discursive practices of describing, delimiting and omitting reality present the people who are displaced in conditions of extreme vulnerability as subjects who are entirely free to make this decision, as if there were no need to protect their rights. Moreover, if the possibility that this person may be a refugee is discarded, what remains is, on one side, a person who voluntarily wants to enter another country for economic reasons and, on the other, a state exercising its sovereign power to deny a foreigner entry and/or right to stay in its territory.

As a result, in these cases, another kind of response becomes legitimised. According to Pace and Severance, "the danger in using [economic migrant] is that it risks leading one to the incorrect assumption that such migrants are never entitled to any regularised status and thus can be summarily refused entry or deported. In some instances, a migrant who is neither a refugee nor an asylum seeker may have the legal basis for regularised stay in a reception country. In any case, all migrants have rights which must be respected. It is important that public discourse recognises the distinctions above in order to enable reasonable and respectful solutions to be found."[16]

This dual description, without nuances, can give rise to many cases where a number of human rights may be at risk because of the causes that drove a person to migrate or the situations he or she experienced while in transit, and these risks are not assessed when the decision is being made. This difference is fundamental, as it is one thing when a sovereign state has before it a person who migrates entirely out of his or her free will, and quite another when the same state is addressing an individual whose rights may be at risk if returned to his or her country of origin or of transit. This is without prejudice to the formal and substantive guarantees that must always be guaranteed, without exception.

In light of the lack of a rights-based approach to conceptualising this situation, the response to irregular migration viewed through the prism of security and sometimes sanctions is strongly legitimised. This consequence has appeared repeatedly in the different measures adopted in recent years in the context of the misnamed migration and humanitarian crises in the U.S. (2014) and Europe (2015).[17] Since then, the reaction has not been very "humanitarian" in nature, much less focused on a rights based approach. It is enough to mention the construction of two detention centres for hundreds of migrant families and asylum applicants in the state of Texas;[18] the temporary closure of borders and the construction or expansion of fences or walls in several European countries; and, more recently, the entry into force of the E.U.-Turkey Agreement on 20 March 2016, which legitimises the detention and expulsion of migrants, asylum seekers and individuals recognised as refugees.

This description of migration as an economic issue - based on a decision made freely and in no way forced and, therefore, where there are no rights at stake, nor the "need for international protection" - is complemented by other discursive practices that help lend greater legitimacy to the responses. Without going into detail on this, due to space limitations, it is worth recalling the construction and extensive use of the term "illegal",[19] which has served as the basis for the explicit or implicit fabrication of a broad, negative

and stereotyped social imagery at the global level. This imagery, in turn, sustains certain mechanisms of migration control and the negation or restriction of social rights. The description of migration as "avalanches", "invasions" or "floods" have helped create a sense of urgency and justify practices typical of a state of emergency.[20]

Therefore, as Grange explains, the language used for the debate on migration and asylum consists less in a euphemism and more in a "defamism", as it gives negative connotations to migration. The pejorative discourses on these issues have become a tool for justifying and lending legitimacy to the severity of the political responses through the *demonisation* of migrants.[21] Doherty, for his part, specifies that the semantic shift is no accident, nor is it a minor corollary of the policy changes. On the contrary, language has been a deliberate and integral part of these policies. The rhetorical constructions have enabled several governments to adopt increasingly punitive regimes towards migrants and asylum applicants.[22] Nearly a decade ago, Zetter warned of the growing politicisation and conceptual fragmentation on this issue based on the interests of countries of the Global North.[23]

Legitimising increasingly restrictive migration policies through the use of narrative strategies (combined with other factors, obviously) has not only affected the human rights of migrants. The attempts to neatly separate "migrants" from "refugees", together with a narrow concept of the "need for international protection", the promotion of the "economic migrant" concept, or even a certain interpretation of references to "mixed flows" have not produced all the desired effects (the effective protection of refugees); in many cases, it has been quite the opposite.

As they feel legitimate in their measures to restrict rights that include border protections or the externalisation of migration control, various states have gone to such extremes that the right to asylum and the international protection of refugees have been severely challenged. One example is the situation of Central American asylum seekers in Mexico or the use of off-shore detention facilities built by Australia in neighbouring countries.[24] In the case of the E.U., the establishment of "quotas" for the maximum number of refugees to be accepted and resettled among member states (which have never even been filled in practice)[25] and the returns from Greece to Turkey are symbols of this grave tendency. This situation demands that the discursive practices contributing directly or indirectly to this problem be thoroughly revised.

In the end, forced migration must be analysed and addressed as a human rights problem that goes beyond the scope of international refugee law. The complementarities between IHRL, international refugee law and international humanitarian law are vital for legally framing the responses to the displacements and migrations that we are currently witnessing. All people must be guaranteed each and every one of the forms of protection to which they are entitled on the basis of the situation in which they find themselves, as well as the rights at stake in each case, including the human right to asylum recognised under various international instruments.

5 • Final remarks

The global scenario reveals the complexity of the causes of migration and, as a consequence, the extreme vulnerability in which human mobility emerges. Faced with this situation, many states have developed - instead of policies and strategies to protect these people based on the rules of international law - various mechanisms that have caused vulnerability to increase in both areas of transit and countries of destination. The alarming number of migrants or asylum seekers who have died or disappeared on migration routes and the tens of thousands who are arbitrarily detained or deported year after year are some of the direct and indirect impacts of these responses.

These few pages have attempted to warn about the role played by certain concepts that occupy a central place in discursive practices on migration at the political, communicational and social level. With a special emphasis on the term "economic migrant", this paper has tried to give visibility to the fact that the use of an erroneous, biased and obsolete description of the causes of migration and the people who migrate helps to conceal other core elements of this phenomenon. It also influences the delineation of the priorities of migration policies and the design of mechanisms of control and sanctioning (sustained, for their part, in euphemisms), which have increasingly affected the rights of migrants, asylum seekers and refugees.

At the same time, while there has not been the space to address this here, it is important to highlight the importance of the media in this process of producing and/or disseminating such discursive strategies, which include the concepts analysed here. Various studies have highlighted their role in the dissemination of pejorative, stereotyped or distorted messages on migration and thus the creation of a social imaginary that influences the very definition or legitimisation of migration policies.[26] These studies have also warned about the role certain media outlets have played in certain electoral bodies in order to favour conservative or extreme right-wing political parties known for their anti-immigration discourse.[27]

In this context, it is imperative to further the debate on these discursive practices so as to promote a series of changes that, contrary to what we have described, contribute to achieving the social and political consensus necessary to address migration adequately. Establishing an honest, realistic and complete description and conceptualisation of migration, its causes and its consequences constitutes an essential step in the identification of responses that are, on one hand, timely and efficient and, on the other, grounded on the full guarantee and respect of the obligations under international human rights, humanitarian and refugee law.

The promotion and dissemination of these changes in the area of language and discourse could contribute to an adequate understanding of the structural causes of migration. This, in turn, would lead to the adoption of plans at the global, regional and national levels with short, medium and long-term measures aimed at overcoming these factors. This also applies to the causes that exist in both countries of origin and destination: for example, the

demands of the informal labour market. It would also contribute to the creation of new channels for regular migration, including the elimination of existing obstacles.

Therefore, precise definitions of concepts would contribute to the enforceability of substantial changes to the policies on migration control, particularly in transit and destination countries. International protection - based on the aspects of international law mentioned above – requires an urgently-needed commitment to put an end to the deaths and disappearances on migration routes; reverse setbacks related to the right to freedom and the arbitrary imposition of sanctions, such as deportations; and design responses to irregular migration that are geared towards the search for long-lasting and legitimate solutions in full accordance with the rule of law and the norms and principles of international human rights law.

NOTES

1 • Enrique Gallud Jardiel, "El eufemismo como instrumento de manipulación social," *Revista Comunicación y Hombre* 1 (2005): 121–129.

2 • Francisco Sánchez García, "Eufemismos y disfemismos del lenguaje parlamentario español," in *El español en contexto. Actas de las XV Jornadas sobre la lengua española y su enseñanza*, ed. Esteban Tomás Montoro del Arco and Juan Antonio Moya Corral (Granada: Universidad de Granada, 2010), 231–235.

3 • Teun Van Dijk, "Política, Ideología y Discurso," *Quórum Académico* 2, no. 2 (2005): 38.

4 • IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Washington, DC: CIDH, March 31, 2008). Approved by the Commission during its 131st regular period of sessions, March 2008.

5 • On this issue, see: Pablo Ceriani Cernadas, "Control migratorio europeo en territorio africano: la omisión de la extraterritorialidad de las obligaciones de derechos humanos," *Sur International Journal on Human Rights* 6, no. 10 (2009): 189–214.

6 • For more on this, see: Pablo Ceriani Cernadas, coord., Niñez detenida: Los derechos de niños, niñas y adolescentes migrantes en la frontera México-Guatemala. Diagnóstico y propuestas para pasar

del control migratorio a la protección integral de la infancia (Ciudad de México: Ed. Fontamara, 2013).

7 • Organización Internacional para las Migraciones (OIM), *Los términos clave de migración*, accessed March, 2016, https://www.iom.int/es/los-terminos-clave-de-migracion.

8 • Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), *¿Quién es un Refugiado?* accessed March, 2016, http://www.acnur.org/t3/a-quien-ayuda/refugiados/quien-es-un-refugiado/.

9 • See, among others: Comité de Derechos del Niño. Observaciones finales: Eritrea. CRC/C/ERI/CO/4, del 2/07/2015; Comité de Derechos Económicos, Sociales y Culturales. Observaciones finales: Iraq. E/C.12/IRQ/CO/4, del 27/10/2015; Comité de Derechos Humanos. Observaciones finales: Iraq. CCPR/C/IRQ/CO/5, del 3/12/2015, Report of the Independent Expert on the situation of human rights in Somalia, A/HRC/27/71, del 4/09/2014.

10 • Naciones Unidas, Derechos Humanos, *Informe de la Relatora Especial sobre la situación de los derechos humanos en Eritrea*, A/HRC/29/41, del 19/06/2015, par. 9-10. See also the Doctors Without Borders field report, in Hernan del Valle, Rabia Ben Ali and Will Turner, "Búsqueda y salvamento en el Mediterráneo central," *Revista*

Migraciones Forzadas (January 2016).

11 • Comité de Derechos del Niño. Observaciones finales: Honduras, CRC/C/HND/CO/4-5, del 3/07/2015. Comité de Derechos Económicos, Sociales y Culturales. Observaciones Finales: Guatemala, E/C.12/GTM/CO/3, del 9/12/2014. See also IACHR, *Situación de derechos humanos de familias, niños, niñas y adolescentes no acompañados refugiados y migrantes en los Estados Unidos de América* (Washington, DC: CIDH, 2015) OAS/Ser.L/V/II.155, Doc. 16, del 24/07/2015.

12 • See: Human Rights Watch. Puertas cerradas El fracaso de México en la protección de niños refugiados y migrantes de América Central, 2016. See also Pablo Ceriani Cernadas, Lisa Frydman and Karen Musalo coord./ed., *Niñez y migración en Centro y Norte América: causas, políticas, prácticas y desafíos* (San Francisco: Center for Gender & Refugee Studies, University of California Hastings College of the Law / Buenos Aires: Programa Migración y Asilo Centro de Justicia y Derechos Humanos Universidad Nacional de Lanús, February 2015, accessed June 15, 2016, ddhhinfanciamigracion.blogspot.com.

13 • Roger Zetter, *Protecting Forced Migrants. A State of the Art Report of Concepts, Challenges and Ways Forward*. (Bern: Swiss Federal Commission, 2014), 18. See also Katy Long, "When refugees stopped being migrants: Movement, labour and humanitarian protection," *Migration Studies* 1, no. 1 (2013): 4–26.

14 • Raúl Delgado Wise, Humberto Márquez Covarrubias y Ruben Puentes, "Reframing the Debate on Migration, Development and Human Rights," *Population, Space and Place* – Wiley Online Library 19, no. 4, (2013): 430–443.

15 • Raquel Celis Sánchez and Xabier Aierdi Urraza, "¿Migración o desplazamiento forzado? Las causas de los movimientos de población a debate," *Cuadernos Deusto de Derechos Humanos* 81 (2015).

16 • Paola Pace and Kristi Severance. "Migration terminology matters," *Forced Migration Review* 51 (January 2016): 69–70.

17 • The way these situations were called also corroborates the analysis presented in this article. In these cases, the "error" is not in defining them as a "crisis", but rather in indicating the geographical place where the crisis occurred and its main characteristics and consequences. The true crisis - of human rights and human development - is in the countries of origin; and then, the humanitarian, human rights and protection of refugees crisis is in countries of transit and destination, precisely due to the way displaced people are being treated.

18 • See Lutheran Immigration & Refugee Service and Women Refugee's Commission, "Locking up Family Values, Again. The Continued Failure of Immigration Family Detention," *Family Detention Report* (October 2014).

19 • It is significant that it is not necessary to explain to what the term "illegal" - used as a noun, and not an adjective - refers to in a news headline. When one reads this kind of news, the individuals are not presented, for example, as someone condemned for a crime against humanity or some other serious crime, but rather people who left their country in a vulnerable situation in search for decent living conditions and whose situation is irregular in administrative terms, usually due to factors beyond their control.

20 • See, for example, Javier de Lucas, "Inmigrantes. Del estado de excepción al estado de derecho," *Oñati Socio-Legal Series* 1, no. 3 (2011).

21 • Mariette Grange, "Smoke Screens: Is There a Correlation between Migration Euphemisms and the Language of Detention?" *Global Detention Project Working Paper* 5 (2013).

22 • Ben Doherty, *Call me illegal. The semantic struggle over seeking asylum in Australia* (Oxford: Reuters Institute for the Study of Journalism, University of Oxford, 2015), 80.

23 • Roger Zetter, "More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization," *Journal of Refugee Studies* 20, no. 2 (2007): 172–192.

24 • The World Post. *Australia's Hidden, Deadly*

Migrant Crisis. En Charlotte Alfred, "Australia's Hidden, Deadly Migrant Crisis," The WorldPost, May 7, 2016, accessed May, 2016, http://www.huffingtonpost.com/entry/australia-migrant-crisis-deaths_us_572d01abe4b096e9f0917807.

25 · Incidentally, up until now (May 2016), E.U. member states have not even met the minimum quotas to which they committed. Whereas more than 1 million people arrived on E.U. territory in 2015, by September of that year, the governments had only assumed the responsibility to distribute 160,000 people among themselves. As if this decision were not bad enough, official information reports that

months later, less than 1% of these people - 1,145 to be exact - had been effectively received by E.U. member states. For more on this, see: European Commission, *Relocation and Resettlement: E.U. Member States urgently need to deliver*, Strasbourg, April 12, 2016, accessed June, 2016, http://europa.eu/rapid/press-release_IP-16-1343_en.htm.

26 · See, among others: Aidan White, *Moving Stories. International Review of How Media Cover Migration* (London: Ethical Journalism Network, 2015).

27 · Greg Philo, Emma Briant and Pauline Donald. "The role of the press in the war on asylum," *Race & Class* 55, no. 2 (2013): 28–41.

PABLO CERIANI CERNADAS – *Argentina*

Pablo Ceriani Cernadas is the Vice Chairperson of the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families. He is a lawyer with a doctorate in human rights from the University of Valencia, Spain, has a Master's in Migrations from the European University of Madrid, is director of the specialist course in migration and asylum from a human rights perspective (National University of Lanus) and is a professor at the National University of San Martin and the University of Buenos Aires. He is the author and / or editor of numerous books and articles on immigration policies and human rights and has worked as a consultant for UNICEF, ILO and UNFPA on various projects relating to human rights and migration. Between 2000 and 2007 he worked as a lawyer at the Centre for Legal and Social Studies (CELS) and between 2002-2005 was the coordinator of the Legal Clinic Rights of Migrants and Refugees (UBA-CELS-CAREF).

CARTOONS

CARTOONING FOR PEACE
Ares
Boligan
Bonil
Brandan
Glez
Payam
Zlatkovsky

CARTOONS
Latuff

CARTOONING FOR PEACE

Europe is facing an unprecedented migration crisis. At a time when thousands are fleeing from the current tragic conflicts in the Middle East, hoping to find refuge in the European Union, the bitter reality is that Europe is becoming a besieged fortress. This is reflected in the rise of both the Eurosceptics and of the far right in a growing number of European countries.

What has become of the founding values of Europe - humanism, solidarity, tolerance and the search for peace? How can we forget human rights and remain passive when faced with the horrors endured by these families who are running from possible death? It would be an unforgivable mistake to think that Europe is powerless and that nothing can be done except to turn in on ourselves. The founding values of Europe require us to welcome these men, women and children.

Cartooning for Peace defends these fundamental freedoms and democracy. It does so through exerting the right to freedom of expression as defined in article 19 of the Universal Declaration of Human Rights which states that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The organisation was set up following the bloody reactions to the publication of the Mohamed cartoons in the Danish newspaper, Jyllands-Posten on 30 September 2005. In its founding meeting Kofi Annan and the editorial cartoonist Plantu from the French newspaper Le Monde, brought together twelve international cartoonists on 16 October 2006 for a seminar on "Unlearning Intolerance".

We provide visibility and support for cartoonists who are unable to work freely or whose freedom is threatened and use the educational value of press cartoons to denounce intolerance. Cartooning for Peace is committed to respecting the pluralism of cultures and opinions. We are mindful to show the diversity of cartoonists' perspectives on a given subject and fight against prejudice and intellectual conformism. We denounce the excesses of extremism, mock its false certainties, counteract odium and strive to dismount impostures. Respectful in disrespect, we do not seek to humiliate beliefs and opinions. We circumvent interdicts with humour. We allow cartoonists to interact with each other and to confront their different opinions.

The seven cartoons that follow show how our cartoonists use their pencils and deploy their talent to denounce the human rights violations in relation to the current migration crisis in Europe.

Cartooning for Peace

ARES | Cuba

Aristides Hernandez Guerrero (Ares) was born in Havana, Cuba in 1963. He graduated in medicine and is specialised in psychiatry. He is a self-taught caricaturist, painter and illustrator and has published 20 books, illustrated more than 80 and received over 150 international awards, including the Grand Prix World Press Cartoon and the first prize in the United Nations/Ranan Lurie political cartoon awards. Ares works in Havana as a freelance artist. Further examples of his work can be found at *www.areshumour.com*.

BOLIGAN | Cuba

Boligan was born in Havana, Cuba in 1965. Since 1992 he has lived and worked in Mexico. His drawings regularly appear in *El Universal, El Chamuco*, Foreign Affairs Latin America as well as various international media. He has won 161 international awards and citations and twice been awarded the National Journalism Award of Mexico. He founded the agency *CartonClub - El Club de la Caricatura Latina* and is a member of various cartooning associations, including Cartooning for Peace, Cagle Cartoons and the National Union of Writers and Artists of Cuba. Further examples of his work can be found at *www.boligan.com.*
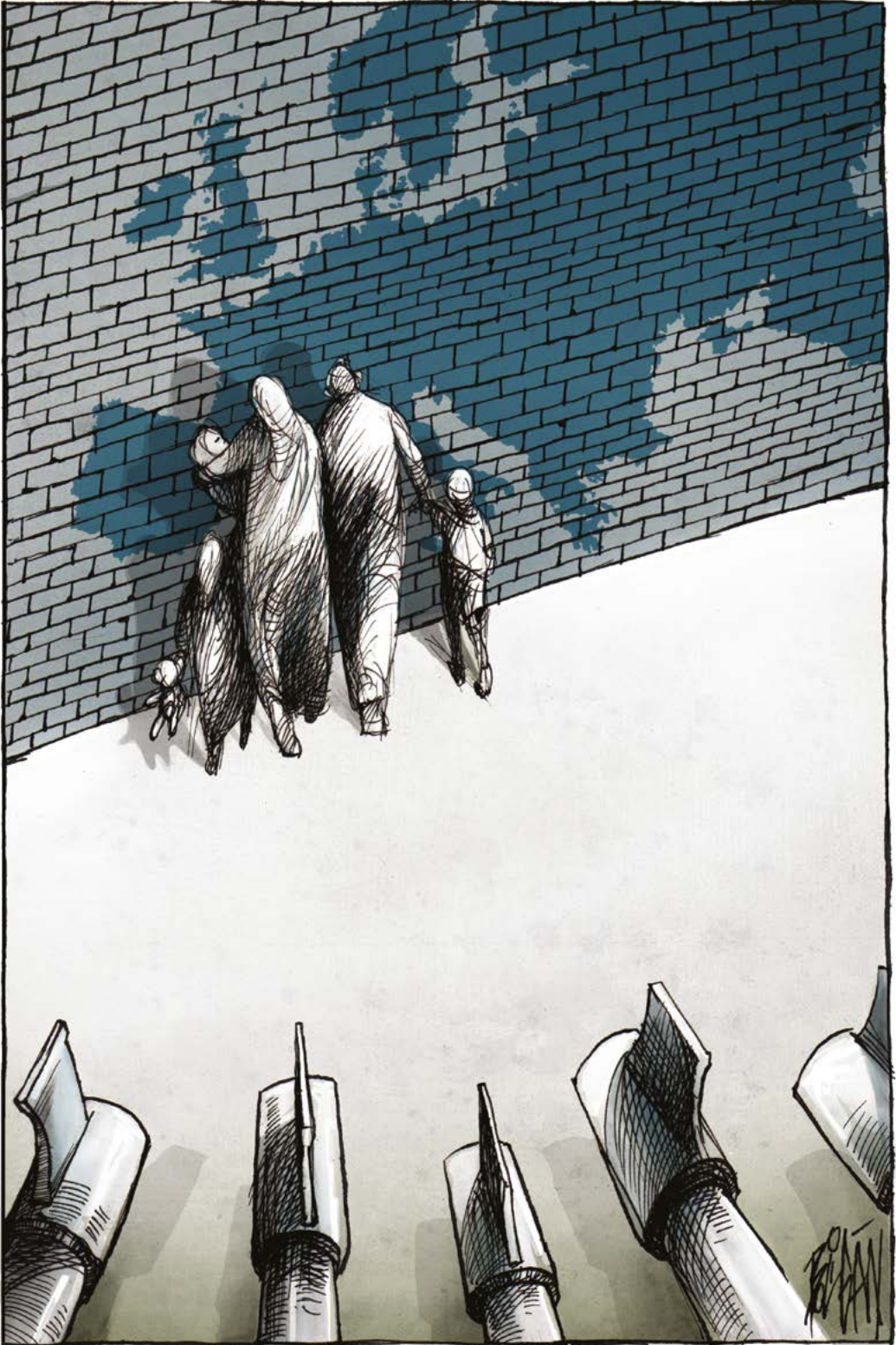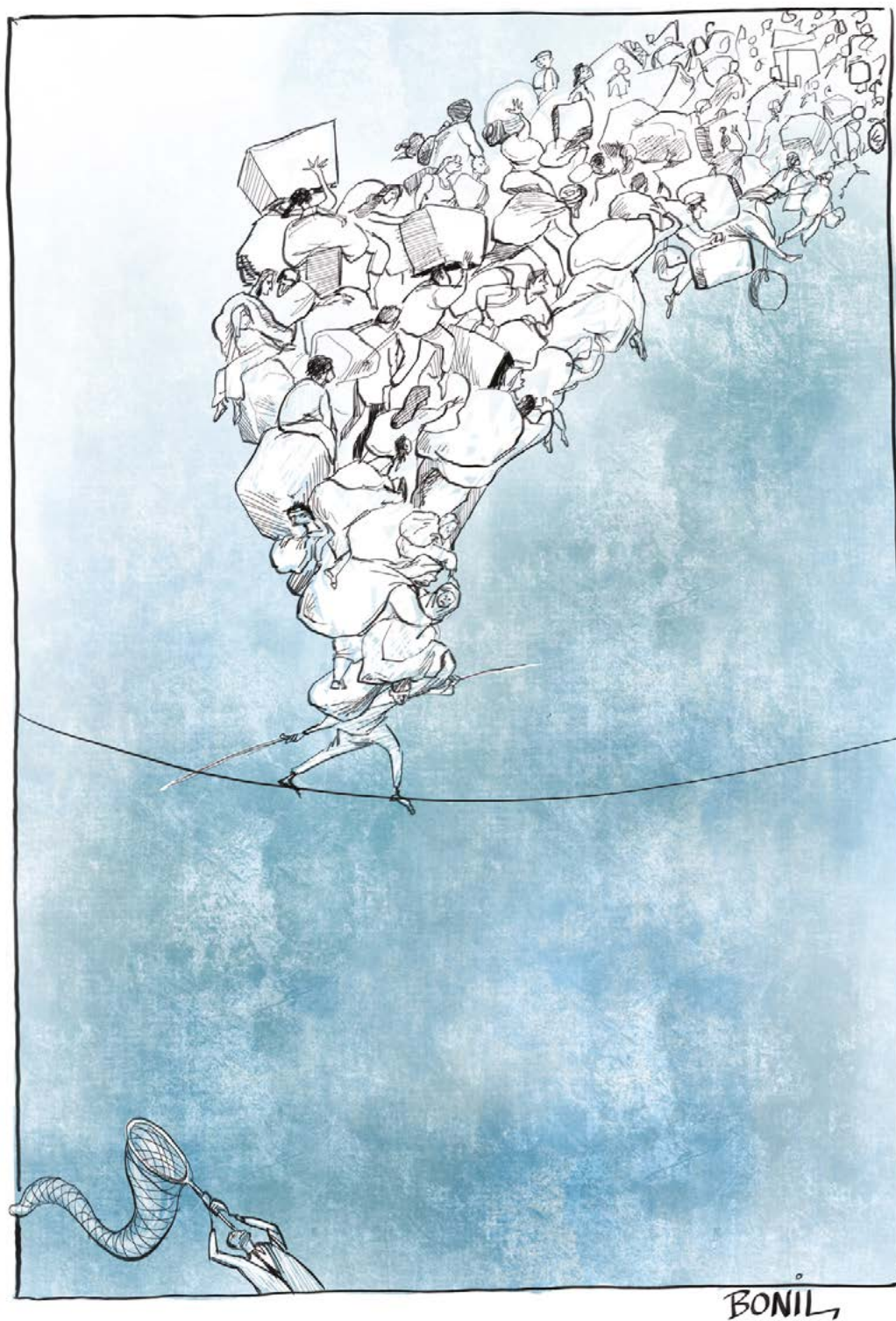
BONIL,

BONIL | Ecuador

Bonil is an Ecuadorian caricaturist born in 1964. He is regularly published in *El Universo*, Ecuador's largest newspaper. He is the recipient of various international awards, most recently the IAPA Grand Prize for Freedom of the Press (2015). He has been indicted on four occasions by the government of Rafael Correa, because of his drawings. He is a member of the Cartooning for Peace and *CartonClub - El Club de la Caricatura Latina.* Further examples of his work can be found at *http://humorbonil.blogspot.com.br/*.
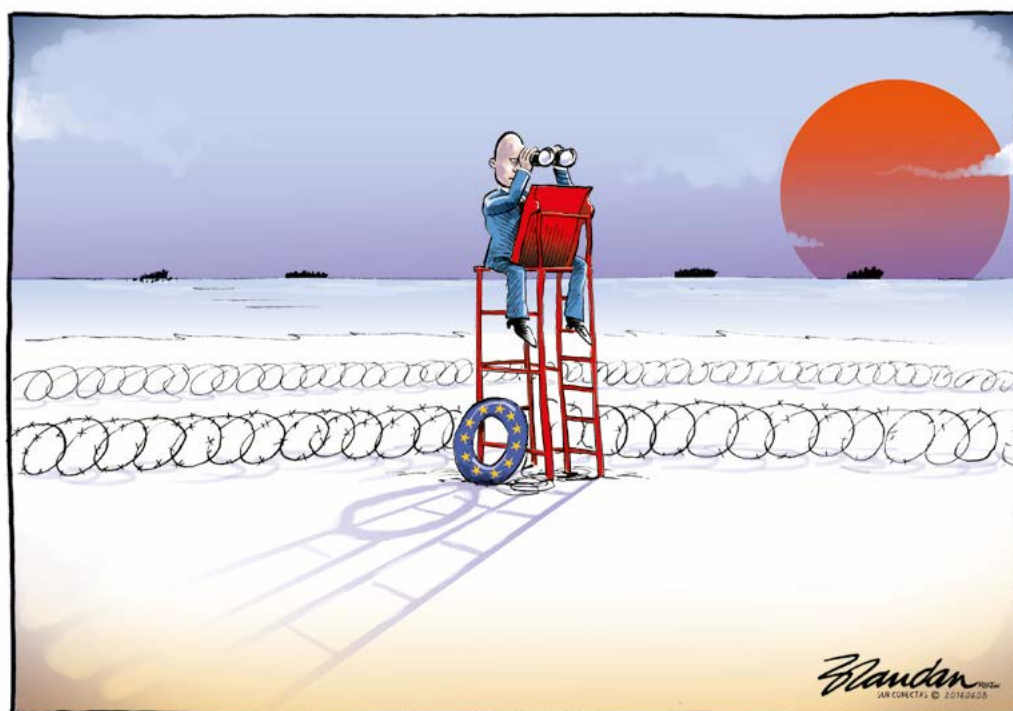
BRANDAN | South Africa

Brandan Reynolds is South Africa's most prolific editorial cartoonist. He graduated with a diploma in Graphic Design from the Ruth Prowse School of Art in Woodstock, Cape Town in 1991. He has been drawing the daily editorial cartoon for the South African newspaper Business Day since 2003 and he also contributes to the Weekend Argus as well Rapport, the Afrikaans-language Sunday newspaper. He was awarded South Africa's Standard Bank Sikuvile Journalism Award for Editorial Cartooning in 2013, was recently made a member of Cartooning For Peace and is also a member of CartoonMovement. Further examples of his work can be found at *https://brandanreynolds.com.*

GLEZ | Burkina Faso

Damien Glez was born in 1967. Following the end of the state of emergency in Burkina Faso in 1991 and the "springtime" for the country's press, Glez began his career as a cartoonist for the satirical weekly *Le Journal du Jeudi*, where he is now the director. He also draws for publications on three continents. Cartoonist-columnist, writer and lecturer at the University of Ouagadougou, Burkina Faso, he is also the author of the comic strip the Divine Comedy. As well as *Le Journal du Jeudi*, Glez's cartoons are regularly published in *Slate Afrique* (France), the non profit magazine *Vita* (Italy), *Afronline* (Italy), *Chorus* (France), World Policy Journal (U.S.), *Courrier International* (France) and *Jeune Afrique* (France-Africa). He is a member of Cartooning For Peace. Further examples of his work can be found at *http://www.glez.org.*

PAYAM | Iran

The Iranian cartoonist and illustrator Payam Boromand was born in 1984. He graduated from Azad University of Art, Faculty of Arts in 2007. He has been working as a cartoonist in Iranian reformist newspapers and weekly magazines. He is currently working at the Peivast magazine. His drawings have also been published in many international newspapers and magazines incluidng *Le Monde, Offiziere, Pflichtlektüre* and 360 Magazine. He regularly participates in national and international exhibitions and is member of various international journalism and arts associations, including Cartooning For Peace, Cartoon Movement and *Cagle.com*.
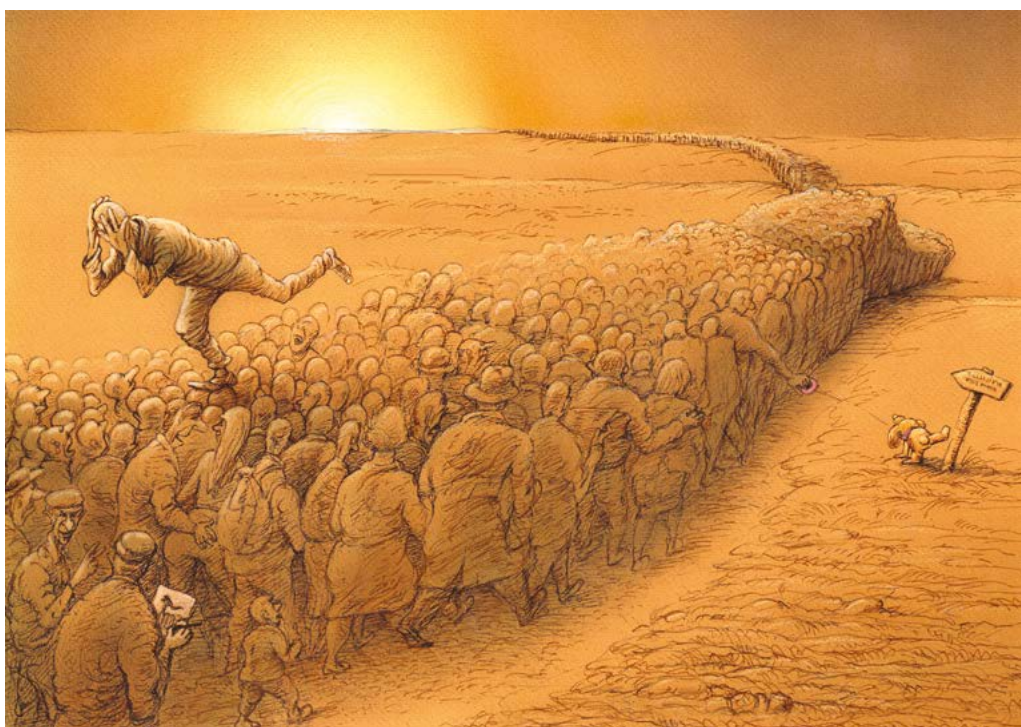
ZLATKOVSKY | Russia

Mikhail Zlatkovsky was born in 1944 and graduated from Moscow Nuclear Physics University. After 5 years he became a free-lance artist. He has won 275 international prizes and was awarded the *Chevalier* (Knight) of the Légion d'honneur by France. Further examples of his work can be found at *www.zlatkovsky.ru*.

LATUFF

Carlos Latuff is a Brazilian cartoonist, born in Rio de Janeiro in 1963. His first cartoon was published in the 1990s and some years later he began to use his art as a form of political activism. His well-known support for the Palestinian cause is the outcome of his visit to the occupied territories in 1998. Many of his works are known worldwide.

Currently Latuff contributes regularly to portals and newspapers in the Middle East, among them *Alquds Alarabi* and *Huna Sotak*, as well as the Islamophobia Research and Documentation Project - IRDP, besides working as a freelance artist. More information about his work can be found at *www.latuffcartoons.wordpress.com.*
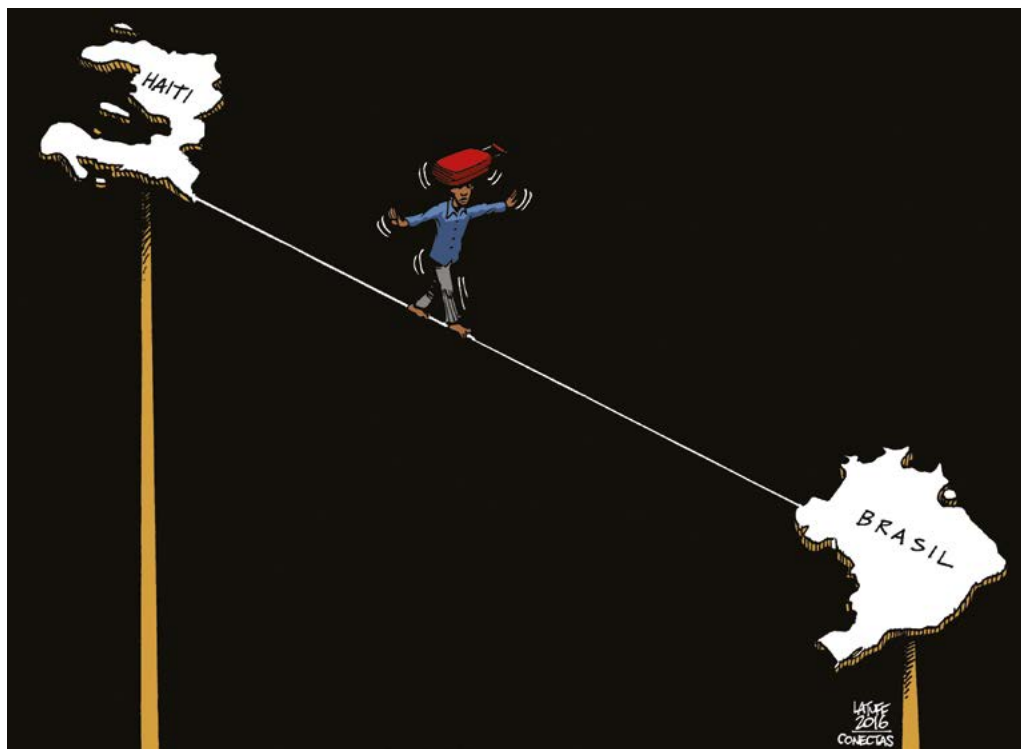
INFOGRAPHICS

INFOGRAPHICS:
MIGRATION AND HUMAN RIGHTS
Deisy Ventura & Natália Araújo

Design by Estúdio Kiwi

DEFINITIONS

REFUGEE

Any person who for "fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality."[1]

IMMIGRANT

There is no standard legal definition for the term "immigrant" in the international sphere, but the term is commonly used to designate non-nationals who voluntarily cross the border of a country in search for better living conditions.[2]
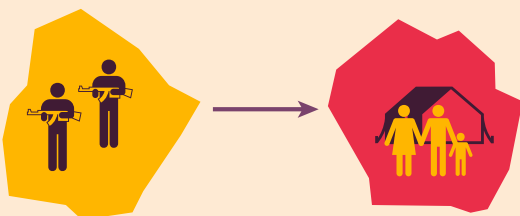
ASYLUM SEEKER

A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments.[3]

INTERNALLY DISPLACED PERSON

Persons or group of persons who have been forced or obliged to flee or leave their homes or places of habitual residence as the result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.[4]

1. The 1951 Convention Relating to the Status of Refugees, Article 1
2. "Refugees" and "Migrants": Frequently Asked Questions (http://www.acnur.org/t3/portugues/noticias/noticia/refugiados-e-migrantes-perguntas-frequentes/)
3. IOM Key Migration Terms (http://www.csem.org.br/pdfs/conceitos_basicos_de_migracao_segundo_a_oim.pdf)
4. IOM Key Migration Terms (http://www.csem.org.br/pdfs/conceitos_basicos_de_migracao_segundo_a_oim.pdf)

MAIN DESTINATION REGIONS OF REFUGEES
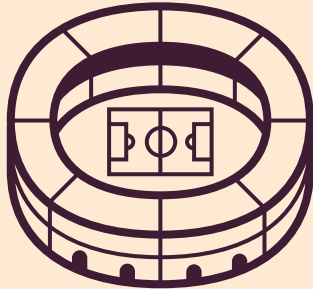
Salt Lake Stadium
India
Capacity
👤 120,000

Total number of refugees as of mid-2015

15.1 million = 🏟 126 stadiums
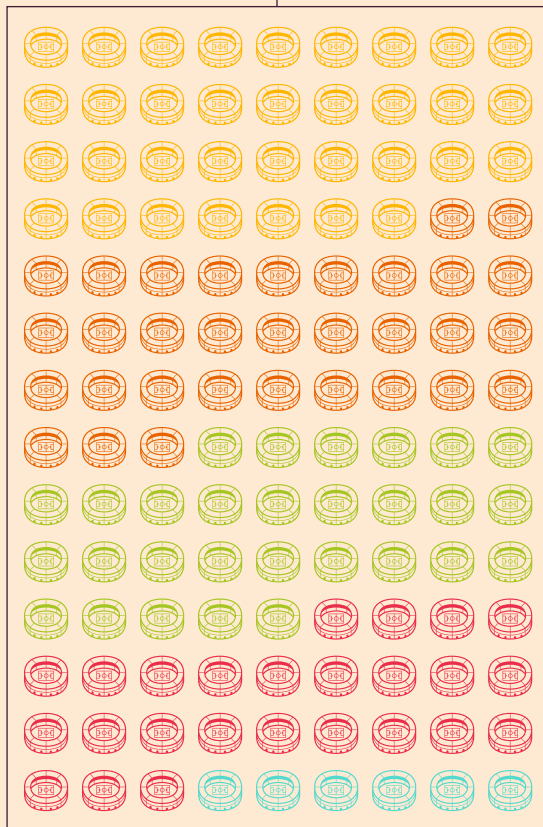
AFRICA
4.1 million
34.16 stadiums

ASIA PACIFIC
3.8 million
31.6 stadiums

EUROPE
3.5 million
29.16 stadiums

**MIDDLE EAST AND
NORTH AFRICA**
3 million
25 stadiums

AMERICAS
753,000
6.27 stadiums

Source: UNHCR Mid-Year Trends 2015, page 4
(http://www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html)

COUNTRIES THAT GENERATE THE LARGEST REFUGEE FLOWS AND WHERE THE REFUGEES GO TO

Syria
3.88 m

Lebanon
1,148,000

Turkey
1,558,000

Jordan
623,112

Iraq
235,421

Greece
4,000

Egypt
138,381

Denmark
8,700

Germany
70,585

The Netherlands
11,000

Sweden
53,300

Afghanistan
2.59 m

Iran
950,000

Pakistan
1,500,000

Turkey
37,300

Italy
10,700

Germany
46,800

United Kingdom
10,900

Austria
18,000

Sweden
14,300

Somalia
1.11 m

Ethiopia
247,780

Yemen
244,204

The Netherlands
18,800

Kenya
427,300

Sweden
25,000

Norway
9,500

Italy
12,600

Germany
12,500

SOURCE: UNHCR Population Statistics - Persons of Concern
(http://popstats.unhcr.org/en/persons_of_concern)

COUNTRIES THAT RECEIVE THE MOST REFUGEES

Pakistan
1.5m

Turkey
1.84m

Lebanon
1.2m

Iran
982,000

Italy
142,000

United Kingdom
155,000

Sweden
198,000

France
319,000

Germany
562,000
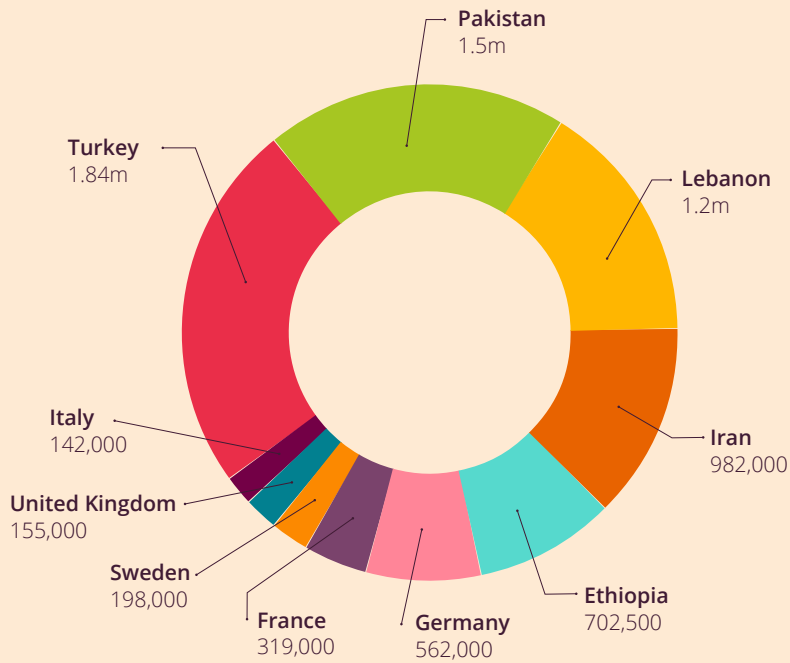
Ethiopia
702,500

1° Turkey
2° Pakistan
3° Lebanon
4° Iran
5° Ethiopia
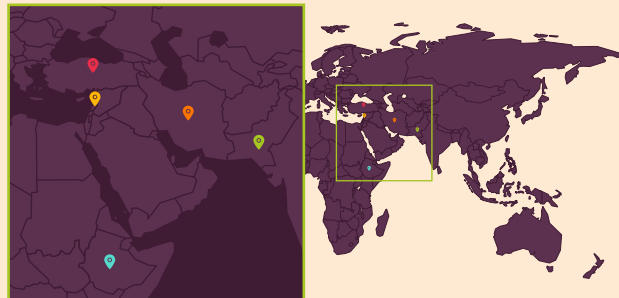
NOTE: this data includes refugees + pending cases awaiting approval of refugee status. The figures in Europe are overestimated due to the number of people who apply for asylum in more than one country. If they apply for refugee status in three different countries, for instance, they will be included in the statistics of all three countries. Even so, the number of refugees and pending cases in Europe is much lower than in the first five countries listed here.

SOURCE: UNHCR Mid-Year Trends 2015, pages 6 and 7
(http://www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html)

SITUATION OF THE MAJORITY OF REFUGEES

1 in every 3
refugees lives in a refugee camp[1]

Total number of people **3,512,500**

29.3%
of all refugees

Refugee camps managed by UNHCR2[2]
56% children***

51% women

Total number of people **487,500**

4.1%
of all refugees

Self-settled camps[3]
56% chidren***

53% women
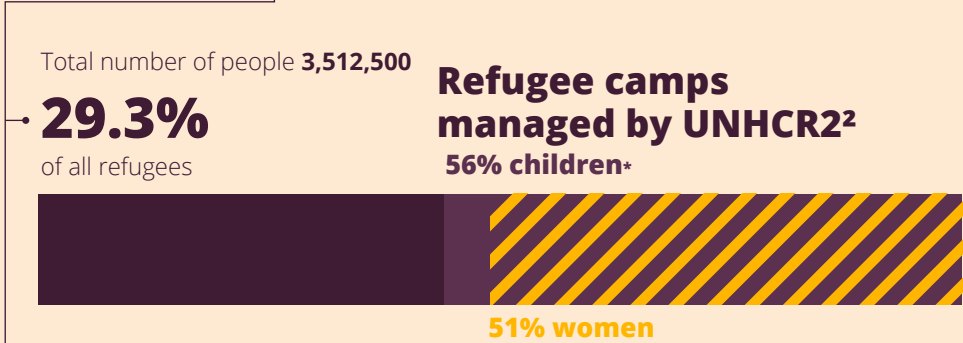
* For these statistics, children are individuals under 18 years of age.
1: United Nations Population Fund - State of World Population 2015, page 19. (http://www.unfpa.org/sites/default/files/sowp/downloads/State_of_World_Population_2015_EN.pdf)
2: UNHCR Statistical Yearbook 2014, page 66 (http://www.unhcr.org/56655f4c16.html)
3: UNHCR Statistical Yearbook 2014, page 66 (http://www.unhcr.org/56655f4c16.html)

PEOPLE WHO DO NOT STAY IN THEIR COUNTRY OF ORIGIN

there are
7 billion
people in
the world

3.7%
of all people in
the world do not
remain in their
countries of origin

**259.1
million**
immigrants, refugees
and asylum seekers[1]

Immigrants
243m[1]

51%
minors under
18 years of age[2]

48%
women[1]

49%
women[3]

15%
women under
the age of 20[1]

**People
applying for
refugee status
993,600[1]**

**Refugees in
the world
15.1m[1]**

Vertical axis: 400 m · 350 m · 300 m · 250 m · 200 m · 150 m · 100 m · 50 m · 0
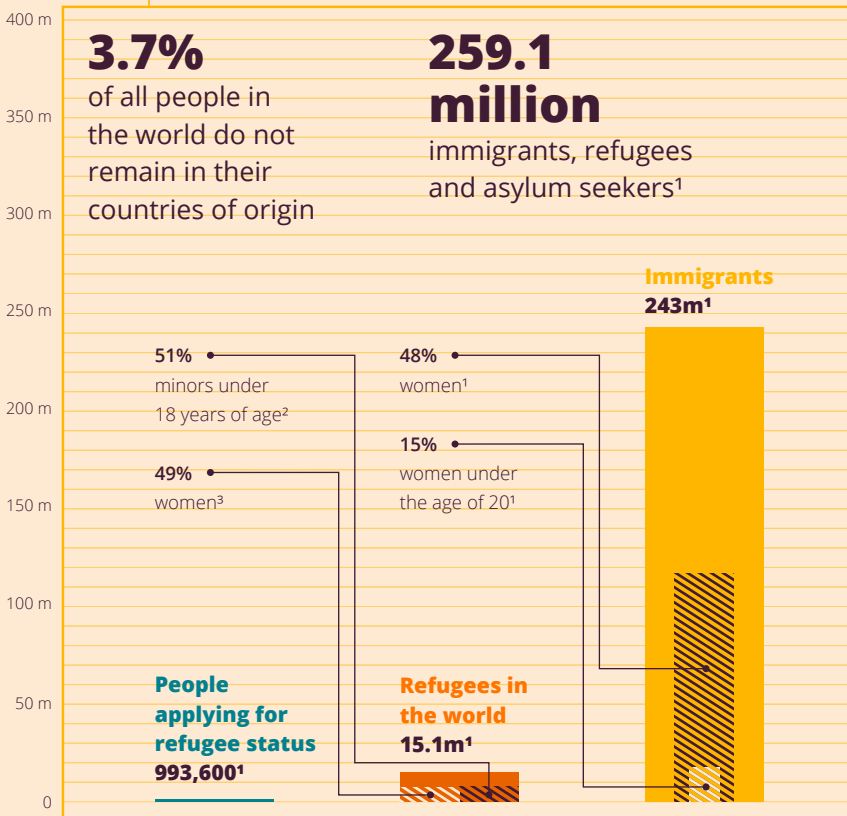
1: UN International Migrants Stock Dataset in 2015 (http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/migration-regions-infographics.pdf)
and UNHCR Mid-Year Trends 2015, pages 5 and 9 (http://www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html)
2: UNHCR Age, Gender and Diversity Accountability Report 2014 (http://www.unhcr.org/548180b69.html)
3: UNHCR Statistical Yearbook 2014, page 64 (http://www.unhcr.org/56655f4c16.html)

INTERNALLY DISPLACED PEOPLE

There are approximately
38 million internally displaced people on the planet

Among the countries with people displaced internally by conflict
and violence in 2014, the largest numbers are in:

1º Syria

Population
17,951,640

Internally displaced
7,600,000
approx. **42.3%**
of the population

2º Colombia

Total population
46,245,300

Internally displaced
6,044,200
approx. **13%**
of the population

4º Sudan

Total population
35,482,230

Internally displaced
3,100,000
approx. **8.7%**
of the population

3º Iraq

Total population
32,585,690

Internally displaced
3,274,000
approx. **10%**
of the population

5º RDC

Total population
77,433,740

Internally displaced
2,756,600
approx. **3.5%**
of the population

● Internally displaced

SOURCE: indexMundi (http://www.indexmundi.com/)
and United Nations Population Fund - State of World Population 2015, page 25
(http://www.unfpa.org/sites/default/files/sowp/downloads/State_of_World_Population_2015_EN.pdf)

DEISY VENTURA *– Brazil*

Deisy Ventura is a professor at the Institute of International Relations and the School of Public Health at the University of São Paulo. She is the author of *Direito Global – o caso da pandemia de gripe AH1N1* (Global Law - the case of the H1N1 flu pandemic, São Paulo: Expressão Popular/Dobra Editorial, 2013), among other books. Since 2009, she has been involved in university outreach projects related to the rights of migrants in the city of São Paulo (SP). She participated in a commission of experts created by the Ministry of Justice of Brazil, which presented a draft bill for a Law on Migration and the Promotion of the Rights of Migrants in Brazil in 2014.

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NATÁLIA ARAÚJO *– Brazil*

Natália Araújo holds bachelor´s degree in International Relations from the University of São Paulo (USP), and is currently pursuing her master's in International Relations, also at USP for which she is researching transnational social movements. She is part of the university collective *Educar para o Mundo* (Education for the world), which works with popular education in human rights for immigrants and refugees in São Paulo. She was a volunteer at Conectas in 2014 and 2015.

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VIDEO ESSAY

MENSAJEROS DE LAS MALAS NOTICIAS

Bia Bittencourt

Isadora Brant

João Wainer

Lucas Ferraz

MENSAJEROS DE LAS MALAS NOTICIAS

An examination of immigration and its relationship with the city of São Paulo

This video-article - available online at sur.conectas.org - combines poetic aesthetics with a journalistic language to provide a look into the dilemmas and difficulties of migrants seeking better opportunities and living conditions in the largest metropolis in Latin America. From the Tanzanian homeless person to the Congolese musician, the documentary portrays the growing challenges governments of major cities are facing due to the increase in the number of displaced people around the world. Migration has been a fundamental part of the history of the city of São Paulo, as it has been responsible for the convergence towards a rare pattern of cultural and ethnic diversity. Even so, it was only in 2013 that concern with the coordination of specific public policies for the migrant population living in the city took shape through the creation of the Coordination for Migrants Policies (CPMig, in its acronym in Portuguese) under the Municipal Secretariat for Human Rights and Citizenship of São Paulo (SMDHC, in its acronym in Portuguese). The work developed since then, which incorporates a human rights perspective, has attempted to introduce a paradigm shift in which migration is no longer tied to the issue of national security. But this has its challenges.

BIA BITTENCOURT – *Brazil*

Bia Bittencourt is an illustrator and video editor. She has worked for MTV, TV Folha and is the founder of Feira Plana the most important fair for alternative publications in Brazil.

ISADORA BRANT – *Brazil*

Isadora Brant is a photographer and worked for TV Folha from 2011 until 2016. She is one of the partners of the publisher Vibrant and works with various publications using photography and video.

JOÃO WAINER – *Brazil*

João Wainter is a documentary filmmaker and has collaborated with the newspaper Folha de São Paulo since 1996. He was one of the creators of TV Folha, which won the Esso Television Journalism prize in 2013. He directed the feature films Pixo (2009) and Junho (2014).

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LUCAS FERRAZ – *Brazil*

Lucas Ferraz was a reporter and international correspondent for the newspaper Folha de São Paulo. He currently works as a freelance journalist with various publications.

CONVERSATIONS

**"THE REPORT CREATED
A SENSATION IN THE HRC"**
Michael Kirby

"THE REPORT CREATED A SENSATION IN THE HRC"

Michael Kirby

• *Interview with retired Australian high court judge Michael Kirby* •
on his role as chairman of the UN Committee of Inquiry
on human rights in the Democratic People's Republic of Korea

In this exclusive interview with Sur Journal, Michael Kirby discusses the Committee of Inquiry on human rights in the Democratic People's Republic of Korea (the "COI on DPRK" or the "COI on North Korea") of which he was chairman. He describes how the report created a sensation when it was tabled in the Human Rights Council (HRC) on the 17 March 2014[1]. The unique methodology – discussed in detail below - used by Michael Kirby and his colleagues, Marzuki Darusman and Sonja Biserko, enabled the COI to gather material and document the serious human rights abuses that are taking place in Democratic People's Republic of Korea (DPRK or North Korea), including crimes against humanity.

The Korean peninsula was governed as a united land for at least a thousand years until 1945 when it was divided by the successful allies in the Second World War after the defeat of Japan, which had been occupying Korea since 1911. The allies drew an artificial line across roughly the centre of the peninsula. The northern section was assigned to the Soviet sphere of influence; the southern section to the sphere of influence of the United States of America. The immediate post-war regimes that were established were both highly autocratic, leading to great tensions in the peninsula. These tensions culminated in 1950 when the northern forces attacked the south. The result was a devastating war, which caused tremendous individual and economic devastation in both parts of Korea. The communist regime in the North survived and the first supreme ruler of North Korea, Kim Il-sung, established a highly autocratic regime which failed to protect, and often deliberately violated, the human rights of its citizens. This trend continues to this day under the current supreme leader, and third member of the Kim dynasty, Kim Jong-un.

In 2013, after many years of international concern about reports of the human rights situation in North Korea, the HRC resolved to establish the COI, an HRC mechanism used to focus international attention in a particular country or area.

Kirby notes how the COI on North Korea is a very interesting case study with many lessons for the way the United Nations (U.N.) can more effectively address human rights problems. According to him, the COI's insistence on due process and fairness - even in the face of a regime such as North Korea - is the only way human rights issues should be handled. Ultimately, he says, this will result in more buy in with follow-up action more likely.

• • •

Conectas Human Rights • The Office for the High Commissioner of Human Rights (OHCHR) has supported or deployed 50 international commissions of inquiry and fact-finding missions since 1992.[2] How does the COI on human rights in the DPRK stand out from the others, especially in terms of the methodology and the way in which the report was presented?

Michael Kirby • We did not expect the DPRK to cooperate with the COI, and it did not. Therefore, we faced the unique problem of not being able to visit the country and check the situation for ourselves. Accordingly, we had to gather testimony outside the country. We did not have any problem in getting witnesses. We advertised for them and received a very large number of people wishing to speak. There is a community of about 28,000 North Korean refugees in South Korea, from where most of the witnesses originated.

Witnesses were permitted to give their testimony without leading questions and with minimum intervention from the COI. One of the strengths of the report of the COI on DPRK is that on almost every page there are passages quoted from the transcript which tell the experience of the individuals. This adds to the power and vigour of the report, which I believe is a page-turner.

As a judge from a common law country, I felt comfortable with conducting the COI on DPRK using common law elements that were familiar to me – in particular transparency. This was particularly relevant to an inquiry into such a secretive place. An antidote to secrecy is transparency. My colleagues, Marzuki Darusman (Indonesia) and Sonja Biserko (Serbia), despite being from civil law backgrounds, agreed with this strategy and the inquiry was held in the most transparent way possible. This included filming public hearings, which - with the due protection of the identity of witnesses where that was necessary - were put online, together with transcripts both in the original language of either Korean or Japanese, and in English.

The U.N. was not at first particularly happy about the transparent procedure that we adopted. They said that unidentified people would try to disrupt our meetings, that there would be security risks and that this was not the way that COIs were normally conducted.

However, we persisted because not only does transparency help to convince the relevant community as to the integrity and fairness of the procedure, it also raises expectations that something will come out of it.

One of the problems with U.N. reports is that they can be difficult to read. In part, that may arise from the fact that officials are writing them with the psychology of officials and sometimes in languages other than their native tongue. Although the report of the COI on North Korea was drafted by our secretariat, I reviewed every word of the report. As the only native English speaker on the COI, I took the responsibility to make sure that the language was comfortable, that it was simple and that it communicated directly to a non-expert what problems we were addressing.

The question also arose as to whether we should provide an advanced copy of its report to authorities in the DPRK. This procedure would have been followed in the case of a common law inquiry, particularly where the subject of the inquiry had not attended the inquiry. We therefore sent a copy of our report to the supreme leader via the DPRK's mission in Geneva. In the covering letter, I warned the supreme leader that he himself might be liable for the human rights abuses revealed in the report. This offered him the opportunity and the stimulus to respond to us. He did not respond. Some officials of the U.N. said that had never been done before. However, to us it appeared to be a basic requirement of due process.

These are some of the features that were distinctive of the COI on DPRK. I was very interested in the methodology. It is important. If you get your methodology right, it is more likely that you will produce a convincing report that will actually help to change things. My hope is that it will be possible to get the report published by a private publisher because the DPRK and its problems have not disappeared from the international scene. I believe that the COI report is still relevant and it should be available as widely as possible.

Conectas • Is there anything you would have done differently?

M. K. • I am sure there are many things that we could have done differently. We offered North Korea the opportunity to have a representative before the COI. That was negotiated with the government of South Korea and it was itself an unusual step in the relationship between North and South Korea Ultimately the DPRK declined the offer. Therefore, if we had our time over, we might have pursued a procedure to ensure that there was an advocate for the DPRK – even if that meant appointing one ourselves.

Conectas • The COI report was unwavering in its condemnation of the DPRK regime, describing how "systematic, widespread and gross human rights violations" have been and are being committed by the DPRK, its institutions and its officials – including crimes against humanity – and recommended that the State be referred to the International Criminal Court (ICC).[3] Despite Pyongyang's total rejection of the COI and its findings, after the report's

publication North Korea engaged for the first time with the Universal Periodic Review (UPR) and also embarked on various diplomatic initiatives at the U.N. and European Union.[4] However, after the U.N. General Assembly referred the Commission's findings to the Security Council in December 2014, Pyongyang renounced any further cooperation with U.N. human rights mechanisms.[5] How much of these diplomatic manoeuvrings do you attribute to pressure created from the report and how do you address the criticism that - by now refusing any further cooperation with U.N. human rights mechanisms - the report may have had the impact of further isolating North Korea?

M. K. • It is clear that the report created a sensation in the HRC and that put pressure on the DPRK to respond. Therefore, the time sequence suggests that the response was the product of the report. The consequence was that North Korea embarked on a so-called charm offensive in order to try to dissuade the organs of the U.N. from pursuing the report and, in particular, pursuing it in any way that would be critical of the supreme leader or referring it to the Security Council. In all its endeavours, the DPRK failed because the international community was properly outraged and alarmed by the content of the report. The steps that were taken by the DPRK, nevertheless, were to be welcomed. It had been the only country in the world that had been submitted to UPR and that asserted that there were no human rights issues that needed resolving. None at all.

Once our report was published, the DPRK took a more active role in the second tranche of the UPR. It agreed that there were a significant number of points - for example, the public execution of enemies of the regime - which should be considered against human rights standards. All this was a good development and certainly to be welcomed. But when it became clear that the matter was going to be referred to the Security Council and when the Security Council by procedural vote placed the matter on its agenda – twice – the DPRK ceased to cooperate.

The COI was not a political body; it was an independent commission to make an inquiry. Our obligation was not that of diplomats trading and negotiating favours in exchange for geopolitical objectives. Our obligation was to make an accurate, fair and principled investigation and report. That is what we did. One does not make progress in the subject of human rights by ignoring or going softly on crimes against humanity. Therefore, it is just inconsistent with such serious crimes against the international legal order to suggest that the crimes, although appearing in the testimony, should have been be suppressed or kept to ourselves in case we isolated the DPRK. The country was already isolated – it isolates itself. But it does not isolate itself from the U.N., of which it is a member, nor from the human rights treaties and the Universal Declaration of Human Rights by which it is bound. Those are protections for the people of the DPRK who look to the U.N. We did our duty in revealing the situation. In due course, when the human rights situation in the DPRK is improved, it will only be because of the shocking way in which the people of the DPRK have been treated and which was brought to world attention by the COI.

Conectas • One of the most shocking findings of the COI report is the treatment of North Korean refugees. Can you explain to our readers the specific challenges that this group of people face?

M. K. • One of the most powerful chapters of the report is the chapter dealing with food and the consequences of the great famine – the so called "Arduous March" – in the mid-1990s. Large numbers of the population starved to death. The exact numbers are a matter of controversy, but it was no fewer than 300,000 and may have been more than a million, from a population of 23 million. Therefore, there was widespread suffering. A consequence of that was that large numbers of people tried to flee to China. At the time, the north-eastern border of China was not strongly protected in the winter. Many people, particularly women, from the DPRK crossed the iced rivers and got into China. They suffered great abuses in China - in some cases, human trafficking, but in many cases, very difficult working and living conditions. Many of them only went to make enough money and to secure means to support their families before going back to the DPRK.

The ethos of the DPRK is one of racial exclusivity. Therefore, there was great prejudice towards anyone who came back to the DPRK, particularly if the returnee had had children by Chinese fathers. In one instance, a witness told us that she had been forced to drown her child in a bucket because the father of the child was Chinese. The people who came back from China were subjected to cruel punishments and often imprisoned in detention camps. The Chinese authorities took steps to cooperate with the DPRK in returning the refugees. The COI cautioned China that doing so was inconsistent with China's obligations under both the Refugee Convention and its Protocol. China responded that these were not refugees, but economic migrants. However, the COI insisted that once people had fled to China, even though they might have originally done so for economic reasons, given the knowledge of the conditions in North Korea, they were technically refugees and were therefore entitled to protection as refugees. China did not agree with that position.

Conectas • The report says how "the international community must accept its responsibility to protect the people of the DPRK".[6] How and to what extent do you envisage this responsibility being manifested in the short and longer term? Is there any evidence that this responsibility has already been recognised?

M. K. • The report contained many recommendations for the U.N. One of them has been implemented, namely the establishment of a field office in Seoul, South Korea. It collects testimonies and in that way, it is continuing the work that the COI started. The report also recommended that the matter should be referred to the Security Council in order that it could invoke its jurisdiction under the Rome Statute and refer the case of the DPRK to the ICC. The first step in that process has been achieved by the reference of the matter by the General Assembly to the Security Council - a step that was unusual and, in human right terms, had

only been taken once before in the case of Myanmar (Burma). This decision was reaffirmed in December 2015 by a similar vote to bring the matter before the Council. Consequently, in February 2016, the Security Council unanimously adopted resolutions imposing much stronger sanctions on the DPRK following the fourth nuclear and missile tests.

The question is whether any of this is a vindication of the contents of the COI report. I can not answer what was in the minds of the Member States of the Security Council at any of these steps along the way, but my own belief is that the report of the COI opened a space which would not have been there if the international community had not known of the peculiarity of the situation in the DPRK and the fact that crimes against humanity had occurred and were screaming out for a response.

The Security Council has not yet referred the case, as we recommended, to the ICC. However, that may well still occur in the future, particularly if the DPRK continues to act in its belligerent, hostile and warlike manner. At the end of the Second World War the international community, in establishing the U.N., resolved that never again would the world turn away from crimes against humanity. Crimes against humanity are not just ordinary human rights violations, of which there are millions in our world. These are the gravest form of international crimes, which together with genocide and certain war crimes, call out for the conscience of humanity to respond. And these are the crimes that are recorded in the report of the COI. I believe that the international community will continue to put pressure on the DPRK and will ultimately hold to account those who are responsible for the crimes against humanity that are proved to have occurred.

Conectas • What role should China play in efforts to improve human rights in the DPRK and how concerning is the recent evidence of a cooling of bilateral relations between the DPRK and China in achieving this?

M. K. • China is the clue to progress on the DPRK. China is the major trading partner of the DPRK whereas the Russian Federation now has relatively small economic interests. That makes me hopeful that China will continue to search for ways to deal with the problem on its doorstep. Obviously, China must be deeply concerned both about the dangers to its own environment and its own political arrangements in the northeast of its country. But also about the terrible weapons that the DPRK has and the somewhat unstable governmental system that they have which makes the possible accidental or mistaken use of those weapons a distinct reality that China has to cope with.

All of this means that it is likely that there will to be an evolution of China's position. However, various indications exist that North Korea has damaged the relationships it enjoyed with China. The murder of Jang Song-Thaek, the uncle of the supreme leader, in December 2013 was an example of this. Following the death of Kim-Jong II, he had reportedly urged that the DPRK should move towards a China-style improvement of its economy and its internal politics.

Quiet diplomacy with China, including secret discussions that are not under the blaze of international scrutiny, will be a way forward to levering pressure on DPRK to improve the human rights situation.

Conectas • Looking more broadly at the foreign policy of other Global South countries who retain representation in Pyongyang (including, amongst others, Brazil, Indonesia, India and Nigeria) – what should the role of these countries be and how can their diplomatic representatives in the country better assist in improving the human rights situation?

M. K. • One of the disappointing features of the response in the U.N. to the COI report was the non-engagement of African and BRICs countries, which have also themselves felt the pain of human rights deprivations. India, for example, repeatedly abstained in relation to the consideration of the report in the General Assembly. The vote in the General Assembly was 120 to 20 with 55 countries abstaining. These abstentions included many of the leading countries of the developing world which have had direct experience with human rights abuses.

A lot of the countries of the developing world continue to live in the dream world of non-alignment. They have not adjusted their international responses to the world since 1989. This was a revelation to me as I watched the U.N. debates. However, it must never be forgotten that 120 countries - a huge vote on a human rights issue - voted for the report of the COI and against the charm offensive of the DPRK. Likewise, in the Security Council, 11 and later 10 Member States voted for action on a procedural vote. And ultimately in February 2016 the Council unanimously voted for stronger sanctions.

Conectas • Were you able to access any civil society organisations in North Korea during the COI – for example that are operating covertly? If so, how are they organised and what is their role in focusing attention on the regime?

M. K. • A surprising feature of our inquiry was that there was no evidence of an organised civil society in the DPRK. It may exist, but it would have to be extremely cautious and covert because the country is a violent and cruel place for anyone who stands against the regime.

Even in South Korea, a surprising feature is the failure of a civil society organisation to emerge representing the many refugees who have fled there. The ostensible reason given for that is that Korea is constitutionally one country, the refugees have joined the "real Korea" and therefore they do not need a separate civil society. But it is perhaps the residual consequence of living in such an oppressive, totalitarian regime that, even in the high levels of civic freedom in South Korea, the refugees from the DPRK have not formed civil society organisations of any significance.

Despite this, the COI had constant dialogue with civil society in other U.N. countries. Civil society played an important part in the moves that led to the unanimous decision of

the HRC to create the COI in the first place. Civil society plays a very important role in the U.N. human rights machinery. It cajoles, it stimulates and it provokes actions to protect principles when inertia or economic interests will sometimes lead states to do nothing.

Conectas • Going forward, how can our readers mobilise to assist in improving human rights in North Korea?

M. K. • We all have to go back to the principle of the Charter of the U.N. Many in Australia or South America will say "what has the DPRK got to do with us? This is a far away country and there is nothing much we can do to affect it, and therefore, we should mind our own business and do nothing." That is not the principle of the Charter. The principle of the Charter, stimulated by the tremendous sufferings of the Second World War and by the horrors of the crimes against humanity in the death camps and provoked by the mushroom clouds of the nuclear bombs over Japan, emphasised that we are all one species, living on the one tiny and rather insignificant planet. We have to search for, and uphold, common ground and that common ground includes the fundamental dignity and human rights of all people, including the people in North Korea.

NOTES

1 • Korea can be read at http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx.

2 • "Commissions of Inquiry And Fact-Finding Missions On International Human Rights And Humanitarian Law - Guidance And Practice," Office of the United Nations High Commissioner for Human Rights (OHCHR), 2015, accessed May 30, 2016, http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf, p. 114.

3 • United Nations General Assembly, A/HRC/25/63, "Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea," February 7, 2014, para. 24 and 94(a).

4 • See for example: David Hawk, "North Korea Responds to the UN Commission of Inquiry." 38 North, October 16, 2014, accessed May 30, 2016, http://38north.org/2014/10/dhawk101614/.

5 • See for example: Christine Chung, "Moving Forward on North Korean Human Rights." 38 North, July 27, 2015, accessed May 30, 2016, http://38north.org/2015/07/cchung072715/.

6 • United Nations General Assembly, A/HRC/25/63, para. 86.

Interview conducted in May 2016 by Oliver Hudson (Conectas Human Rights).

MICHAEL KIRBY – *Australia*

Michael Kirby retired from the High Court of Australia in 2009, at the time being the country's longest serving judge and having held twice the position of Acting Chief Justice of Australia. Aside from being chairman of the United Nations (U.N.) Committee of inquiry on human rights in the Democratic People's Republic of Korea (2013-14), he has held a series of high profile national and international appointments, including president of the International Commission of Jurists (1995-98) and the U.N. Special Representative for Human Rights in Cambodia (1993-6). He is currently a member of the UNAIDS Reference Group on HIV and Human Rights (2004 -) and serves as Editor-in-Chief of The Laws of Australia (2009 -). In December 2015 he was appointed by the U.N. Secretary-General to be a member of the U.N. High Level Panel on Health Technology Innovation and Access.

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Original in English.
Photo by Sasha Hadden.

ESSAYS

AFRICA AND THE RULE OF LAW

Makau Mutua

*• The problematic rebirth of liberalism in Africa and why the rule •
of law must be reconsidered to achieve sustainable development*

ABSTRACT

The rule of law is often seen as a panacea for ensuring a successful, fair and modern democracy which enables sustainable development. However, as Makau Mutua highlights, this is not the case. Using the example of African states, he describes how no African country has truly thrown off the shackles of colonial rule and emerged as a truly just nation state – even though many have the rule of law at the heart of their constitutions. This, he argues, is because the Western concept of the rule of law cannot be simply transplanted to Africa. The concept must be adapted accordingly to take into account the cultural, geographic and economic peculiarities of each state. In order to achieve this, Mutua offers seven core values which the rule of law must reflect in order to achieve sustainable development across the continent.

1 • Introduction

Few concepts have been as captivating as the rule of law.[1] The concept stretches deep into antiquity and the Magna Carta. Its genius lies in the subordination of rulers to the law and due process. The modern democracy – which is not possible without the rule of law – is anchored in liberalism, the Enlightenment project, and attempts at the universalisation of its morality. In a historical continuum, liberalism predates and gives birth to political democracy which in turn is universalised in human rights. The common thread that runs through them is the rule of law. But the rule of law is not without complication and controversy. Like political democracy and human rights, it has endured a checkered history and been subject to profound critiques about its normative incompleteness, cultural blindness, Anglo-Saxon imperial complicity, and historical context.[2] For Africa, the rule of law and related concepts offer hope and caution in an environment replete with extreme complexity and historical trauma.

Distinction ought to be drawn between the "law" and the "rule of law". The two terms are often conflated. Charles Dickens in Oliver Twist popularised the English expression "the law is an ass – an idiot."[3] The reference by Dickens was to the rigidity of the application of the law, not the law itself *per se* as an artifact. The point is that like the donkey, the law is rigidly stupid and obstinate in its application. Stripped to its bare minimum – and shorn of more modern meanings that impute human rights at its core – the rule of law assured fidelity and certainty to its application. The question was not whether the law was just or fair. It is the rule of law – not the law itself – that needs interrogation. Put differently, it is the language of rights – interpreted as the rule of law – that requires scrutiny.

This piece accepts the common view that no viable society can exist today without a credible, legitimate, and widely accepted legal regime. In other words, both the law and the rule of law are indispensable pivots of any legitimate political society. Systems of arbitrary personal rule, or kleptocracies have no place in the modern world. But this paper argues that such a view is only anti-catastrophic and does not answer the challenges of powerlessness that continue to cause and exacerbate human privation. A system governed by the rule of law is more likely to prevent the collapse of social and political order but it may not address deeply embedded inequities. It may provide procedural justice but deny substantive social justice. Indeed, both liberal and even illiberal regimes are governed by the rule of law. But that is not a bar to oppression, exclusion, and marginalisation. This article argues that virtually all African states experience large gaps of legitimacy that the rule of law is unlikely to cure unless deep social transformation is undertaken. The medium of rights is not an adequate tool for human liberation. The piece identifies deficits that the rule of law could address but cautions against the euphoria of solely relying on the law to undo deep societal distortions. Ultimately, the article questions the viability of the liberal project in the construction of a just and humane society. It concludes that market solutions coupled

with income inequality and the powerlessness engendered by social alienation, exclusion, and other post-colonial distortions ought to give the global rule of law communities a pause. Thinking anew the place of the rule of law in a resurgent Africa must be done, but the failed models of yore should not be replanted. The rebirth of liberalism in Africa – if that is what Africans want – must be problematised. But that rebirth must deepen democracy to release the human potential of every African.

2 • Africa's History of Trauma

Africa has young states even though it is an old continent. Perhaps no other continent has suffered more trauma than Africa over the last 500 years. The Arab and European/American trade in enslaved Africans stands out for its brutality and legacy on the peoples of the continent. The slave trade was closely followed by the Scramble for Africa in which African societies, institutions, and norms were wrecked by European imperial powers. The plunder and theft of Africa's resources for the benefit of the West stands out in the era of colonialism. Independence from colonial rule starting in the 1950s brought little relief as the hopes of a resurgence were consumed in the cauldron of the Cold War and a scandalous international economic order.[4] Opaque and oppressive one-party states and military dictatorships proliferated the continent. African ruling elites failed to implant the promise of the liberal constitution and to cohere the state. The transition from colonialism to an independent, viable post-colonial state proved exceedingly challenging. Elites chose first to consolidate their own power. They stifled dissent, dismantled liberal constitutions, retreated to ethnic loyalties, and buttressed the patrimonial state.[5] Corruption and crony capitalism became a culture. Infrastructures collapsed, societies fragmented, religious, civil, and ethnic conflicts became all too common. A number of states entirely collapsed.[6] The transition from colonial rule to a viable post-colonial state proved more challenging that was expected. Building and sustaining state institutions – including in the justice sector – was undermined by the lack of internal cohesion, ethnic rivalries, cultural dissonance, and external interventions.

Every arm of the state – executive, legislature, and judiciary – experienced contraction, dysfunction, or collapse. An overbearing executive was often the culprit. The men in power usually corralled the legislature and turned it into a rubber stamp. The Africanisation and indigenisation of the judiciary failed to transform the justice sector from a colonially racist, anti-people, and oppressive instrumentality. Judges became extensions of the executive and served at its whim. Instead of becoming fountains of justice, courts were used to instill fear in the populace at the behest of the executive. The courts were used to crush political dissent and curtail civil society.[7] Under this climate it was impossible to even think of reconciling competing legal regimes within the state. Formal and informal justice systems – civil and common law, Muslim and sharia law, African dispute resolution and justice regimes, and Hindu law – co-existed without coordination. The result was a confused hodge-podge, a stew of legal regimes

in which justice was often the casualty. Legal pluralism, otherwise a source of strength and vibrant diversity, instead subjected citizens to often unequal, and discriminatory treatment. This was especially true for women and girls. As a result, courts and the wider legal sector were rarely viewed as legitimate institutions where citizens could seek justice. Judges were viewed with disdain, contempt, or fear in most African states. This is why today the law, courts, and the legal sector are viewed with suspicion by most Africans. Judiciaries are not perceived to be the guardians of legality or impartiality. To be sure, the illegitimacy of the justice sector extended to all the other arms of the state.

But even with these challenges Africa has been a resilient continent. The ravages of the Cold War started to retreat with the collapse of the Soviet bloc in the late 1980s. Africans arose as one to demand freer societies across the continent. Civil society was reborn. Political opposition found its voice and mobilised to take power. The entire continent, except Arab North Africa, was rocked by a wave of political liberalisation not seen since the Independence Decade.[8] It would not be until the fall of the Ben Ali kleptocracy following mass protests in Tunisia that the phenomena known as the Arab Spring ousted one dictator after the next in Arab North Africa.[9] A cauldron of revolutionary protests consumed long serving despots in Egypt, Yemen, Libya, and besieged others in Syria and Bahrain. In Africa, virtually all states have given in to political reforms. In Africa in particular, new social compacts, usually in the form of a rewritten, or new constitution, became the norm. Central to the new compacts between the state and citizens were the key tenets of the liberal tradition. These were the rule of law, political democracy through multipartyism and open, contested elections, checks on executive power, judicial independence, separation of powers, and a guarantee of individual rights. This wave of remaking the African state was known as the Second Liberation.[10] South Africa shed off Apartheid. To signal a new era, in 2001 African states transformed the Organization of African Unity, an organ formed to complete decolonisation, to the African Union (the "AU"). One of the key objectives of the AU spoke to this new compact. It states clearly that the AU shall "promote democratic principles and institutions, popular participation and good governance."[11]

The last two decades have seen a steady rise in Africa's growth in virtually every sector – justice, economic, social, and political. Africa today has some of the world's fastest growing economies.[12] To be sure, there have been horrible reversals in some states, and a stubbornness to crises in others. The most desperate cases are driven by the collapse of social order, the failure of governance, and the persistence of privation. But the denial of citizens of the right to map their own fate has been at the centre of misery in the few states that have not joined the caravan of freedom. Even in those states that opted for a return to political democracy within the last two decades, many problems persist. Social inequities, economic deprivation, discrimination along every cleavage, and the lack of social justice are manifest. Either democracy has not been deepened, or a culture of justice has not penetrated the bone marrow. Challenges to entrenching systems of governance that give meaning to citizenship remain. Many

populations are still excluded from political participation and economic opportunity. It is clearly not enough to write great constitutions and enact good laws. Nor do elected legislatures and executives automatically usher a culture of justice, or create a human rights state. Judiciaries remain beholden to powerful and vested interests in politics and the economy. Power is still concentrated within very few hands, regions, or groups. The rule of law – understood as adherence to good laws – is not enough of a panacea for Africa's complex problems. There is no doubt that Africans must unpack the concept of the rule of law within a democratic polity to respond to these challenges.

3 • The Rule of Law as a Terrain of Contest

Its checkered history notwithstanding, the rule of law remains a pillar of good governance. It has evolved over time to contain within it the core values of human rights. Over time, the understanding of the concept – including its normative reach, scope, and content – has become more sophisticated. Soon after Africa's independence, cadres of Western academics and policy-makers believed that Africa's new states would be "civilised" by the rule of law. Western thought viewed pre-colonial Africa as pre-law, and thus argued that emergent states needed formal Western legal regimes to enter modernity. No credit was given to pre-existing African legal systems, which were often referred to as "customary law," "traditional," "savage," or "uncivilised". Such views were common in the colonial Church which often was practically fused to the colonial state. A pithy example is that of Shropshire, a British missionary in what is present-day Zimbabwe. He wrote of "unlettered Natives" who "were in the technically barbaric and pre-literary stage of cultural and social development."[13]

European, or white, predestination over black, brown, or yellow peoples has a long history. Shropshire's worldview was part of the fuel for the colonial project. It is a philosophy that grounded the civilising mission, the justification for Empire, and the attendant Christian conquest over "barbaric" peoples. Rudyard Kipling, the English poet, captured it well in the White Man's Burden:

> *Take up the White Man's burden, Send forth the best ye breed*
> *Go bind your sons to exile, to serve your captives' need;*
> *To wait in heavy harness, On fluttered folk and wild—*
> *Your new-caught, sullen peoples, Half-devil and half-child.*[14]

Kipling was not writing about Africa here, but his exhortation of the United States of America to take over and civilise the Filipino natives is a classic. His command to white men to colonise native peoples for their benefit is a duty of the race. It is impossible to understand the colonial project and the movement of modernity absent Kipling's worldview. Nor is it possible to comprehend the Westernisation of the Global South through the mediums of the modern state with the apparatuses of concepts such as the

rule of law and human rights.[15] Much of it was a negation of existing norms – an attack on accumulated wisdom. It was the murder of the spirit of so-called native peoples.

This is the context in which the West viewed the rule of law in Africa during colonial rule and especially in the aftermath of decolonisation. These erroneous notions were partially fueled by another erroneous assumption – that pre-colonial Africa was devoid of law, or that so-called African customary law was a downwind on the African state. The initial law and development movement sought to implant Anglo-Saxon legal norms in emergent states through the establishment of law schools, the training of legal professionals such as judges and lawyers to support a market economy and budding political institutions. No attempts were made to view law in the wider social context both domestically and internationally. How could law be used to transform deeply embedded social and economic justices? Was there a difference between due process and procedural justice, as opposed to substantive justice? Would law play any role in freeing Africa from an unjust international economic order? Would the rule of law combat illiberalism or bad governance by rulers and elites bent on husbanding their privileges? In a word, how could law be used as a tool for social justice? These questions, which are central to the rule of law, went largely unanswered. As a result, many of the same academic proponents of the initial rule of law movement for development declared it a failure by the early 1970s.[16] Thereafter, the concept of the rule of law and development endured ridicule. Academics and policymakers realised how complex, and arduous, the process of creating viable and legitimate states would be. The early optimism died. Over time, there was realisation that rule of law understood in a more liberating idiom would play a key role. Thus its centrality in the rethinking and practice of social reconstruction, nation-building, spurring economic development, and good government never went away. The reason is that Africans understand, and do not want to imagine, let alone live in, a society devoid of the rule of law. It is the meaning and practical effect of the rule of law, not its importance or necessity, that remains a terrain of contest. What is clear is that the concept is rapidly evolving and is being re-imagined by thinkers and practitioners.[17] Even so, it still has its ardent critics and fervent defenders.[18]

The crisis of legitimacy of the rule of law has not dimmed its star. In fact, the current re-imagination of the African state is not possible without the rule of law. Concepts of transparency and accountability – which are central to the rule of law – lie at the centre of efforts by civil society, the political opposition, the press, and the judiciary to penetrate and reform the deep state. The writing, or revision of new constitutions, place at the centre the use of the rule of law to promote equity and protect the citizen and her resources from plunder. It is the norm used to justify why power must be decongested – deconcentrated – from the centre and brought closer to the people. The emerging clamour for devolution as a legal and constitutional device to address official impunity and create less opacity and accountability in smaller units embeds the rule of law as one of its key weapons. In an era where social media makes each citizen an "eye of the people", access to timely information and official documents permits the audit of the state by the

public. However, such an audit is not possible if government is not open and subject to law. The ability of marginalised communities to participate in politics and economic development depends on access to information. So is the delivery of services, access to justice, and health care. Individuals and communities are able to mobilise themselves for political action, or planning for development, if they can freely organise. Dialogue with, or protest against, local and central authorities is not possible without the rule of law.

4 • Rethinking Development

Africa must think anew about how to address many of the deep-seated questions that continue to bedevil state and society. The crises facing the continent do not have easy solutions. The problem is not the diagnoses of the malaise, but in the prescription to overcome them. Two variables, which are related, are often thought to be at the centre of these crises. The first, and perhaps the most important, is the nature of the African state itself. The illegitimacy of the imposed colonial state and its resistance to democratisation are key reasons for its dysfunction. The African state is reflexively repressive and generally disdainful of civil society. It has trouble performing the basic functions of statehood. Its proclivity for corruption is well known. These problems stand at the centre of the crisis. The second variable is Africa's relationship with the international legal, political, and economic order. International institutions, hegemonic states, and the culture of international law have at best been negligent, and destructive at worst. Internally, Africa has attempted to answer the first challenge by rewriting the constitutional order to create a more transparent and responsive state. This attempt to reinstitute the original liberal promise of the early post-colonial state has born unsteady but visible results. On the second challenge, which is external, Africa has become more assertive with a resurgent economy.

The problem of development – underdevelopment – has been a major challenge for Africa. Different global, continental, and national initiatives have been tried. While there have been some successes, no one can dispute the persistence of poverty even in the best endowed and most developed countries on the continent. Large populations continue to live in dire poverty. Inequality, discrimination, and violations of the most basic human rights are endemic. Bad governance and corruption eat away at the fabric of society. Some global initiatives, such as the much-touted Millennium Development Goals (the "MDGs"), have come and gone. While the MDGs were laudable, and some progress was made under them, the overall record has been mixed. Some critics argued that the MDGs were vague and lacked sufficient input from the Global South.[19] The legitimacy of the MDGs was questioned. Critics charged that the constituencies targeted by MDGs were treated as passive recipients, not actors with agency. Neither the rule of law, nor human rights, were explicit in the agenda.[20] It is now clear that accountability and transparency – nationally and internationally – are essential to meaningfully transform societies. The post-2015 Sustainable Development Goals (the

SDGs), a more refined global initiative, seeks to remedy some of the deficits of the MDGs. Will the SDGs do for Africa what the MDGs could not?

Unlike the MDGs, the SDGs have a more expansive and exhaustive catalogue of goals that span the entire scope of the human condition.[21] The essential elements in all the goals are equity, sustainability, inclusivity, transparency, empowerment, access, and equality. Of all the SDGs, Goal 16 comes closest to articulating a rule of law agenda in the context of development. It calls for the promotion of "peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels". The key language – "provide access to justice for all" – recognises that sustainable development is not possible without functioning and effective institutions to dispense justice without fear or favor to every person. This is the essence of the rule of law. The rule of law is not simply a totem of democracy, but an integral and core element in every aspect of human development. Although it has historically been associated – wrongly – with only civil and political rights, the rule of law is indispensable for the realisation of economic, social, and cultural rights. The segregation of the two cannons of human rights was not a labour of the intellect, but a necessity of politics. That is why the chasm of both sets of rights cannot be watertight, and must be collapsed in any true development initiative. This is particularly true for Africa where the violations of one cannon of rights (civil and political rights) is a direct result of the denial of the other (economic and social rights). A dynamic understanding of the law of law in Africa cannot be limited to legal formality and procedure. It must have as its core norm a rejection of oppressive vested property and market interests that use the law to protect ill-gotten wealth and an unjust economic order. Social and substantive justice must be a mission of the rule of law.

5 • Beyond Traditional Liberalism

Development is not a linear process that can be reproduced from country to country. In fact, the contrary is true. Transplanted models of development and politics have fared very poorly in Africa. There is ample evidence, empirical and otherwise, that the traditional tools of the formulaic liberal state are not a panacea for Africa's ills.[22] Africa cannot adopt undigested liberal theories of the state reconstruction if it hopes to benefit from some of the most compelling values.[23] It must identify and rethink many normative tenets of liberalism and thus the rule of law. This is necessary to respond to the particular historical challenges and cultural context of the African landscape. Thus the rule of law cannot be exported to Africa ready-made. The rule must be divorced from its imperialist origins and uses.[24] Africans need to identify and isolate those thematic, normative, and sectoral areas most likely to be impacted the most by the language of rights, and use the rule of law to transform them. Many of them are overarching and cross-cutting. The core values are: integrity, transparency,

accountability, equity, equality, access, and participation. No sustainable development – which gives citizenship meaning and every citizen a sense of belonging and allows a culture of justice – is possible without them. Simply put, the rule of law is meaningless without each of these core values which must be addressed in the followings ways:

1 – Devolution

It is unarguable that a thorough reform of the state and its institutions is a condition that is required for development to occur. A key problem has been the concentration of power in the executive, and the concentration of that power in the hands of the head of state. This arrangement begot the patrimonial state and bred impunity and corruption. Power must be decongested and devolved to smaller units within the state. But power should be understood as both political and economic. Thus devolved units must have the ability to plan and expend resources in a locally participatory process. This makes locally elected officials accountable at the grassroots. But care must be taken that the corrupt practices at the centre are not just simply devolved to local powerbrokers. Nor should the local units engage in practices of exclusion and marginalisation along gender, religion, ethnic, or other cleavages. Devolution of power and resources is therefore one of the most effective devices for creating the conditions for sustainable development. The true devolution of power brings government closer to the people because it creates opportunities for popular participation in the projects and institutions of governance, including actors in the justice sector. Done correctly, devolution demystifies the courts and makes justice tangible to citizens. Devolution in this imagination goes beyond process – it is consequentialist and concerned with substantive outcomes and outputs in social justice. Devolution can be a safety valve for ethnic grievances in fractured societies because it permits a degree of regional, or ethnic autonomy, without weakening the central state, or turning into full-blown federalism. It can enhance national cohesion and give pre-colonial loyalties a reason to embrace the post-colonial state to create a national consciousness. In Africa, where virtually every state is hodge-podge of distinct pre-colonial ethno-political societies forced together by the colonial cartographer,[25] devolution serves the purpose of forging a common national identity.

2 – Transparency

This is an unarguable condition which is required for inclusive and participatory political and economic development. Without it, any meaningful notion of the rule of law, or a culture of justice, would be a mirage. State brutality, impunity, and corruption grow where the state is opaque. Information about government resources and how they are spent is essential. This requires institutions of oversight at the local and national levels and an unfettered press. Citizen participation in planning – akin to the traditional African *baraza* (public open-air meeting) – allows communities to claim their own development and gives meaning to their agency. This is especially true, for example, in the context of the exploitation of mineral and natural resources.

3 – Equity and social justice

These are indispensable to social stability and development. One of the most underdeveloped sectors in African states is the justice sector. Traditionally, judiciaries have been beholden to the executive and corrupt private business interests.[26] Courts of law are often not fountains of justice.[27] Judges are regularly for sale, and lawyers facilitate the corrupt deals. Large segments of the population that cannot buy justice have no access to the courts. Women and the poor, often the largest segments of the population, are shut out. It is not unusual for litigants to wait for a decade before a case is heard. Lack of access to justice is compounded by the paucity of courts in rural areas where the majority of Africa lives. Yet this is where courts are most needed to settle land disputes and protect the vulnerable such as women who are often disinherited, or subjected to severe exclusion. These conditions create an angry and impoverished population incapable of playing any meaningful part in development. Such marginalised populations cannot defend themselves or take part in the practices and ceremonies of political democracy. These conditions hollow citizenship out. The answer to these dire conditions is to re-establish the institutions of justice and retrain people working in the judicial sector. There are many examples in Africa where the successful recreation of the justice sector is already underway. Access to justice must be an end in itself. But a re-imagination of the justice sector cannot reify the judiciary, or forget to integrate and treat with dignity so-called alternative justice systems. Legal pluralism is a fact of most African states, but the most neglected legal regimes, such as sharia law and African dispute resolution mechanisms, affect millions. A reform of the sector needs to regularise these systems and bring them within the purview of public law while at the same time cross-breeding their most liberating norms with the common or civil law systems.

4 – Culture of governance

Or put differently, the culture and style of politics. In Africa, the culture of governance weighs heavily on the state. Political power is remote from the people. Those who carry the instruments of the state expect to be feared, not just respected. Public officials are masters, not servants of the people. This construction of public power goes against every norm of democratic governance. It stifles citizens, kills dissent, and dulls the public. It puts the state at perpetual loggerheads with the people. It creates deep distrust in the population towards public authority. This culture of dictatorship has been identified by Africans as the greatest hurdle to sustainable development. It breeds impunity and runaway corruption. It is unaccountable. The arrogance of power facilitates the theft of public resources and condones the violations of basic human rights. Great strides to unpack this phenomenon have been made in the last two decades. Intellectually, Africans know that this indefensible culture is the bane of the state. The African press in every country is awash with incident after incident of unacceptable conduct by public officials and their business acolytes. It is a culture that must be directly interrogated

and publicly confronted. Africa will not advance unless these colonial-era mentalities of governance are banished from public life.

5 – Women and citizenship

Gender remains among the thorniest challenges to the rule of law and development. A poisonous mix of culture, colonial-era laws, and religious practices have conspired to consign women and girls to the margins of society. Their exclusion from public life is a stunning fact of African existence. The privation of African women – from domestic violence to exclusions on property ownership are well known. The facts haunt the human conscience. Yet some women have been resurgent of late with many joining the professions, as business entrepreneurs, and within the corridors of public power. But gender biases persist, and those who have escaped marginalisation are but a tiny few. There is consensus that actual and sustainable development will not occur unless women are not only included, but play a manifestly public role. The concept of the rule of law must be transformed by theories of insubordination and multidimensionality – recent understanding of gender and powerlessness that unpacks the complex ways in which multiple identities subject a group to layers of oppression and exclusion.[28]

6 – Women and Migrants

Another population that is excluded – and often abused – is migrant labour. Though not citizens in the classic sense, many migrant workers have settled permanently in their host countries. Many of these migrants are also women who suffer doubly because of their gender and alienage. As South Africa has demonstrated with recent shocking xenophobic attacks – migrant workers often bear the brunt of the anger generated by the lack of social justice and inequitable development.[29] This category of the population is disposed in similar ways like women. However, migrant workers are a norm in Africa. That is why any discussion of the rule of law should not exclude migrant workers, immigrants, and refugee populations in Africa.

7 – Land ownership, access, and reform

Even though the last four decades have seen a historic surge of Africans moving to urban areas, the largest African populations still live in rural areas. Agriculture remains the backbone of African economies, even where mineral wealth is abundant. Land, in a word, remains the surest source of wealth and livelihood. And yet land ownership – and access – remains highly exclusive, inequitable, and a great source of conflict. No issue is more volatile in Africa. Land is the source of water, pastures for livestock, and the basis of Africa's family economy. But large populations have historically been excluded from land ownership, or access to land. Much of the alienation from land is traceable to colonial expropriation – and evictions of so-called "natives" from their ancestral lands. These historical injustices have largely been uncorrected by successor regimes. They are the source of many clan, inter-

ethnic, and inter-communal conflicts. Successor regimes oftentimes exacerbated alienation by allocating land formerly owned by colonialists to favored ethnic elites, or cabals and cartels close to the regime. Land is a powder keg in Africa. The cases of Zimbabwe, South Africa, Kenya, and virtually most African states attest to land policies fraught with challenge and often catastrophe. This is complicated by the exclusion of women from land ownership, although they are the ones who are primary tillers of land. The law has been a diligent and faithful servant to corrupt cartels that illegally "grab" land often with fake or forged documents.[30] The rule of law as a vehicle for equitable development must address land as a key bottleneck to Africa's stability and growth.

8 – Africa and the world

No discussion of Africa's development is complete without an exploration of the continent's relationship with the outside world. Much of that history is tortured, but there are many positive aspects of it. Ali Mazrui, the renowned Kenyan intellectual, spoke of the richness and paradox of this phenomenon as "Africa's triple heritage",[31] a reference to the complex alchemy of Africa, Europe, and the Muslim world in Africa's identity. External forces have both ravaged and enriched Africa. But it is the inequitable structure and disequilibrium between Africa and the world that needs to be addressed as an integral part of Africa's march towards a greater global destiny. Africa's voice in shaping and influencing international norms, institutions, and practices needs to be enhanced. Inequity in international markets and biases towards Africa must be eradicated. A new global order without superiors and subordinates – where Africa sits at the bottom – must be one of the primary outcomes of the SDGs. This is a large conversation covering trade, geopolitics, migration, and defence.

6 • Conclusion

The difficult South African experiment with democracy is proof that using rights discourse alone without a deep restructuring of the political economy can exacerbate powerlessness among the most vulnerable populations.[32] Law does not exist in a vacuum. Nor can law and rights language by themselves transform society. But what is unarguable is that no society can achieve sustainable development without infusing in its mainstream a culture of justice grounded in the core norms of the rule of law. However, these core norms must grapple with Africa's unique history and be adopted to its historical circumstances to achieve cultural legitimacy. Even more important, the rights language and the bed of political democracy, on which it rests, cannot be swallowed by Africa unchewed. Otherwise, the rebirth of the liberal project will die again – on the vine.

NOTES

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PROTECTION POLICIES
FOR HUMAN RIGHTS DEFENDERS

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• *An analysis of the Latin American context: Brazil, Colombia and Mexico* •

ABSTRACT

From a civil society perspective, this article examines experiences with policies for the protection of human rights defenders currently in place in three Latin American countries: Brazil, Colombia and Mexico.[1] It identifies the main issues of concern for the organisations monitoring these policies and indicates the challenges and the importance of regional coordination on the issue. Based on the experience of the Brazilian Committee of Human Rights Defenders, a platform that brings together non-governmental organisations and social movements, the article also analyses the process of implementing the National Programme for the Protection of Human Rights Defenders (Programa Nacional de Proteção aos Defensores de Direitos Humanos or PPDDH) in Brazil and its political institutions.

KEYWORDS

Defenders | Human rights | Protection | Civil society | State | Public policies

1 • Introduction

Despite Latin America's diversity and that there are many local particularities, we share various historical and political processes that bring us closer together. A region where the majority of countries are still young and considered fragile by many, it is marked by development models based on agribusiness, the extractive industry and infrastructure megaprojects (such as hydroelectric dams, ports and major urban renewal projects), as well as intense militarisation. It is no coincidence, then, that it is the scene of serious human rights violations. It is precisely for this reason that a large number of civil society organisations coordinate their actions to advance the debate on the importance of providing protection to those fighting to guarantee rights. It is therefore understandable that Latin America is home to three of the few countries in the world that have a state mechanism for the protection of human rights defenders (HRDs): Brazil, Colombia and Mexico.[2]

Brazil established the National Programme for the Protection of Human Rights Defenders (*Programa Nacional de Proteção aos Defensores de Direitos Humanos* or PPDDH) in 2004. When the first report on the situation of HRDs in the country was released,[3] a working group was created to discuss protective measures. Among the various issues of protecting HRDs (through individual or collective measures) which the working group addressed, one in particular was the challenge of maintaining defenders in the place where they conduct their activities. There was much discussion about the need to ensure that the justice system conducts a thorough investigation into the threats and attacks against HRDs and the need to address the issues that give rise to these threats and attacks.

At the same time, civil society groups from Colombia and Mexico have accumulated experience and have been promoting a debate on the effectiveness of their country's public policies for the protection and recognition of HRDs.

Colombia was one of the first countries in the region to adopt a protection mechanism for HRDs. The armed conflict, which has existed since the 1960s, serves as the main backdrop for the attacks and assassinations of thousands of HRDs in the country. For local civil society have strengthened their joint actions as the debate on the protection of HRDs has long been a key issue. With the eyes of the international community glued to the situation in Colombia, the first government programme for the protection of defenders was created in the late 1990s.

The history of institutional violence in Mexico, which involves complex networks, also turns a large number of HRDs there into victims. The government's protection programme is recent and human rights organisations have discussed whether it is an effective instrument for dealing with recurring cases of violations, threats and assassinations of HRDs and journalists.

2 • The history and structure of mechanisms in Brazil, Colombia and Mexico

Despite being first launched in October 2004, the Brazilian protection programme only became operational following the assassination of Sister Dorothy Stang[4] in 2005 in the state of Pará. The PPDDH is composed of a General Coordination Office and a National Coordination Office, in which representatives of civil society and public authorities participated in until early 2016. The National Coordination Office analyses the cases of defenders in situations of risk, develops strategies for protection and for addressing structural issues, and deliberates on cases of inclusion in or exclusion from the programme, among others. However, the civil society organisations[5] in the PPDDH had limited capacity to act,[6] especially in being able to respond to cases that are still pending and to the definition of protection strategies. The programme also has a Federal Technical Team, which is hired through a civil society organisation, whose task is to assist the states where the PPDDH has not yet been established.

The programme has been set up in nine Brazilian states. However, for different reasons, it was suspended in the states of Pará, Rio de Janeiro and Rio Grande do Sul, and has been interrupted several times in various other states. At the time this article was written, the programme had formally been established in only six states: Pernambuco, Minas Gerais, Espírito Santo, Ceará, Maranhão and Bahia. It should be noted, however, that in Bahia, no agreement has been established with an organisation on the implementation of the programme and in Maranhão, even though an agreement existed, the programme was still not operational.

The institutional weaknesses that mark the Brazilian programme reflect a series of problems that the Brazilian Committee for Human Rights Defenders - a network of social organisations and movements that have been monitoring the policy since the beginning - has been identifying[7] and raising with the Secretariat on Human Rights and also making public for many years.[8]

In Colombia, although there is no national law that specifically and fully addresses the issue, Law 199 of 1995 and Law 418 of 1997 served as the basis for the creation of the first government programme designed for people in situations of risk. The programme is linked to the Office of Human Rights of the Colombian Ministry of the Interior.[9] Since its creation, civil society has been monitoring it and questioning its weaknesses. This pressure has led to the enactment of several decrees, norms and regulatory protocols and in 2011, Decree 4,065 created the National Protection Unit (*Unidad Nacional de Protección* or UNP), again under the responsibility of the Ministry of the Interior.[10]

In addition to monitoring government policy, civil society has been coordinating to develop independent protection strategies since 1997. The Committee for the Protection of Defenders (*Comité para la Protección de Defensores*) was created in response to the assassination of human rights defenders Mario Calderón and Elsa Alvarado, which brought to the country's attention both the seriousness of the situation and the urgent need to protect defenders. In 1999, the

non-governmental We are Defenders (*Somos Defensores*) protection programme emerged with the support of various organisations, including the United Nations (U.N.), the European Union (E.U.) and human rights networks around the world.

The We are Defenders programme aims to ensure that full protection is provided for the lives of HRDs and to prevent attacks. The work is developed along different lines of action: protecting defenders directly and accompanying cases, mainly by relocating defenders within Colombia or outside of Colombia in high risk situations, as well as making direct financial support available through a fund; educational activities; political advocacy; communications strategies; and the Information System on Attacks on Human Rights Defenders (*Sistema de Información sobre Agresiones contra Defensores y Defensoras* or SIADDHH). Thanks to the coordination efforts of a broad network of Colombian social organisations and movements (currently over 500), this system documents and systematises case information in order to produce periodical reports on the issue. These reports are important sources of information for coordinating actions and exerting domestic and international pressure.[11] Some of these publications are thematic and offer more in-depth political analysis. The We are Defenders programme has earned a high level of recognition from the government and is called upon to participate in consultations and provide critical assessments of the UNP.

Since 2009, the programme, together with other civil society organisations that make up the four main human rights platforms in Colombia, participates in the *Mesa Nacional de Garantías* (national roundtable on guarantees). The roundtable is the highest instance of dialogue with the government. Monitored by the international community, it was created as a space for discussing and adopting effective measures on prevention, protection and on the investigation of issues related to human rights defenders. Local civil society organisations' evaluation of this space has been very positive due to the advances it has allowed them to make.

The experience with the Colombian mechanism served as inspiration for the programme developed in Mexico. There, the 2008-2012 National Human Rights Plan (*Plano Nacional de Direitos Humanos*) defined the competencies of state institutions and their responsibilities in the protection of human rights. The Office of the High Commissioner for Human Rights in Mexico published a report in 2010 in which it highlighted the importance of creating a national protection mechanism and collaborated in the elaboration of the law.

In 2011, Mexican organisations participated in several public hearings in the Senate on the elaboration of a proposal for a policy on protection. This process resulted in the publication of a legislative bill on the protection of human rights defenders and journalists, which was approved and published on 25 July 2012.[12] An advisory council for the protection mechanism was elected on 19 October 2012: since then, four representatives of defenders, four journalists and two scholars have been meeting regularly. However, the mechanism has had to face problems of bureaucracy and a weak response to the high demand before the protection mechanism. Therefore, the programme in Mexico is experiencing similar impasses to the ones found in Colombia.

3 • Civil society's assessment of the protection programmes

In general, civil society organisations in Brazil, Colombia and Mexico have identified various difficulties and challenges they share in relation to the protection mechanisms in their countries. Concrete recommendations have also been made, but unfortunately, their governments are slow to adopt them.

Perhaps the main one is the need for the programmes to articulate public policies and, more importantly, to tackle the structural issues that contribute to the vulnerability of HRDs and social movements.[13] Protection measures based primarily on policing or strictly material in nature will never be enough to protect HRDs who are under threat as long as there is no political will to address the problems that give rise to the threats and situations of vulnerability in the first place.

It is equally important that the threats be duly and effectively investigated in order to hold actors that threaten HRDs accountable. Without this guideline for justice, roles are perversely reversed, thereby helping to perpetuate the already generalised criminalisation or delegitimisation of HRDs, while the violators continue to be immune.

Another crucial element is the institutional weaknesses of protection mechanisms in the region. The case of Brazil is marked by the absence of a legal framework and the financial and political crisis that led to the dismantlement of state-level programmes and, in early 2016, to threats to dismantle the protection policy as a whole, which would cause serious setbacks in the human rights portfolio in the country. In Colombia and Mexico, despite the laws that sustain such programmes (although as said earlier, in Colombia, the UNP is sustained by decrees and norms, not a specific law) and sizeable budget allocations to them, there is a difference between what exists on paper and what is actually being done in practice. The volume and quality of the rules and regulations do not guarantee the effectiveness of protections, which are often reduced to purely material or palliative measures (such as heavy bullet-proof vests, mobile phones, vehicles and security escorts). In 2014, Colombia witnessed a corruption scandal involving the UNP, which exposed practices such as patronage and the embezzlement of millions of dollars in funds in the transfers to security companies.[14] The protection programme has outsourced the service of providing protection to HRDs to private security companies. The involvement of such companies in the implementation of protection measures of the mechanisms in Mexico and Colombia are, incidentally, a cause of great concern. These companies have been strongly denounced for their involvement with paramilitary groups, death squads and corrupt security agents.[15]

Furthermore, in the mechanisms of all three countries, private security companies have been given a major role. The level of participation of these bodies - whether it be in management positions or at the "point" of implementation of protection measures (as security guards for defenders, for example) - is highly questionable, as in many cases, they are the ones

issuing the threats and committing violations against HRDs. Many defenders do not trust the security guards who escort them, as not only do the guards not receive proper training for their work, but they also do not value the struggle of the people they are protecting. In light of this problem, the best option appears to be keeping public servants involved in the mechanisms, provided they are civil servants.

Another indication of institutional weaknesses is the high turnover in the management of the programmes, as reported in Brazil and Mexico. This lack of continuity merely shows the governments' lack of commitment to this agenda. In Brazil, the programme still does not have a more sound structure. However, an excess of institutional structures could mean excessive bureaucratisation, which can limit the participation of civil society in decision-making bodies and delay the implementation of urgent protection measures - as Colombian and Mexican civil society organisations have warned. The situation in Brazil got worse when on 27 April 2016, Decree no. 8724[16] was signed to strip the National Programme for the Protection of Human Rights Defenders (PPDDH) of its original features and backtrack on several points that had been established by Decree 6.044/2007, which created the programme. The new decree contains extremely problematic elements: it does not take into consideration collective subjects and institutions that work to defend human rights, only individuals. Also, it merely refers to "threatened persons" and no longer includes the broader term "at risk and in situations of vulnerability". Furthermore, it eliminated the participation - which was previously equal - of civil society and public agencies in the programme's coordination office or advisory council.[17]

There is a lack of clarity with regards to the methodology used by the PPDDH in Brazil for risk assessment. In this case, a consolidated work methodology is lacking in general. As for Colombia and Mexico, while the risk assessment methods are said to be quite objective, civil society affirms they are insufficient, inflexible and too strongly based on an instrumental logic, which leaves out the complexities and specificities that are inherent to the contexts of HRDs.

The human rights organisations from these countries have also reported the states' difficulties in dialoguing with HRDs and their concrete demands for protection. Channels of participation and attentive listening to the specific demands of a defender who is being threatened are fundamental, not only for the evaluation of the policy, but also to ensure that adequate measures are adopted for each case. Furthermore, these governments have not developed strategies for minority groups - that is, ones that take into account their specificities. There are no measures designed specifically for women, the LGBT community or indigenous peoples, for example, who are affected in unique ways. Therefore, there is still much to do in order to advance towards a collective approach to protection: in the three countries in question, the measures adopted prioritise individual actions. In some cases, this is not only insufficient - as it is entire groups or communities that are being threatened - but it also omits the possibility of having a more politicised view on the context in question.

4 • Conclusion

When one observes the difficulties and challenges analysed above, one issue that is present in the contexts of Brazil, Mexico and Colombia and that constitutes the main cause of the situations of risk and attacks on human rights defenders stands out: the contradiction between the development model adopted by these countries - which is grounded in the extractive industry, agribusiness and large-scale infrastructure projects - and the actions of the defenders. In all three countries, the HRDs affected the most are rural workers, indigenous peoples and traditional communities - that is, those who are involved in the fight for land and territory. The next issue - and Mexico is the most serious case here - is the right to freedom of expression: journalists and all those who denounce networks of corruption, political groups, large landowners and criminal groups that maintain control over territories and power are severely threatened and attacked. In the case of Brazil, it is important to highlight the harsh repression of protestors by security forces in the past two years, as well as the process of criminalising different forms of social protest[18] - an issue that also marks the context of the fragile democracy in Colombia. It is therefore crucial that we advance the debate on the violation of the fundamental rights of those, who in their majority, defend economic, social, cultural and environmental rights.

These political-economic-historical-social arrangements take on different nuances according to each country and region, but the forces at play vary very little: accelerated and aggressive development projects supported by heavy militarisation, which only exacerbate social inequalities and other long-standing structural problems. As long as there is no serious confrontation of these basic causes and no political commitment to do so, more defenders will continue to be attacked and more human rights will continue to be violated in a generalised way in Latin America. To promote better practices, regional and international coordination of civil society organisations that have been monitoring protection policies in this area for years is necessary in order for them to exchange experiences and strengthen their networks. The strategy of working as a group has proved to be an important lesson learned, as it increases the political weight of civil society actors and gives greater global visibility and value to the work of defenders. This, in turn, puts pressure on states to establish truly effective public policies for the full protection of human rights defenders.

NOTES

1 • The majority of the information and observations from civil society in Colombia and Mexico used in this article were gathered *in loco* by the Justiça Global team. The team visited both countries between July and August 2015 as part of a project carried out in partnership with Terra de Direitos and Front Line Defenders, with the support of Open Society. We would like to give special thanks to Protection Desk from Colombia and SERAPAZ from Mexico.

2 • In the region, Guatemala also has a government mechanism and Honduras is currently in the process of elaborating a policy.

3 • Justiça Global and Front Line Defenders, *Na Linha de Frente – Defensores de Direitos Humanos no Brasil (1997-2001)*, 1st ed., vol. 1 (Rio de Janeiro: Justiça Global, 2002).

4 • Dorothy Mae Stang, known as Sister Dorothy (Dayton, June 7, 1931 – Anapu, February 12, 2005), was originally a nun from the U.S. who became a Brazilian citizen. Since the 1970s, she had been working with rural workers in the Brazilian Amazon.

5 • The civil society organisations that compose the National Coordination of the PPDDH are: *Comissão Pastoral da Terra, Conselho Indigenista Missionário, Terra de Direitos, Justiça Global and Movimento Nacional de Direitos Humanos.*

6 • While this article was being written, Decree nº 8724 was signed, which instituted the *Programa de Proteção aos Defensores de Direitos Humanos* (national programme for the protection of human rights defenders). The decree ended civil society participation in the national coordination of the programme. We will discuss this matter later on in the article.

7 • The Brazilian Committee of Human Rights Defenders is composed of the following organisations: AMUS – Associação de Mulheres Unidas da Serra; Associação de Advogados de Trabalhadores Rurais – AATR – Bahia; Associação de Apoio à Criança e ao Adolescente – AMENCAR; Comissão Pastoral da Terra – CPT; Dignitatis – Assessoria Técnica Popular; Dom da Terra – AfroLGBT; CDDH – Serra; CDDH Dom Tomás Balduíno; CDDH Pedro Reis – Regional Sul/ES; CADH – Centro de Apoio aos Direitos Humanos Valdício Barbosa dos Santos "Leo"; Fórum Estadual de Juventude Negra/ES – FEJUNES; Fórum Paranaense das Religiões de Matrizes Africanas; Grupo Tortura Nunca Mais – Bahia; Justiça Global; Movimento Nacional de Direitos Humanos – MNDH; Movimento dos Atingidos por Barragem – MAB; Movimento dos Trabalhadores Sem Terra – MST; Secretaria de Justiça e Segurança Pública da ABGLT; Sociedade Paraense de Defesa dos Direitos Humanos – SDDH; Sociedade Colatinense Proteção e Defesa dos Direitos Humanos; Terra de Direitos.

8 • The letters with the most recent recommendations are available at: http://global.org.br/programas/carta-aberta-sobre-a-politica-de-protecao-as-defensoras-e-defensores-de-direitos-humanos/; "Letter to the National Secretariat for the Promotion and Defense of Human Rights Demands Improvements to the Defenders Protection Programme", Terra de Direitos, 2015, accessed May 5, 2016, http://terradedireitos.org.br/2015/03/04/carta-enviada-a-secretaria-nacional-de-promocao-e-defesa-dos-direitos-humanos-cobra-melhorias-no-programa-de-protecao-aos-defensores/.

9 • María Martín and Luis Enrique Egure, "Protección de Defensores/as de Derechos Humanos: Buenas Prácticas y Lecciones a partir de la Experiencia." Protección Internacional, 2012, accessed May 20, 2015, http://protectioninternational.org/wpcontent/uploads/2013/04/Proteccion_de_defensores/as_buenas_praticias.pdf.

10 • "Informe Especial - Protección al Tablero," Somos Defensores Programme, 2014, accessed May 6, 2016, http://www.somosdefensores.org/attachments/article/88/proteccion_al_tablero_version_eb.pdf.

11 • Somos Defensores Programme, accessed September 12, 2015, http://www.somosdefensores.org/index.php/en/.

12 • "Ley para la Protección de Personas Defensoras de Derechos Humanos y Periodistas y Reglamento de la Ley para la Protección de Personas Defensoras de Derechos Humanos y Periodistas," Secretaría de Gobernación, 2012, accessed March 15, 2015, http://www.derechoshumanos.gob.mx/es/Derechos_Humanos/Ley_para_la_Proteccion_de_Personas_Defensoras_de_Derechos_Humanos_y_Periodistas.

13 • Rafael Dias, Sandra Carvalho e Isabel Mansur, *Na Linha de Frente: Criminalização dos Defensores de Direitos Humanos no Brasil (2006-2012)*, 1st ed., vol. 1 (Rio de Janeiro: Justiça Global, 2013).

14 • "Carrusel de Contratos en la UNP Dejó Pérdidas por $600 Millones," El País, 2014, accessed May 6, 2016, http://www.elpais.com.co/elpais/judicial/noticias/capturan-gerente-financiero-unidad-proteccion-por-corrupcion; "Director de la UNP Denunciará Más Casos de Corrupción," El Espectador, 2014, accessed May 6, 2016, http://www.elespectador.com/noticias/judicial/director-de-unp-denunciara-mas-casos-de-corrupcion-articulo-515260.

15 • Ignacio de los Reyes, "Além do Narcotráfico, México Teme Agora os Paramilitares." BBC, 2011, accessed May 6, 2016, http://www.bbc.com/portuguese/noticias/2011/10/111007_mexico_mata_zetas_paramilitar_mm.shtml; Daniel Valero, "Temen que Proyecto de Cooperativas de Seguridad Reviva las Convivir." El Tiempo, 2011, accessed May 6, 2016, http://www.eltiempo.com/archivo/documento/CMS-10314228; Zósimo Camacho, "Seguridad Privada: 50% de Empresas, Irregulares." Contralínea, 2013, accessed May 6, 2016, http://contralinea.info/archivo-revista/index.php/2013/05/21/seguridad-privada-50-de-empresas-irregulares/.

16 • Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Decreto/D8724.htm.

17 • The Brazilian Committee of Human Rights Defenders adopted a critical stance on the new decree and submitted a document suggesting changes to the then Ministry of Women, Racial Equality, Youth and Human Rights (eliminated in May 2016 by the Michel Temer government).

18 • Dias, Carvalho e Mansur, *Na Linha de Frente.*

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SOVEREIGN DEBT RESTRUCTURING, NATIONAL DEVELOPMENT AND HUMAN RIGHTS[1]

Julieta Rossi

• *Towards a new global consensus (with powerful opponents)* •

ABSTRACT

Julieta Rossi describes how the Néstor Kirchner administration (Argentina) negotiated one of the most important debt swaps in the history of international finance. However, a court judgment in the United States of America, which held that the vulture funds could expect full repayment, undermined the sovereign agreement that had been reached with the majority of other creditors. This article examines how this decision led to international condemnation that the property rights of a few – the creditors - could be held to be more important than the rights of the many – those populations predominantly, though not exclusively, in the Global South. These people's economic, social and cultural rights would likely be negatively impacted by the financial instability of their respective countries if countries are forced to exhaust all resources to pay off their sovereign debt. Key resolutions have subsequently been adopted by the U.N. General Assembly and the Human Rights Council on the issue. Here Rossi examines the Basic Principles on Sovereign Debt Restructuring Processes, which constitute the main guidelines upon which the multilateral regulatory framework must be based. She calls on countries in the Global South to double their efforts to advance their own agenda on the creation of a more just, democratic and equitable international order that truly benefits its peoples and protects the sovereign equality of states.

1 • The destabilising actions of "vulture funds" and the United States of America (U.S.) justice system in Argentina: A starting point to kick off the global debate

In 2005, Argentina initiated an unprecedented process to reduce its debt burden.[2] It paid off its existing debt with the International Monetary Fund (IMF) and other multilateral agencies that, in recent decades, had been promoting the adoption of neoliberal policies, which have severe impacts on the population of borrowing countries.[3] In spite of this payoff, USD 81.8 billion of defaulted bonds remained in the hands of private creditors, a result of the largest default in Argentina's history in 2001. In 2005 and 2010, the Néstor Kirchner government promoted debt restructuring processes that involved the cancellation of around two-thirds of the value of the defaulted bonds. These processes were accepted by more than 90 percent of bondholders in one of the most important debt swaps in the history of international finance. Together, these measures "ensured the sustainability of the economic process thanks to the drastic reduction of foreign debt burden and the elimination of the restraints that IMF conditionalities imposed on economic policy."[4] They were framed as a political decision to break the cycle of subordinating national interests to those of financial capital and to achieve higher levels of autonomy and sovereignty in defining domestic economic policy.[5] This repositioning of the state marked a turning point in policy direction. It led to the implementation of policies for economic growth geared toward strengthening the domestic market, promoting employment and social inclusion, and consolidating higher levels of public investment, especially in social services.

Despite the very positive results of the debt restructuring processes, a minority group of creditors led by NML Capital Limited, a subsidiary of the U.S.-based fund Elliot Capital Management (whose public face is Paul Singer, a contributor to U.S. Republican Party campaigns) refused to join the debt restructuring process and filed a lawsuit in courts in the U.S. This group, which constituted only 1.6% of all bond creditors, demanded to be paid 100% of the amount claimed, thus seeking to obtain a tremendous return of approximately 1600% on what they had paid for the bonds at the time of acquisition. These hedge funds, also known as "vulture funds," acquire the debt of highly indebted states on secondary markets at heavily discounted prices, for speculative purposes. Vulture funds have been especially active since the 1990s. Their goal is to engage in litigation, embargos, smear campaigns, and other forms of political pressure against debtor states in order to obtain full payment of the face value plus accrued interest.[6]

In 2014, a federal judge of a trial court, Thomas Griesa, handed down a ruling in favour of this group.[7] This ruling was then ratified by the U.S. Court of Appeals for the Second Circuit in New York and later validated by the U.S. Supreme Court, which decided not to intervene in the case.[8] Based on an unprecedented interpretation of the *pari passu* (equal treatment of creditors) clause, the Griesa ruling barred the Argentine

government from paying the restructured debt unless it paid the group of creditors that had not entered the agreement at the same time. It thus established a mechanism to block the process of paying off the restructured public debt and gave priority to the property rights and the speculative purposes of the bondholders who had not agreed to the restructuring agreement. At the same time, the sentence meant the Argentine government would be forced to ignore the domestic laws on the restructuring of the public debt that the Congress passed in a clear exercise of sovereignty.[9]

In contrast, the Supreme Court of Argentina recently ruled in the Claren Corporation case that the government had the legitimate authority to restructure or suspend payment of the sovereign debt in order to guarantee that the state could continue to function and provide basic services. It also reaffirmed that it is the Court's duty to prevent the execution of a foreign court ruling when the ruling allows an individual actor to evade a debt restructuring process carried out according to domestic laws, which had been adopted in accordance with the constitution.[10]

In sum, the intervention of the U.S. justice system, whether by act or omission, validated the following: a vulture fund - or any creditor that refuses to participate in a debt restructuring process undertaken by the sovereign decisions of a state to create the conditions necessary for national development - can dismantle or destroy an agreement that has been negotiated with the rest of the debt holders. Thus, the U.S. judicial system endorsed the exercise of extortion toward a country seeking to guarantee the compatibility of the external debt restructuring process with its economic development. Within this framework, the vulture funds conflict is the expression of "new forms or attempts to subordinate national states to the logic of international financial capital".[11]

During the negotiation process that began once the Griesa ruling became final, the judge committed many inaccuracies, expressed biased attitudes, and adopted extravagant resolutions that were difficult to understand even for those involved in the process and interested third parties, such as the banks through which the payments to creditors who accepted the restructuring were to be made.[12] Judge Griesa later accepted the claim of the so-called "me too" creditors who demanded equal treatment with the original funds, NML and Aurelius. It is worth mentioning that around 7.6 per cent of the bondholders, whose nominal value is approximately USD 5.6 billion, did not partake in the debt swap. It is estimated that if payment were made to the vulture funds and holdout creditors according to the formula designed by Judge Griesa, it would mean issuing between USD 17.8 billion and 22 billion of new debt - that is, half of the USD 40 billion in bonds that Argentina handed out during the restructuring process in order to normalize 92.4 per cent of those liabilities.[13]

From the time the conflict began until the end of former president Cristina Fernández Kirchner's term in 2015, the Argentine state's position was to pay the rest of the bondholders, provided that they came to a fair, sustainable, and legal agreement with

conditions similar to those of the restructured bondholders. This position was endorsed by renowned economists.[14] Since current president Mauricio Macri assumed office on 12 October 2015 - defending an orthodox and liberal vision on the economy and a return to the logic of external borrowing - resolution of the vulture funds conflict has been a central issue and priority on the government's agenda. In record time, an agreement that is extremely advantageous for these funds was reached. It contains *pari passu* clauses (which include the so-called "me too" creditors) and only cancels between 30 and 27.5 per cent of the monetary claim. However, the percentage used for Singer and related vulture funds is 25 per cent, which falls to 22.5 per cent when other benefits are taken into account.[15]

Furthermore, the agreement demands that the Argentine Congress repeal the "Padlock Law" (which established that the state could not offer vulture funds better conditions than those offered to the 93 per cent of the creditors who accepted the restructuring of their debts in the 2005 and 2010 debt swaps) and the Sovereign Payment Law (which named Nación Fideicomisos as the trustee of these payments in place of the Bank of New York). Passed on 30 March 2016, the law that approved the settlement agreement authorised the issuance of USD 12.5 billion in government bonds, the highest amount issued by a developing economy in the last twenty years.

Several analysts anticipate that this agreement, which does not include all litigants, could give rise to new complaints against Argentina by those who negotiated less favourable conditions than the ones now being offered to the vulture funds. This would worsen the problem the agreement claims to resolve.[16] One of the arguments that the bondholders who participated in the restructuring process could use is Law 27.207/15, passed by Congress in November of 2015, which declares the *Basic Principles on Sovereign Debt Restructuring Processes* to be of "public order" and an integral part of Argentina's legal system. The Principles were approved by the United Nations (U.N.) General Assembly in September 2015 and will be examined in Section 3 of this paper.[17] Economists Joseph Stiglitz and Martín Guzmán warned that the agreement signed with the vulture funds "was excellent news for a small group of well-connected investors, and terrible news for the rest of the world, especially countries that face their own debt crises in the future."[18]

Litigation and the ominous fate of this conflict in particular aside, the former Kirchner government decided to actively promote a regulatory framework on the international stage - which to date is still non-existent - to prevent these private groups from engaging in extortion and allow other nations to sovereignly restructure their foreign debt in order to reach orderly and sustainable agreements.

This foreign policy decision came to fruition in the form of a series of key resolutions adopted by the U.N. General Assembly and the Human Rights Council in 2014 and 2015. The resolutions aimed to fill the existing gap in this area and to safeguard the fundamental rights of affected countries' populations against the speculative interests of financial capital, as we will see below.

2 · Towards a new global consensus on sovereign debt restructuring

Due to the deeply unjust consequences of the Argentine case and its implications for other developing - or even developed - countries[19] (take, for example, the recent cases of Greece[20] and Puerto Rico), the conflict garnered massive support from the international community and, with it, countless declarations of solidarity from various states, regional and international institutions, scholars, and social organisations.[21]

The Argentine case was a spearhead in calls for changing the way the global capitalist system functions, as it offers the vulture funds excessive opportunities to engage in speculation. The conflict brought to light legal gaps at the international level that must be filled: for instance, the lack of regulation on the processes for collecting on sovereign debt. One must take into account that for developing countries, and the poorest countries in particular, debt relief - especially cancellation and restructuring of debt - can be a mechanism to safeguard the people's well-being and their ability to exercise their basic rights. This regulatory gap is particularly important in a context in which experts estimate that the number of claims filed by vulture funds will increase in the future. A recent study shows that the amount of cases against debtor states has doubled since 2004, with an average of eight cases filed per year. Africa and Latin America are harassed the most by vulture funds.[22]

At the regional level in Latin America, strong statements have been issued by MERCOSUR, UNASUR, CELAC, PARLASUR, as well as an Extraordinary Meeting of Consultation of Ministers of Foreign Affairs of the Organization of American States (OAS), which was called exclusively to discuss the situation of Argentina and vulture funds. At the international level, the Group of 77 and China (G77+China) mentioned the issue in its declaration during the "For a New World Order for Living Well" summit, as did the Group of Twenty (G20). Similarly, technical organisations such as the ECLAC and the IMF spoke in favour of introducing changes to the current state of affairs. In the private sphere, the International Capital Market Association (ICMA), a reference for investment banks and large international funds, announced its decision to modify the rules to be used in future restructuring processes in order to prevent cases such as that of Argentina from arising again.[23]

Additionally, human rights organisations around the world have criticised the actions of the U.S. justice system in favour of the vulture funds. They have emphasised that the conflict "reflected a global problem with impacts on human rights" and demanded that the financial system be reformed to restrict "the predatory activities of creditor funds". Among the more than one hundred organisations involved, the Center for Legal and Social Studies (CELS), the *Comisión Colombiana de Juristas, the Ligue de Droits de L'Homme*, Conectas Human Rights, the Center for Economic and Social Rights and the Center of Concern stand out.[24]

The intense international mobilisation, combined with the strong determination of Argentine diplomacy to find a just, equitable and sustainable solution to the conflict, led to the adoption of a series of extremely important international resolutions in September 2014. The resolutions aimed to regulate the debt restructuring processes and limit the predatory actions of vulture funds[25] and other representatives of financial capital in order to guarantee the right to development, material well-being and human rights of the affected populations. These resolutions were considered a major step in the development of international law on sovereign debt restructuring.

First, the U.N. General Assembly approved a resolution to elaborate and approve a multilateral legal framework to regulate the restructuring of the countries' public debts. The resolution's text, which Bolivia promoted as president of the G77+China, explains that the purpose of this legal framework is to increase the efficiency, stability and predictability of the international financial system and achieve sustained, inclusive and equitable growth and economic development in accordance with national circumstances and priorities.[26] There were 124 votes in favour of the resolution, meaning that 70 per cent of the states present in the debate were in favour of its adoption.[27] As Bolivian Ambassador to the U.N. Sacha Llorenti pointed out, the importance of this resolution lies mainly in the fact that for the first time, this issue was being addressed in the most democratic and legitimate organisation of the multilateral system where, he emphasised, "all countries have one vote, regardless of the size of their economy or military power".[28] In December 2014, a new resolution, which gained the support of new countries, advanced the process to put the legal framework into motion.[29]

The U.N. Human Rights Council, for its part, adopted by a large majority[30] a resolution[31] to conduct an investigation on the impact of the activities of vulture funds on human rights.[32] Furthermore, the resolution condemns the repayment of debt under predatory conditions, due to the direct negative effects it has on sovereign governments' capacity to fulfill their obligations on economic, social and cultural rights in particular. It also encourages states to participate in negotiations on the establishment of a multilateral legal framework that is compatible with international human rights norms.

3 • The way forward: a multilateral legal framework for sovereign debt restructuring processes in accordance with human rights

As we saw above, the need to impose limits on the vulture funds' operations and to generate clear, fair and predictable rules that provide a framework for sovereign debt restructuring processes succeeded in entering the agenda of the organisations at the centre of the U.N. system as a question of development and human rights. The issue was not relegated to conferences and political declarations of typical economic forums where the U.S. and core countries play a predominant role. This situation reveals a transnational consensus "under construction" on the need to impose (certain) limits on the "deregulated" functioning of the world economy and financial capitalism.

Based on the proposal put forward by Argentina, with the support of the countries of the G77 + China, the U.N. General Assembly went one step further and approved Resolution 319/69 on September 10, 2015, which establishes the *Basic Principles on Sovereign Debt Restructuring Processes* ("Basic Principles"). The resolution was approved by an overwhelming majority, with 136 votes in favour, six votes against (led by the U.S. and countries representing main financial centres)[33] and 42 abstentions.[34] These numbers indicate the high level of global consensus on the need to resolve debt crises - which are growing in number - in a timely, legitimate and equitable manner. For this to happen, sustainable and long-term solutions must be identified, especially in light of the fragility of the global economy and the commitment to achieving development objectives and the post-2015 development agenda.[35]

The countries that represent main financial centres, led by the U.S., advocate for negotiations on this issue to be held in the framework of the IMF - a more favourable arena in which they have an unquestionable advantage. Together with the main market players, they argue in favour of a contractual approach - that is, they propose modifying sovereign bond contracts.[36] Joseph Stiglitz, who chairs the Initiative for Policy Dialogue Taskforce on Debt Restructuring, points out that modifying bond issuance contracts is insufficient to resolve the multiple and complex challenges of these processes. He supports the need to create a multilateral framework for debt restructuring.[37]

The Basic Principles take up several fundamental postulates that have already been elaborated in this area and approved by the Human Rights Council: the *Guiding Principles on Foreign Debt and Human Rights* and the *Principles on Promoting Responsible Sovereign Lending and Borrowing*.[38] These principles promote the articulation of responsible sovereign lending and borrowing with human rights and international public law obligations. Moreover, they have the added value of having been adopted by the most representative and democratic body of the international community: the U.N. General Assembly.

These new principles - the sovereign right to debt restructuring, sovereign immunity, equal treatment of creditors, majority restructuring, transparency, impartiality, legitimacy, sustainability, respect for human rights, and negotiations conducted in good faith - constitute the main guidelines upon which the multilateral regulatory framework must be based.

One of the most-emphasised principles is the *sustainability principle*. It says that in a debtor state, sovereign debt restructuring must create a stable debt situation while preserving the rights of creditors and, at the same time, promoting sustained and inclusive economic growth, sustainable development, and respect for human rights. This principle unambiguously expresses the need for norms that regulate international economic processes - in this case, debt restructuring - to be limited by those governing state commitments to respect and guarantee human rights. This link is generally absent in regulations governing the international financial sector.

Furthermore, the *majority restructuring principle* establishes clearly and precisely one of the basic rules of any insolvency or bankruptcy procedures that apply within states: if the results of sovereign debt renegotiations are approved by "a qualified majority", the rest of the bondholders must abide by them.

Other prominent principles establish that a sovereign state has the right to elaborate its own macroeconomic policy, including the restructuring of its debt. Creditors and debtors must carry out negotiations constructively with the goal of concluding the restructuring process in a transparent and timely fashion. The resolution also stipulates that states must not discriminate among creditors and alludes to state immunity from the jurisdiction of foreign courts in these cases.

As this brief analysis shows, the Basic Principles represent a significant step for negotiations on a new binding multilateral framework that is compatible with human rights commitments. However, as Stiglitz and Guzmán argue, it is possible that the next step - building an international treaty that establishes a mandatory global regime on bankruptcy - will be considerably more difficult,[39] since the initiative has powerful, if few, detractors. In the meantime, states can (and should) incorporate these principles in their national legal systems to regulate the actions of state and multilateral or private actors in debt restructuring processes that they may eventually face.[40] The principles also represent interventions on the national, international and regional level that are needed to put an end to financial capital operations that prioritise the property rights of a few over the right to a decent life of the majority.

4 • Final considerations

In conclusion, the steps the international community has taken to generate a framework for the adequate and predictable management of national debt constitute an important milestone in the path towards a global order that puts human rights and interests before the quest for profit, the speculation of a few private powers and the interests of the most powerful countries. Countries should not be forced exhaust all resources to pay off their sovereign debt, much less when repayment will be at the expense of the well-being and rights of our peoples.

Ultimately, and unfortunately, the Argentine case took a turn in favour of the interests of the vulture funds, but it has undeniably put a matter of utmost importance to developing and poor countries on the global public agenda. This will have concrete impacts on debt processes and lawsuits currently underway. Moreover, it has raised another red flag to warn that something (or many things) in the global economic order must change. The roles of the vulture funds and the U.S. justice system in Argentina have also contributed to heightened awareness of the serious injustices that international financial capitalism has created and continues to make worse.

There is still a long way to go in the political struggle to pass a binding treaty. Moreover, while legal reform is a crucial step, it alone is not enough. It must be accompanied by appropriate institutional changes and sustained political will, which affected individuals and communities actively maintain by mobilising to demand their rights and push for the adoption of structural changes.

Finally, it is necessary for countries in the Global South to double their efforts to advance their own agenda on the creation of a more just, democratic and equitable international order that truly benefits our peoples and protects the sovereign equality of states.[41] An agenda that erodes the extreme asymmetries that fuel the global economy and the democratic deficit of its governance is also needed. An agenda that prioritises national development and the establishment of a global economic order that helps developing countries achieve sustained economic growth, full employment, protection of the environment and nature, and, fundamentally, that guarantees people the right to lead a life in dignity, with autonomy and freedom, is essential. We must work to build a global order that is genuinely in accordance with the founding principles of the U.N. and the Universal Declaration of Human Rights and firmly guides international cooperation to resolve the most urgent international problems, such as poverty and inequality. Today, poverty and inequality are the greatest obstacles to discouraging wars and terrorism and to securing peace and social justice.

NOTES

1 • The basis for the elaboration of this article is Chapter XIII of the report of the Centro de Estudios Legales y Sociales, CELS, *Derechos Humanos en Argentina, Informe 2015* (Bueno Aires: Siglo XXI, 2015).

2 • For more on the composition of Argentina's debt, its exponential growth during the 1976-1983 military dictatorship and the neoliberal economic model based on financial valorisation established from then on, see Eduardo Basualdo, *Acerca de la naturaleza de la deuda externa y la definición de una estrategia política* (Buenos Aires: Instituto de Estudios sobre Estado y Participación (IDEP) de la Asociación de Trabajadores del Estado (ATE), 1999). Also see Aldo Ferrer, "La construcción del Estado

neoliberal en la Argentina," *Revista de Trabajo* 8, no. 10 (July/December 2012).

3 • For more on this issue, see Joseph Stiglitz, *El malestar de la globalización* (Torrelaguna: Punto de Lectura, 2007).

4 • Eduardo Basualdo, coord., *Ciclo de endeudamiento externo y fuga de capitales. De la dictadura militar a los fondos buitres* (Bueno Aires: Cefidar y Universidad Nacional de Quilmes, 2015), 30.

5 • Cfr. CIFRA/CTA, "La naturaleza política y la trayectoria económica de los gobiernos kirchneristas," *Documento de Trabajo no. 14* (October 2015).

6 • For a mapping of the debt crises brought to court since the 1970s, see Julián Schumacher, Christoph Trebesch and Enderlein, Henrik,

"Sovereign defaults in Court: The Rise of Creditor Litigation 1976-2010", 2013. The study highlights, among other issues, that vulture funds have accumulated 106 lawsuits against America and Africa and that currently 50% of debt restructuring ends up in court.

7 • For information on the history of Judge Griesa's actions in relation to Argentina's debt, see Basualdo, *Ciclo de endeudamiento*, 77 and 78.

8 • On the position of the U.S. government and other actors in the case, see Mark Weisbrot, "¿Quién le disparó a Argentina? Un caso misterioso digno de investigación en Washington," *Página/12*, July 1, 2014.

9 • See Alfredo Zaiat, "Legalidad", *Página/12*, August 24, 2014.

10 • Corte Suprema de Justicia de la Nación, "Claren Corporation" c/ E.N. arts. 517/518 CPCC exequátur s/varios', March 6, 2014.

11 • Basualdo, *Ciclo de endeudamiento*, 59.

12 • See Tomás Lukin, Interview with Sebastián Soler, "El fallo de Griesa es extravagante", *Página/12*, July 10, 2014.

13 • Tomás Lukin, "Una idea para agotar reservas", *Página/12*, June 23, 2015.

14 • See, among others, Aldo Ferrer, "No se debe aceptar cualquier arreglo", *Página/12*, January 15, 2015.

15 • See Alfredo Zaiat, "A los pies de Singer", *Página/12*, March 13, 2016.

16 • See Horacio Verbitsky, "El tercer ciclo", *Página/12*, December 13, 2016.

17 • See Verbitsky, "El tercer ciclo".

18 • See Martín Guzman and Joseph Stiglitz, "How Hedge Funds Held Argentina for Ransom," *New York Times*, April 1, 2016.

19 • Increasing debt is a deliberate strategy on the Washington Consensus' menu of policy options. See Mario Rapoport, *En el ojo de la tormenta, La economía política argentina y mundial frente a la crisis* (Buenos Aires: Fondo de Cultura Económica, 2013).

20 • For more on the recent process on Greece's debt, see Slavoj Zizek, "El apocalipsis griego," *Página/12*, August 21, 2015.

21 • See Verbitsky, Horacio, "Misión improbable", *Página/12,* June 22, 2014.

22 • Schumacher, Trebesch and Enderlein, "Sovereign," 3.

23 • For details on these declarations, see, CELS, *Derechos,* cap. XIII.

24 • CELS, "El conflicto entre Argentina, los fondos buitre y el poder judicial de Estados Unidos refleja un problema global con impacto en los derechos humanos", Argentina, July 29, 2014.

25 • Abramovich argues that the strategy of the Argentine government in this case is an example of how an international forum and the principles of public law and human rights can be used to restore the state's capacity to exercise regulatory powers while facing transnational actors with concentrated economic power. See Víctor Abramovich, "State Regulatory Powers and Global Legal Pluralism", *Sur, International Journal on Human Rights* 21 (August 2015).

26 • U.N. General Assembly, Resolution A/RES/68/304, September 9, 2014, "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes" September 17, 2014.

27 • The U.S., England, Japan, Canada, Australia, and Israel voted against it.

28 • See U.N. News Centre, "La Asamblea General dispuesta a aprobar un marco regulador para procesos sobre deuda", September 9, 2014.

29 • U.N. General Assembly, Resolution A/RES/69/247, "Modalities for the implementation of resolution 68/304, entitled 'Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes'", January 13, 2015.

30 • Of the 47 members of the Human Rights Council, it received the support of 33 countries; five were against it and nine abstained.

31 • U.N. Human Rights Council, "Resolution A/HRC/27/L.26," September 23, 2014.

32 • A preliminary version of the report was presented by Jean Ziegler, head of the drafting group, dated August 3, 2015. See Human Rights Council, U.N., "Draft progress report on the activities of vulture funds and the impact on human rights," A/HRC/AC/15/CRP.1, September 9, 2015.

33 • England, Germany, Japan, Canada and Israel.

34 • A group of European professors and intellectuals - including Thomas Piketty (Paris School of Economics) - encouraged European countries to vote in favour of the General Assembly resolution that establishes the basic principles. See "Europe should back debt crisis principles at the UN," *The Guardian*, September 7, 2015.

35 • See UNCTAD press release, "United Nations General Assembly adopts basic principles on sovereign debt restructuring," September 11, 2015.

36 • Tomás Lukin, "La propuesta para cambiar las reglas del juego", *Página/12,* September 9, 2015. For more on the different alternatives and their implications, see Abramovich, "State Regulatory".

37 • See Skylar Brooks et al., "Identifying and Resolving inter-creditor and debtor-creditor equity issues in sovereign debt restructuring," *Policy Brief* 53, CIGI (January 2015) and Joseph

Stiglitz and Martín Guzman, "Un paso adelante en beneficio de la deuda soberana," *Project Sindicate,* The world's opinion page, November 9, 2015.

38 • U.N. Human Rights Council, "The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights," HRC/RES/20/10, July 18, 2012 and the United Nations Human Rights Council, "Human rights and transnational corporations and other business enterprises," HRC/RES/17/4, July 6, 2011, respectively.

39 • Stiglitz and Guzman, "Un paso".

40 • Argentina approved the principles and declared them to be of public order in Law 27.207. Belgium (2007 and 2014) and Great Britain (2009 and 2010) sanctioned laws designed to put an end to the actions of vulture funds that file claims demanding payment of an excessive amount of benefits from indebted countries in their domestic courts.

41 • For more on this agenda, see the Declaration of the Summit of Heads of State and Government of the Group of 77, "For a new world order for living well," A/68/948, July 7, 2014, annex.

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EXPERIENCES

**FIGHTING COMPANIES
FOR ACCESS TO INFORMATION**

Lisa Chamberlain

FIGHTING COMPANIES FOR ACCESS TO INFORMATION

Lisa Chamberlain

• *How the VEJA v AMSA case in South Africa was a victory for activists* •
and the lessons it provides for future freedom of information battles

ABSTRACT

A recent decision of the South African Supreme Court of Appeal (Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance) represents an important vindication of communities' right of access to information held by the private sector. Access to information is often a necessary precondition to the realisation of other rights, in this case environmental. Communities and civil society organisations need to be properly informed in order to ascertain the nature of environmental harm and how to hold accountable those responsible for causing it. In this case study Lisa Chamberlain reflects on the decision and draws out important lessons for communities and the human rights lawyers that support them.

KEYWORDS

Access to information | Environmental rights | Human rights | Corporations | South Africa | Private sector

1 · Introduction

Consider the following example: large-scale industrial development takes place in a thriving peri-urban agricultural community. Over time, cattle owned by members of the community begin to get sick and die. The community notices a grey haze which has settled over their homes, shops and farms and they begin to suffer from a range of respiratory ailments. They find it increasingly difficult to grow crops, and the water in their taps comes out milky and bitter-tasting. People begin to move away from the once prosperous area. Those that remain suspect that their troubles are as a result of pollution caused by the factories down the road. If they are right, the companies that own and run those factories have violated their right to an environment that is not harmful to their health and wellbeing enshrined in section 24 of the Constitution of South Africa.[1] However, those that remain also know that suspicion alone is not enough to prove a rights violation. They need information in order to establish this.

This story is not just a hypothetical example. It is the story of the struggles of the Vaal Environmental Justice Alliance (VEJA) – an alliance of community-based organisations, affected communities and environmental activists[2] - to obtain documents necessary in their struggles to hold ArcelorMittal (AMSA) accountable for widespread pollution in an area known as Vanderbijlpark in South Africa.[3] It is also a story and a struggle which has resulted in one of the most significant access to information judgments in South Africa in the last two decades. This case study will discuss the judgment and offer some thoughts on lessons that can be learned from it.

2 · The legal context

One of the interesting features of the South African Constitution is that it contains a right of access to information, not just from the state but from the private sector as well. Section 32(1) provides that:

> *Everyone has the right of access to*
> *(a) any information held by the state; and*
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

Notably, there is a difference between the right enforceable against a public body and that which communities can exercise against the private sector. If the information you seek is in private hands, then you must establish which other right (other than the right of access to information) you seek to exercise or protect.[4] In the example above, the community would need to demonstrate that the information they seek is necessary for the realisation of their section 24 environmental right. The right to information is thus an "enabling" right in the sense that it enables the realisation of other rights

in the Bill of Rights. Realising the information right can therefore be understood as a necessary precondition for other rights to become a lived reality.[5] In this vein, access to information is also a prerequisite for democracy, open debate and accountability.[6]

In South Africa, the right of access to information is explained in the Promotion of Access to Information Act 2 of 2000 (PAIA). PAIA is the result of the directive in section 32(2) of the Constitution that national legislation be enacted to give effect to the right of access to information. PAIA does not replace the constitutional right, but because it purports to "give effect" to it, parties must now assert the right via PAIA.[7] PAIA sets out the nuts and bolts of the system by providing for the appointment of information officers to process requests,[8] the process for how to submit a request,[9] and what legitimate grounds for refusal may exist.[10]

3 • The story

VEJA has spent more than a decade trying to get hold of the results of an environmental impact study commissioned by Iscor (AMSA's predecessor) in 1999. The results of this study were written up in a document known as the Environmental Master Plan, which mapped pollution levels caused by AMSA's activities as well as the company's plan to remediate this damage over a 20 year period. VEJA sought access to the Master Plan in order to establish the extent to which the health problems and the threats to livelihoods were being caused by AMSA, and to assist them in ensuring that AMSA complied with the pollution remediation measures that the company itself had outlined.

When other channels proved unsuccessful, in 2011 VEJA eventually resorted to submitting a request for the Master Plan under the PAIA. The initial PAIA request was refused by AMSA on the basis that VEJA had not indicated which right they needed the Master Plan in order to realise. AMSA also indicated that the Master Plan was technically flawed, out of date and irrelevant.[11] In addition to the case being about securing access to the Master Plan, ultimately the case also became about whether civil society has a role to play in assisting government in monitoring environmental harm caused by the private sector and monitoring compliance with obligations to deal with that harm. This is because, after its other arguments failed, AMSA also took the position that VEJA was not entitled to the Master Plan because they sought somehow to inappropriately usurp the compliance monitoring and enforcement role assigned to government.

4 • The judgment

In September 2013 the South Gauteng High Court ordered AMSA to hand over the requested information.[12] AMSA appealed this decision to South Africa's Supreme Court of Appeal (SCA). In November 2014, the SCA handed down one of the

most significant access to information judgments in democratic South Africa.[13] The court made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct.[14] Regarding the role of civil society, the court confirmed that the regulatory framework applicable to the environmental sector envisages a form of collaborative corporate governance in relation to the environment, based on the notion that environmental degradation affects us all.[15]

The court also emphasised the importance of corporate transparency in relation to environmental issues, stating that "[c]orporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment…there is no room for secrecy and that constitutional values will be enforced."[16] The judgment thus sends a clear message to the private sector, including to multinational corporations operating in South Africa: as envisaged in the South African Constitution, transparency is the default position.

5 • The lessons

So what lessons can we learn from a case like this, particularly as it has played out in a jurisdiction which is one of the few in the world to have a right of access to information held by the private sector.[17] I would like to suggest that there are at least six (but probably more) lessons that we can learn from VEJA's experience.[18]

First, the case clearly confirms the enabling nature of the right of access to information. Without sight of the Master Plan, VEJA was finding it impossible to know the extent of the pollution that had been caused, what action AMSA had undertaken to perform to mitigate the effects of that pollution, and therefore how to hold AMSA to account. The case thus demonstrates how critical it is for communities and civil society organisations to have the ability to compel companies to provide the documentation needed to ensure that other rights contained in a bill of rights (in this case the environmental right) are promoted and protected.

Furthermore, like VEJA, the communities most affected by pollution and other forms of environmental degradation, often do not have the financial resources necessary to brief their own army of scientists to conduct impact assessment studies. Therefore if such studies have already been conducted by experts contracted by either the state or the corporation involved, then an access to information system is an important conduit for accessing the knowledge that already exists.[19]

Secondly, one of the interesting components of the case which has not received much attention is the fact that licences were granted to AMSA by government regulators on the basis of what has turned out to be, according to AMSA's own version of events,

flawed scientific analysis.[20] This must surely bring the credibility of those licences into question. Unfortunately, none of the government departments involved seem to have taken up this issue since the judgment. Nevertheless, the lesson here is that access to information litigation can flush out other important issues which need to be brought to light, as a kind of by-product.

Thirdly, and less positively, the case illustrates just how long it can take to access the kind of information necessary to realise environmental (and other) rights. It has taken VEJA the better part of 15 years to finally get its hands on the Master Plan - and this in a legal system which has a constitutionally enshrined right of access to information enforceable against the private sector, buttressed by dedicated legislation. A conducive regulatory system is therefore not enough. VEJA's experience signals loud and clear that the existence of a right of access to information alone does not change corporate behaviour. More is needed to trigger a shift from a default of secrecy to one of transparency.

The issue of time and delay also has particular implications in the environmental context. In this case, AMSA tried a whole series of arguments to frustrate the process.[21] If access to information requests take too long however, the harm may well occur before the process is resolved. In the environmental sector, there is often a window in which damage to the environment (and thereby to people's health and livelihoods) can be prevented. After that window closes, mitigating the extent of the damage is the best you can do. Timing is thus critical. This is not just a technical matter of legal process.

Perhaps another time-related lesson is to lodge formal requests for access to information as soon as possible (if you have a legal system which allows for that). VEJA tried to access the Master Plan for roughly 10 years before it submitted a PAIA request. This links to the fourth lesson that can be drawn from this case. Even in progressive legal systems with advanced constitutional protections, it remains extremely difficult for communities to realise their rights without access to support from lawyers. In the Centre for Applied Legal Studies' (CALS) experience, lawyerly follow-up to an access to information request significantly increases your chances that the request gets taken seriously.

Unfortunately, the need for legal assistance plays out not only in the PAIA request protest, but also should it become necessary to challenge a decision. Although PAIA provides for an internal appeal against a refusal by a *public* body to grant access, there is no equivalent internal appeal mechanism if your request is denied by a *private* body. In that instance, your only recourse is to approach the courts, as VEJA did. While in theory it should be possible to do so without the assistance of a lawyer, in reality courtrooms and legal processes remain inaccessible and intimidating in South Africa. For a country that has been committed to access to justice for 21 years, this is a disquieting reality that is slowly suffocating rights realisation.

Thankfully, this problem may soon be somewhat mitigated. For several years, civil society activists in South Africa have been calling for some kind of information ombud to make accessing information a quicker, cheaper and generally more accessible process. The Protection of Personal Information Act 4 of 2013 has now introduced an Information Regulator which will have jurisdiction to hear appeals against unsuccessful PAIA requests.[22] The Regulator is currently in the process of being established with a public call for nominations having closed in August 2015. Hopefully, the Information Regulator will operate in such a way that communities are able to challenge attempts by either government or the private sector to block access to information, without the need for assistance from a lawyer.

The fifth lesson that I would like to highlight is also about lawyers – but this time about the forms of collaboration that are possible between human rights lawyers. VEJA is represented by a non-profit organisation called the Centre for Environmental Rights (CER).[23] However, CER is based in Cape Town and the litigation took place in Johannesburg. VEJA needed local assistance because, in South Africa, litigants are required to appoint an address within a few kilometres of the court at which they will accept service of court papers. This is referred to as acting as a "correspondent attorney". In this case CALS acted as correspondent attorneys for VEJA and the CER.[24] Taking on the private sector can often feel like a David and Goliath battle with power skewed in favour of multinational corporations. In CALS' experience, one of the ways to deal with this is to team up with other social justice organisations. Importantly, in social justice work, the possible forms of such collaboration are many and human rights lawyers and activists should think creatively about the possibilities.[25]

Lastly, it is important to remain conscious of the fact that accessing the information you seek is the beginning rather than the end of the process. Subsequent to the judgment, VEJA received and analysed the Master Plan. It is a voluminous document consisting of much scientifically technical material. In addition, it was delivered by AMSA in such a disorganised format that it took several weeks just to organise and index. At the time of writing, VEJA had sent vast sections of the Master Plan to a team of experts to assist them and their lawyers to make sense of the material. Only then will they be able to ascertain the most strategic next step. VEJA has been fortunate to be assisted by a whole range of experts (both technical and legal). Not all communities suffering from the effects of pollution caused by large corporations are in that position.

6 • Conclusion

Cases like this one bring refreshing relief to communities and the human rights lawyers that support them. Such conclusive legal victories are few and far between, and usually take years to build. So when they do come around, they should be celebrated. But in addition to celebration, it is important that we reflect on the

strategies and processes involved in order to extract lessons for the next battle, and to share these with comrades and colleagues involved in similar struggles in other parts of the world. This case has many lessons to offer: about the limits of progressive legal systems, timing, collaboration, access to justice and keeping your eye on the end game. Fundamentally, although the journey to obtaining information may be an arduous one, a right of access to information, particularly one enforceable against the private sector, has the potential to play a powerful enabling role in the quest to realise environmental rights.

NOTES

1 · Section 24 of the Constitution of the Republic of South Africa, 1996 provides that:

"Everyone has the right

(1) to an environment that is not harmful to their health or well-being; and

(2) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

(a) prevent pollution and ecological degradation;

(b) promote conservation; and

(c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

2 · For more information on Vaal Environmental Justice Alliance (VEJA) see https://www.facebook.com/pages/Vaal-Environmental-Justice-Alliance-VEJA/322703054542182, accessed September 7, 2015.

3 · ArcelorMittal is one of the world's largest steel suppliers.

4 · See Jonathan Klaaren and Glenn Penfold "Access to Information," in *Constitutional Law of South Africa*, ed. Stuart Woolman and Michael Bishop, 2 ed (Claremont: Juta & Co., 2003), chapter 62.7.

5 · Note that there are other rights which may also be understood as "enabling" rights such as the right to protest and the right to participate in decision-making. Likewise the rights which access to information "enables" extend far beyond just the environmental right. However, this case study will focus on the way in which the right of access to information can facilitate the realisation of the environmental right.

6 · Jo-Marie Burt and Casey Cagley, "Access to Information, Access to Justice: The Challenges to Accountability in Peru" SUR 10 (2013).

7 · Cora Hoexter, *The New Constitutional & Administrative Law*, vol II (Johannesburg: Juta, 2001), 57.

8 · South Africa, *Promotion of Access to Information Act 2 of 2000 (PAIA), February 2000*, sec 17.

9 · South Africa, PAIA, secs 11, 18, 50-53.

10 · Ibid., secs 33-46, 62-70.

11 · This case is the subject of a documentary produced by the Centre for Applied Legal Studies, the South African Human Rights Commission and One Way Up Productions which is available at https://www.wits.ac.za/cals/about-us/law-and-film/, accessed April 14, 2016.

12 · South Gauteng High Court, *Vaal Environmental Justice Alliance v Company Secretary of Arcelormittal South Africa Ltd and Another*, Case n. 39646/12.

13 · Supreme Court of Appeal (SCA), *Company*

Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance, 2015 (1) SA 515 (SCA).

14 • For more information and discussion of this case, see http://cer.org.za, accessed September 11, 2015.

15 • SCA, *AMSA v VEJA* (n 13 above) para 71.

16 • Ibid., para 82.

17 • The other jurisdictions in which this is the case include Antigua and Barbuda, Angola, Armenia, Colombia, Czech Republic, Dominican Republic, Estonia, Finland, France, Iceland, Liechtenstein, Panama, Poland, Peru, South Africa, Turkey, Trinidad and Tobago, Slovakia, and the United Kingdom. See Mazhar Siraj "Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective," *Journal of Alternative Perspectives in the Social Sciences* 2, no. 1 (2010): 211.

18 • VEJA is represented by the Centre for Environmental Rights (CER), a civil society organisation working in the environmental justice sector to provide legal and related support to environmental CSOs and communities. See further http://cer.org.za/. Because the litigation took place in Johannesburg, and CER is based in Cape Town, CER has been supported by the Centre for Applied Legal Studies (CALS) who acted as correspondent attorneys in the case. CALS is a human rights organisation based at Wits University's Law School which engages in research, advocacy and impact litigation across its five programmes namely Basic Services, Business and Human Rights, Environmental Justice, Gender and Rule of Law. More information on CALS can be found at http://www.wits.ac.za/law/cals/16858/home.html.

19 • Of course the problem of the independence of experts contracted by a corporation remains, but that is a discussion for another day.

20 • See AMSA's admission in para 32.4.1 of its answering affidavit in the High Court case referred to in SCA, *AMSA v VEJA* (n 12 above) at para 21 and reference to the water use license that was granted on the basis of the Master Plan in VEJA's answering affidavit at para 37.

21 • These included that CER was not properly authorised to represent VEJA, that the Master Plan was flawed and out of date and therefore irrelevant, and that VEJA was not entitled to the Master Plan because in seeking access to it they were trying to usurp a government function.

22 • See South Africa, *Protection of Personal Information Act 4 of 2013* (Popi), November 2013, chapter 5.

23 • CER is a civil society organisation working in the environmental justice sector to provide legal and related support to environmental CSOs and communities. See further http://cer.org.za/.

24 • CALS is a human rights organisation based at Wits University's Law School which engages in research, advocacy and impact litigation across its five programmes namely Basic Services, Business and Human Rights, Environmental Justice, Gender and Rule of Law. More information on CALS can be found at https://www.wits.ac.za/cals/.

25 • For another innovative model pioneered by CALS and CER, see University of the Witwatersrand, Johannesburg, *The Mapungubwe story: A campaign for change*, available at https://www.wits.ac.za/cals/our-programmes/environmental-justice/mapungubwe-watch/ accessed April 14, 2016.

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INSTITUTIONAL OUTLOOK

**FIVE REASONS
TO FEAR INNOVATION**

Lucia Nader
& José Guilherme F. de Campos

FIVE REASONS
TO FEAR INNOVATION

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• ...and many other reasons to dare •
to innovate so as to adapt to today's world

ABSTRACT

In recent years, innovation has become a buzz word in the human rights sector. The concept is increasingly emphasised by funders and, consequently, non-governmental organisations (NGOs) are beginning to pay attention to it, but usually with reluctance and cynicism.

Wanting to better understand the origins of innovation and why rights based NGOs tend to instinctively resist it, Lucia Nader and José Guilherme F. de Campos interviewed over one hundred activists and human rights defenders.

Here they distil the results of their research and offer the five main concerns with innovation that were articulated during the interviews, specifically that (1) it is simply a fashionable word from the private sector in the Global North; (2) there is no real need for innovation when fighting for human rights since the underlying principles of the movement do not change; (3) it is unfair to test innovative concepts on those that the human rights movement seeks to protect; (4) innovation only results in creating more rights violations; (5) innovation brings uncertainties, which funders tend not to like.

Analysing each of these concerns in turn and presenting counter arguments, the authors conclude by suggesting five questions that organisations must ask themselves before embarking on a process of innovation.

"The Stone Age did not end for the lack of stones", but because humanity decided to take a different direction and adopt new habits. This is the maxim accepted by many of those who believe in innovation: a controversial and recurrent concept in our research project on "Solid Organizations in a Liquid World" (SOLW).[1] SOLW aims to explore how civil society organisations (CSOs) and funders are reacting and adapting to the trends of contemporary society, including the empowerment of individuals as political actors, the multiplicity of information and agendas and the state in crisis, all of which are hallmarks of "liquid modernity".[2]

In order to do this we interviewed 102 activists and human rights defenders from Europe, the United States of America (U.S.) and Latin America between 2015 and 2016. A considerable number showed some resistance either to the concept of innovation in general or to the need for rights-based non-governmental organisations (NGOs) and donors to constantly innovate. Many of them shunned the idea of innovation, raising a series of concerns, which we have grouped here as "5 reasons to fear innovation".

As Emily Martinez from the Open Society Foundations (U.S.) pointed out recently during a conference, "who knows, might this resistance result from the fact [that] it seems contradictory to speak of innovation in a field where persistence and resilience are deemed key features and take so much of our energy? How is it possible to innovate in weekly visits to prisons to document abuses and torture, for example? Or, why do we immediately associate innovation with technology, whereas there is an increasing mistrust of and awareness about the limits of turning everything technological and modern?"

Nevertheless, it is undeniable that we are living through profound transformations in our societies. Some of these changes are visible in the recent waves of protests and in the emergence of "new movements" around the world. Among these changes, one could cite the speed of information and new forms of mobilisation, the multiplicity of agendas, the exacerbation of individual activism as opposed to channeling demands through existing organisations, the efforts to making state institutions truly representative and, in extreme cases, challenging the value of democracy and rights themselves.

During the course of our research, Alexandre Ciconello from Amnesty International (Brazil) warned that "we are witnessing a new cycle of renewed discussion on the identity and work methods of NGOs…We cannot isolate ourselves from the changes that are happening in our societies - we must give space and conditions to innovate if doing so is necessary."Akwasi Aidoo from Trust Africa (Ghana) added to this, stating that "there is an increasing alienation of human rights groups. In some contexts, the trust of ordinary people in human rights NGOs is decreasing and those organisations depend on donors to sustain their structure and operations." Pablo Collada from Ciudadano Inteligente (Chile) went even further, saying that "often we are concerned more with our survival than our relevance and fail to notice the changes in the world surrounding us." Several respondents highlighted that there is a sense of "exhaustion"

within their organisations, with challenges and historical violations persisting while new rights violations arise at every moment.

It is not just internal (organisational) factors that influence the ability and success of an innovation. External factors also play a key role – such as the dynamics of the different actors of the society related to a particular problem and the political, economic and cultural context.[3] In addition, it is key to recall that we will never fully control all those factors, especially in a world of ongoing and rapid changes.

Thus, it is crucial to move forward in a frank and constructive discussion about what innovation means for NGOs and human rights funders and what the challenges and opportunities are that lie ahead. In the following pages, we will do just that, knowing it is only the first step.

1 • Fearing Innovation

We have summarised and grouped what we heard from more than 100 human rights activists and donors when we discussed the issue of innovation into five overarching concerns that permeated the responses. After identifying the five recurring concerns, we then offer our analysis of why these concerns are valid but why innovation can still take place. All of them are relevant and bring important elements to qualify the debate.

1 – Isn't innovation just a fashionable Global North term used in the private sector and by funders now being forced on the social sector?

Indeed. It is undeniable that innovation has become fashionable and there is external pressure, including from donors, to seek "the new". It is also undeniable that much of what is written about innovation comes from the Global North and the private sector. Innovation is the first word in the Silicon Valley lexicon, accompanied by others such as "disruption", "human centered approach" and many other English terms that are hard to translate in a meaningful way to other contexts and languages.

According to the Oslo Manual on Guidelines for Collecting and Interpreting Innovation Data, one of the main theoretical references on the subject, "innovation is the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations."[4] This definition by itself could raise concerns from those who work for social change as it is primarily focused on the private sector.

The chart below shows the evolution of the use of the term "innovation" between 1948 and 2008 in books available on the Internet (an innovative tool in itself, powered by Google and available for free).

Evolution of the use of the term "innovation" in the books published digitally

Source: Google Ngram Viewer

Warning that there are few studies on innovation in the world of NGOs, Johanna Mair and Christian Seelos, both researchers at Stanford University, define innovation in NGOs as "the process by which an idea that is new to an organisation fosters a new set of activities, such as new technologies, new management processes, new products or new services."[5] They highlight three dimensions that affect innovation: (i) individual factors - such as personality, motivation, cognitive ability, (ii) group factors - structure of the staff, organisational environment, internal processes and leadership style; and (iii) organisational factors - such as size, available resources and the culture of an organisation. They conclude by saying that innovation is complex and also depends on factors external to the organisation and can cause greater or lesser break or discontinuity with the previous *status quo* depending on this whole range of factors.

Mair, who is also the editor of the *Stanford Social Innovation Review*, believes that NGOs have exaggerated the idea of innovation as "a panacea for all ills". This may be due to: (i) a perception that we are undergoing a crisis in the social sector, having conducted decades of hard work without being sure of the results achieved; (ii) a general sense of "urgency" - maximised by the speed of information - which reinforces the need to "do something different" and (iii) financial resources available for innovation, linked to the private sector, which has led us to adopt a logic of innovation derived from the market, such as social ventures, hybrid models and impact investing.[6] However, Mair does not believe that we should refrain from innovating. According to her, considering the way we consume and process information today, our attention span has changed dramatically. Hence, organisations run the risk of having their credibility and visibility weakened if they do not innovate in the way they communicate, as just one example.

Beyond passing trends, we must define better what innovation means for the social sector. This article seeks to comprehend the specifics of innovation in this context. Moreover, it is necessary that each organisation adjusts the definition in order to make it useful to its mission. Innovation should serve the purpose and be in tune with the *modus operandi*, values, structure and history of each organisation.

So, it is up to each organisation to adapt the definition of innovation to their specific structure and institutional moment. What for some organisations is an innovation, for others may be considered as boldness, risk-taking or adjustment to the modern world. Where and how to innovate should also be a choice and adjusted according to the context of each institution. For instance, some innovate in processes, others in strategies or activities, others in their structure, in their "final product" or in relation to their beneficiaries. "NGOs and donors need to be more flexible and innovative, but within a strategic framework of what the organisation wants, what it is and what it seeks to achieve," said Hal Harvey, one of the creators of the idea of Strategic Philanthropy,[7] who is now reviewing some of the underlying assumptions of this concept.

2 – The core, values and principles of human rights have not changed (and will never change) - so why do we need to innovate?

The emergence of the contemporary legal framework of human rights dates from the mid-twentieth century, with the Universal Declaration of Human Rights of 1948 and the various treaties and conventions that followed (and which continue to be created). The values and principles that are contained in these documents are non-negotiable. The fight for human rights depends on this to guarantee the effectiveness and strength of these rights.

Therefore, the idea of innovation can be uncomfortable, especially if we are talking about values and rights so rooted and historically constructed. Standing firm to principles and being persistent is no doubt commendable. However, innovation does not necessarily mean throwing out everything that has come before, ignoring its record, diminishing the importance of values, principles, persistence and expertise. These are qualities on which many organisations pride themselves, and with good reason.

Unfortunately, however, there are numerous problems that we fight against that continue to persist. To be bold and venture into new strategies, processes or activities may be well suited to address a particular challenge or seek a result desired by the organisation. This does not make the intrinsic tension disappear between, on the one hand, depth, which involves time necessary for knowledge and learning, and on the other, innovation. The tension exists and it was not born today.[8]

Finally, it is worth mentioning that one of our respondents told us that "an organisation needs to be strong enough to be able to be fluid, to reinvent itself," stressing the importance of seeking a balance between the two aspects.

3 – Don't you think that NGOs deal with real people who are victims of human rights violations and who should not be treated as guinea pigs or products to test new strategies?

Yes, people are not products and victims of human rights violations should never serve as guinea pigs. They are already too vulnerable to be the target of experiments, and of trial and error. But innovation can rightly arise from the need or demand of the victims or beneficiaries, and should always be developed in a way that positively impacts them. This is possible and healthy if we are appropriately cautious.

The interview with Susi Bascon from the Peace Brigades International (UK), illustrates this concern: "For me, the need (or not) to innovate and how we will do it derives from listening in-depth to human rights defenders and the victims - and not through other indicators. Otherwise, how will we know?…If we lose contact with people outside the organisation, how will we know when and where to innovate?"

The focus on impact, on theories of change, and on more efficient processes should always trigger the question: where are the people, the beneficiaries of the organisation? Without this, the very *raison d'être* of the human rights movement and its values - such as empowerment, participation, transparency and humanism - are put at risk. This phenomenon is called "dehumanising", a ghost that can come to haunt us as a result of the professionalisation of NGOs. It can also affect the relationships and capacity of people to communicate and share ideas, create and access external concepts and even lose motivation and commitment to the organisation's mission. Altogether, this might affect the capacity of organisation to continuously innovate.[9]

Some new trends in planning, such as "Design Thinking", "Agile", or "Lean Thinking" - again the terms are all in English and are difficult to translate meaningfully into other languages - indicate various ways to shift attention from organisational structure, tools or processes towards people. These are methodologies based on the concept of "human-centered approach" (or "human-centered design" or HCD)[10] - i.e. to (re)place the individual at the centre. As far as the social sector is concerned, those individuals are the various people involved in a particular action of an organisation as well as its main beneficiaries. Those methodologies are pragmatic in essence, and encourage innovation by the culture of continuous improvement and flexibility. Importantly, the common feature of all these methods is the necessity to stay in close and continuous contact with the beneficiaries, so the organisation can go on adapting itself in accordance with the results achieved and the feedback received. Again, having a clear vision and mission remain fundamental elements, which guide the organisation, and any methodology requires adaptation to the specific circumstances of each organisation.

4 – Are we talking about new forms of technology as innovation? How do we prevent them from creating new violations instead of resolving existing issues?

Another common argument is one that defines innovation as adaptation to new technologies. Innovation would then "only" be to adapt to new technologies and forms of communication, to make use of online tools and integrate "tech culture" to the day-to-day running of the organisation.

Yet, as we all know, technology is not a solution for everything and may even have undesirable effects. For instance, technological advancement can cause new rights violations. Darius Cuplinskas from the Open Society Foundations (UK) recalls that "the expansion of the current state surveillance is unprecedented and, unlike physical violence, it tends to be highly invisible." We also know that the same new media, which facilitates mobilisation can also create new barriers for political organisation. Miguel Lago, from NossasCidades (Brazil), stressed the ambiguities of the apparent dichotomy between online and offline. "The first tends to create superficial involvement and relational ties. However, it often broadens the spectrum of participation, while the second tends to nurture deeper relational ties without, however, the same power of mobilisation." Additionally, it is often argued that we must resist technological innovation because it can deepen inequality.[11]

Even with so many caveats, technology and connectivity are a fact and they can bring many benefits, when used against old rights violations, and to combat the new rights violations, which technology brings.

Today, several organisations are exploring new ways of collecting evidence of violations and processing information through, for example, mobile applications, videos and other tools. "Technology can help speed up the process of checking evidence and improving the quality and time spent in drafting reports on violations. In addition, with technology you can expand and diversify the voices of people who report abuses" said a representative of The Whistle[12] during the RightsCon 2016[13] – an annual conference on rights and technology which brought together 800 people in San Francisco. The Whistle is an app designed to address exactly this challenge. In the same panel, the representative of Physicians for Human Rights[14] (U.S.) warned that organisations resist adapting themselves to the virtual world, adding that "many believe that using technology is to transfer what we have on paper to an online format. It is not. It is a whole new language. But then will we replace human rights lawyers for young people who know how to use technology to document violations? Not necessarily - I think of doctors who use our applications to document violations, who at the same time must continue knowing how to examine their patients, keeping themselves up to date on their medical knowledge in addition to knowing how to use technology. It all depends on what kind of organisation and what technology we are talking about."

The use of videos by organisations is also growing. "In 2015, for the first time, the number of videos we made reporting violations exceeded the number of printed reports. Today a researcher goes to a country visit taking along a camera, he or she tweets during the investigation, etc. A few years ago, this did not happened. We have to adapt", said Carroll Bogert, from Human Rights Watch (U.S.). Finally, one should remember that for organisations which have

technology in their DNA, the need for innovation is a constant concern: "As we work with technology and video, we have to be constantly watching changes and adapting some of our strategies, innovating," recalled Tanya Karanasios, from Witness (U.S.).

5 – And who can guarantee that we will have more impact if we innovate - and which funders will accept more flexibility, audacity and risk-taking?

There is just no way to guarantee it. Taking risks and learning from mistakes is a fundamental condition of those who are willing to innovate. Also, we have as the initial challenge the difficulty of measuring impact, whether the action is innovative or not. This challenge is not new - and we continue to act regardless, every day, more or less successfully.

Still, according to Johanna Mair, "the vital mistake we often make is to measure the success of an innovation only by its impact. Innovating, if done well, also leads to improvements in internal processes, organisational environment, motivation and cognitive improvements."

The funding model of an organisation influences - greatly - its ability and willingness to innovate. "We cannot afford to make mistakes. The current model of financing of most organisations does not allow us to innovate, to dare," noted Ana Valeria Araujo from the Fundo Brasil de Direitos Humanos (Brazil).

Based on the interviews, there is no doubt that predictable funding and long-term and institutional support - rather than project-specific support - is more likely to foster audacity and risk-taking. This type of financing also enables a more fluid and honest dialogue between the funder and the funded, where both sides win.

"We received enough general operating support and because of that we could, for instance, be innovative, and adapt to the unexpected protests in Brazil when they happened in June 2013", said Tanya Karanasios from Witness (U.S.). Mauricio Albarracín, from Colombia Diversa (Colombia), added that "NGOs seek the cooperation of international agencies, seduce them, but it should be the other way around. Those agencies should go after them, because NGOs are the ones that have new ideas, and do the actual work as 'ideas hunters'."

2 • Thus, *habemus* innovation?

There are plenty of reasons for being cautious with regard to "innovation for innovation sake", as described above in each of the five reasons for "fearing innovation". Yet, there is also a broad spectrum of reasons to be explored before an organisation understands and decides to put a new idea into practice.

For this to happen, organisations and activists who are thinking about innovation need to ask the following questions:[15]

i – What is innovation for my organisation? Without discrediting the theoretical scholars in this field, no definition of innovation will be 100% suitable to any organisation. Within the areas in which we want to have an impact, it is our duty to think about what innovation means to the organisation's mission, to its staff and those for whom the organisation exists. Whatever the concept people have in mind, when the term innovation is used, they are often talking about adapting, making room for creativity, changing and risk-taking.

ii – For what, and why, do I want to innovate? The most obvious answer is that we want to innovate to pursue our main objective in a better way - the mission of the organisation. However, when you dwell on this question we can get more detailed answers - do we want to achieve better results; do we want to (re)position the human beings, our beneficiaries, at the centre of our action; do we want to motivate our staff; do we want to engage public opinion; and so on.

iii – Where do I want to innovate? Innovation can occur at the programmatic level of an organisation, regarding their strategies, activities, structure, internal flows and/ or processes. Depending on its magnitude, it can be seen as a break with an old way of doing things, creating something entirely new or adapting to a new reality. Depending on how it is implemented and upheld, it can also be seen as experimentation: gradually figuring out whether there are better ways to execute activities, strategies, etc. In order to do that, organisations can gradually implement small changes and constantly make use of feedback and evaluations to ratify or not changes done without taking the inevitable risks of more radical transformations.

iv – How will I innovate and what do I need for it? This will depend on the answers to all the questions above. It will also depend on how we overcome funding challenges, including an analysis of external factors and the context in which the organisation operates at any given time, country, etc.

v – Who will innovate? It is important to remember that the leadership and management of people in an organisation is another key factor of innovation. "An organisation has greater capacity for innovation when it is composed of a multidisciplinary staff, and the roles are well defined between managers, experts and strategists. It is essential that the entire team is guided and inspired by the purpose of the organisation and the organisational culture is enhanced in a responsible way through creativity, cooperation and risk-taking," notes Lucas Malaspina, from Escola de Ativismo (Brazil).

3 • Conclusion

Finally, the assumption that innovation is always good - or good in itself - is a mistake. But to resist innovation for fear of taking risks or for being overcautious

can be a mistake as well. The challenges are many. Innovation is a choice and can be a complex process that simultaneously requires humility and ambition. In order to foster reflection, sharing experiences among NGOs and among funders is not only essential to have new ideas, but it is also a good way to test them and share lessons learned. As some say, "borrowing is the new innovation."[16]

NOTES

1 • For more information on the research project, visit http://www.liquidworld.info.

2 • For a comprehensive explanation of the "liquid modernity", see Zygmunt Bauman, *Liquid modernity* (Cambridge: Polity Press, 2012).

3 • The dynamics between internal and external factors, as well as the features that prevent or enable innovation are discussed in detail in the report prepared by the Rockefeller Foundation, What Determines the Capacity for Continuous Innovation in Social Sector Organizations? (Christian Seelos and Johanna Mair, "What determines the capacity for continuous innovation in social sector organizations," *Rockefeller Foundation Report*, January 31, 2012, accessed March 2016, http://www.christianseelos.com/capacity-for-continuous-innovation_PACS_31Jan2012_Final.pdf).

4 • Organisation for Economic Co-operation and Development (OECD), *Oslo Manual: Guidelines for collecting and interpreting innovation data* (Paris: OECD, 2005), 46.

5 • Seelos and Mair, "What determines," 7.

6 • Christian Seelos and Johanna Mair, "Innovation is not the Holy Grail," *Stanford Social Innovation Review*, 44-49, 2012, accessed March 2016, http://ssir.org/articles/entry/innovation_is_not_the_holy_grail.

7 • The concept of "Strategic Philanthropy" was coined by Hal Harvey and Paul Brest in their book Money Well Spent (Paul Brest and Hal Harvey, *Money Well Spent: A Strategic Plan for Smart Philanthropy*

(New York: Bloomberg Press, 2010)). Adopting a Strategic Philanthropy approach includes designing a realistic strategy based on a solid evidence-based understanding of the world, adopting clear goals and previously stated indicators of success in order to evaluate progress and measure it against the stated strategy and milestones.

8 • See James G. March, "Exploration and Exploitation in Organizational Learning," *Organization Science* 2, no. 1(1991): 71-87.

9 • Seelos and Mair, "What determines," 19.

10 • For more information, see the Manual published by IDEO - a U.S. consultancy firm known for being one of the pioneers and major contributors to the popularisation and development of the concept of Design Thinking and Human-Centered Approach (https://www.ideo.com/work/human-centered-design-toolkit).

11 • In an article published in January 2016, Ricardo Abramovay discusses the negative impacts caused by the technological innovation, such as rising unemployment and concentration of wealth and power. (Ricardo Abramovay, "Robôs, personagens do capítulo inicial de uma era de transformação," *Valor Econômico*, January 12, 2016, accessed March 2016, http://ricardoabramovay.com/robos-personagens-do-capitulo-inicial-de-uma-era-de-transformacao/).

12 • For more information, see http://www.thewhistle.org/.

13 • For more information, see https://www.

rightscon.org/.

14 · For more information, see http://physiciansforhumanrights.org/.

15 · See in Seelos and Mair, "What determines," 31-32, a list of features (called "pathologies") that can positively or negatively influence in an organisation's ability to innovate.

16 · In an article, Gahrmann points out that this idea of "borrowing, copying and stealing good ideas" was widely echoed at a conference hosted by the European Foundation Centre. (Christian Gahrmann, "Borrowing is the New Innovation," *Blog Grantcraft a Service of Foundation Center*, Milan, May 28, 2015, accessed March 2016, http://www.grantcraft.org/blog/borrowing-is-the-new-innovation).

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VOICES

WHEN AFRICA UNITES
Kumi Naidoo

REFLECTING FOR THE FUTURE
Laura Dupuy Lasserre

WHEN AFRICA UNITES

Kumi Naidoo

*•   How a new pan-African civil society initiative aims   •
to foster peace, justice, democracy and human rights*

ABSTRACT

Following hundreds of years of oppression under colonial rule and decades as a pawn in a bipolar world, Africa has been left a damaged continent. Here Kumi Naidoo explains this historical context in which a new pan-African civil society initiative is developing, of which he is the start-up director. After examining various prior attempts to create civil society unity in Africa and suggesting why they have all failed, the author offers a glimpse at what the new Africa Civil Society Initiative might look like. Acknowledging that it is still in its infancy, Naidoo describes the consultation process that is being used to better understand what civil society means in Africa today and how consensus can be achieved in such a diverse environment. He concludes by outlining the kinds of activities that will be undertaken at the outset to implement the six cross cutting thematic areas that have so far been identified.

1 • Introduction

Over the past few years the global media has repeatedly referred to the phenomenon of "Africa Rising" to describe the ongoing looting of natural resources and illicit financial outflows from the continent. This confirms that the earlier models of colonisation have not ended, but have merely been adjusted and refined and are now conducted and presented behind the veneer of liberation and democracy of African people.

Over the next few pages I set out some key historical facts about colonisation and what the current effects of colonisation are and why, in this context, a discussion arose to establish a new initiative - a broad based African civil society platform. During the many discussions in relation to this new initiative, some consensus points have emerged which are presented here. These are not meant to be understood as *fait accompli* of the new platform. Instead they are key starting points to show how we are going about establishing such an initiative, what makes the process and outcomes different from previous attempts at civil society unity and how we are going to build consensus around such an initiative that will seek justice, peace and sustainable development on and for the African continent.

2 • Context

The African continent draws its modern history from the Berlin Conference held between 1884 and 1885, which sought to legitimise control over the continent, its people and specifically its natural resources. No African was ever consulted in this process.[1] By 1900, European states claimed almost 90% of the land mass, ignoring and abolishing local autonomy and self-governance of the African people. The decolonisation period post World War II and then the Cold War, saw Africans being used as political and economic pawns by both sides of the ideological conflict.

The effects of having excluded Africans from decision making about their own countries and their continent are starkly manifested in an artificially divided continent, weak and often at war with itself. This was the prime impulse behind the idea of building a movement for a more united continent, starting with civil society as the vanguard of such a process.

Africans remain constrained by these major incidents of political and economic domination of the peoples (and resources) of Africa. Starkly summed up by the pan-Africanist Tajudeen Raheem (1961-2009), when he observed that "Africa is the richest continent underneath the ground and that is precisely why we are one of the poorest continents above the ground", this resource curse[2] and its abhorrent effects remain the daily reality for the majority of Africans. Within this context (and unlike some of their South American and Asian counterparts) individual African countries are unable to stand firm on the global stage in terms of climate change or trade negotiations, despite having proxy representation through South Africa in platforms such as the G20. There is little evidence to show that South Africa has used this

proxy role for any substantial continental benefit. Instead, its political leadership has mostly just accepted the negative compromises of these platforms, including the G20, leaving the continent inadequately represented amongst the global economic and political forces.

The imperative to work more urgently and diligently towards a united civil society across the continent is ever greater now that civil protests are more widespread and a frequent feature of life in most parts of the world. The people of the African continent have an opportunity to integrate their struggles into the larger global movements against rising inequality and climate change impacts, standing shoulder to shoulder with their governments on these global stages, while simultaneously pressurising African governments to perform substantially better than they are doing currently.

Attempts at civil society unity on the continent are not new. Several initiatives have been spawned over the years, including the first Pan African Conference (ironically held outside the continent) as early as 1900, several civil society backed resolutions and the Organisation of African Unity (OAU) process to establish more widespread cooperation between non-governmental organisations (NGOs) and civil society organisations (CSOs) in 2003.[3]

Within these broader attempts of unity there have also been several attempts to build civil society networks across the continent. Some were thematically focused, such as the African Association for Literacy and Adult Education (AALAE), and others where more generic such as the Harare Caucus, that sought to bring together regional civil society networks across the continent. A cursory assessment of these initiatives highlights some of the reasons for their limited success:

>   - The impetus for setting them up was external to the continent and they were usually geared towards meeting short-term interests of particular (global civil society) organisations.
>   - There was a lack of adequate resourcing for the initiatives, from human and financial capital to ideological robustness – a long-term strategy is critical to movement building.
>   - Governance failings – the competing interests of individuals heading established and resourced NGOs sometimes goes against the needs of a continent wide movement. Those entrusted with leadership responsibilities of continental networks did not have the dedicated time to exercise proper governance of the management and secretariat.

3 • Civil society under attack

Africa's historical resistance to slavery, economic imperialism and political colonisation finds focus in the current struggles by African people for democratic governance, justice, equality and a voice in the international policy arena.

Today we are told that Africa is rising. Yet, when we look closer, it seems that this is based solely on aggregated assessments of national Gross Domestic Product. In these rising African countries the few are becoming fantastically wealthy while the majority remain socially marginalised and economically excluded. In truth, the majority of Africans are not rising and continue to struggle with poverty and the denial of their most basic rights.

Underlying this state-of-affairs is the phenomenon of shrinking political and civic space. We have seen a drastic curtailment of the freedom of association, assembly and expression in far too many countries across the continent.[4] This has been accompanied by heightened levels of corruption and growing levels of inequality.[5] These rights violations have been met by new forms of social organisation and leadership leading to partial victories and new forms of popular actions and movements. Civil society in Africa is under assault on many fronts. We are experiencing many restrictions on political space, the erosion of women's rights, increasing inequality and climate change that is already having significant negative human impacts across the continent.

4 • Africans rising

The current initiative to establish a continent wide social justice platform for civil society actions, solidarity, protection and advancement came about as a confluence of factors at a similar time and operating within the context set out above.

For some years now, Action Aid Denmark has been running the well-regarded Training Centre for Development Cooperation (TCDC) in Arusha, Tanzania. In 2015 Action Aid Denmark handed over the TCDC facility to an African institution in order to further establish the facility as a base of operations for a new Africa wide centre for civil society.

In February 2016, I agreed to serve as the start-up director of the new initiative. Upon accepting the role I immediately set about engaging in dialogue with civil society across the continent to gain further insight into perspectives on a move to build greater unity within civil society on the continent. The process included numerous formal and informal consultations with civil society activists, regional and local networks, NGOs, international non-governmental organisations (INGOs), trade unions and faith-based groups across the continent.

This process of bottom-up consultations (which is ongoing) has shown that almost everyone who has participated agreed that African unity - reflected by greater social, political and economic integration - is critical for Africa and its peoples. Individual nation states are far too weak to fight for what they need; be it in negotiations about trade, climate or a host of other pertinent issues.

Secondly, most activists feel we are fighting on two fronts. On the one hand, we are fighting a global system that is unjust, inequitable and is leading us to climate catastrophe

that fundamentally threatens our very ability to survive as a species. A system that serves the top 1% has to be vigorously opposed. On the other hand, we are facing national governments that have witnessed "state capture" by local and global elites and are often acting against the interests of their own citizens. This leads us to a situation where we need to both defend human rights and democracy at home and also ensure our governments are taking on the obscene injustices that prevail at the global level.

Thirdly, many on the continent feel that we need to have a fundamental rethink as to what constitutes civil society. There is a growing recognition that there is too much dependency on and too much influence of INGOs but also greater acceptance that even local and national NGOs are disconnected from the poorest and most marginalised. While there are, of course, inspirational exceptions to this, there is increasing agreement that the engine of resistance to injustice is not coming from formal and bureaucratised NGOs but is coming from looser, informal and social media driven activism. Some of the most inspiring challenges to power in Africa, and globally, in the last decade have not seen the more formal NGOs playing any decisive role.

Lastly, the consultations were unanimous in their focus on a wider initiative as opposed to a specific centre. Thus, while the Arusha TCDC facility is likely to be a key convening point for civil society (it already enjoys credibility and success as an NGO management training facility), for the purposes of building the vision of the potential future initiative we want it to be driven by a bottom-up process of consultation that is not focused on a single centre but on a range of such convening spaces.

These key discussions were affirmed at a recent strategy workshop organised by the African Civil Society Initiative. 30 activists, NGOs and networks aligned themselves with the inspirational Rustlers Valley Declaration (2014),[6] thus taking up the challenge for civil society generally and NGOs specifically "to be the change we want to see in the world".

The key consensus points developed in the African Civil Society Initiative process to date represent some significant departures from previous attempts at civil society unity in Africa. Firstly, there is an acceptance that NGOs and INGOs cannot be the sole drivers of the process. The initiative must be much broader than any previous attempts and will make a special effort to be inclusive of social movements, NGOs, peoples and popular social justice movements, intellectuals, artists, sports people, cultural activists and others, across the continent and the African Diaspora. Secondly, a phased approach must continue to be employed, ensuring consensus at each step – no one must be left behind. Thirdly, the eventual organisational structure of the initiative must reflect the lean and agile nature of the initiative itself.

Based on the current feedback from the consultation process, it is likely that the initiative will focus on six key cross-cutting areas that have substantial significance and have gained general consensus, specifically:

- Exposing corruption and opposing impunity;
- Fighting for full gender equality;
- Defending and deepening democratic space generally and civic space specifically;
- Working for poverty eradication;
- Opposing inequality; and
- Assertively addressing the challenge of climate change.

These consensus points will most likely be implemented by the nascent initiative in the following ways:

- Sparking a major conversation across the continent about the establishment of the initiative – what such an intervention would look like, who would participate, what participants' expectations are and what the objectives of such a platform would be?
- Establishing internal and external communications functionality, making as much use of social media platforms to ensure widespread engagement of all who are interested in civil society;
- Inviting people to express interest in the initiative[7] - we can only succeed if we have broad based membership across civil society;
- Organising a Validation Conference[8] in Arusha, Tanzania - the final steps to establish the initiative must have broad public endorsement with people and organisations ready to stand up and be counted in the fight for justice. The conference will deliberate on how the initiative should be established and operate. Should the conference demonstrate the requisite level of support the initiative's operations will commence promptly thereafter;
- And lastly, all of this work requires that most basic of needs, the resources to succeed and the current team is busy preparing for the Validation Conference, staff and other related costs.

It is time we speak together and decide what change we wish to see in our countries, across Africa and what we want Africa to be when we celebrate Africa Day in the future. For a long time now, others have been writing our story. Now is the time for us to take a brave step, a giant step for us and start writing (and telling) our own story – a story of a united Africa, at peace with prosperous and healthy people.

We need your voice, ideas, thoughts, and action to keep working together to build this initiative. It is not complicated to do your part, tweet to us @helloacsi, write on our Facebook wall or send an email to acsihello@gmail.com.

Together for Africa, for justice, peace and sustainable development.

NOTES

1 • Elizabeth Heath, "Berlin Conference of 1884-1885," *Oxford Reference*, accessed June 8, 2016, http://www.oxfordreference.com/view/10.1093/acref/9780195337709.001.0001/acref-9780195337709-e-0467.

2 • Andrew Rosser, "The Political Economy of the Resource Curse: A Literature Survey," *IDS Working Paper 268*, Institute of Development Studies, April 2006, accessed June 8, 2016, http://www2.ids.ac.uk/futurestate/pdfs/wp268.pdf.

3 • Organization of African Unity (OAU), *Draft Code of Ethics and Conduct for African Civil Society Organizations*, June 2003, accessed June 8, 2016, http://www.sarpn.org/documents/d0000352/P340_AU_SACSO_Code_Ethics_Conduct.pdf.

4 • OHCHR, *"Hate is being mainstreamed,"* press release, June 13, 2016, accessed June 27, 2016, http://www.ohchr.org/EN/NewsEvents/Pages/media.aspx?IsMediaPage=true.

5 • See, for example, https://www.worldwealthreport.com/.

6 • "An open letter to our fellow activists across the globe: Building from below and beyond borders," *Civicus Blog*, August 6, 2014, accessed June 8, 2016, http://blogs.civicus.org/civicus/2014/08/06/an-open-letter-to-our-fellow-activists-across-the-globe-building-from-below-and-beyond-borders/.

7 • See http://africacsi.org/.

8 • See http://africacsi.org/signup.

KUMI NAIDOO – *South Africa*

Born in South Africa in 1965, Kumi Naidoo was executive director of Greenpeace from 2009 – 2015 and was the Secretary General and CEO of Civicus, the world alliance for citizen participation, from 1998 - 2008. He fought against apartheid in his home country and has led various global initiatives, including the Global Call to Action Against Poverty and the Global Call for Climate Action. He is now the start-up director for the Africa Civil Society Initiative.

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REFLECTING FOR THE FUTURE

Laura Dupuy Lasserre

• *Ten years of the United Nations Human Rights Council* •

ABSTRACT

To commemorate the tenth anniversary of the United Nations (U.N.) Human Rights Council, Laura Dupuy Lasserre reflects on its achievements and how it might be improved in the coming years. Dupuy Lasserre examines the Universal Periodic Review process and considers why it is such an important mechanism in the struggle for human rights. She notes that there must be improved coordination between regional human rights bodies in Africa, Europe, the Americas and the HRC in order to better focus issues in the international arena. The text highlights the positive role of Global South countries within the HRC, noting that the kinds of issues they have raised show the interdependency between economic, social and cultural rights and political and civil rights. She concludes that the HRC has provided a forum which offers a role to each individual country, while all working together to build a more just and fair world based on U.N. principles.

On the occasion of the tenth anniversary of the establishment of the United Nations (U.N.) Human Rights Council, it is worth reflecting on its achievements and the possible improvements that could be made to help meet the challenges related to ensuring the full enjoyment of all fundamental human rights and liberties by all people.

The Universal Periodic Review (UPR) of the human rights situation in all U.N. Member States is undoubtedly an innovative mechanism, based on peer reviews and with the involvement of high-level representatives at the time of the country reports. This, combined with the fact that civil society actors, such as non-governmental organisations (NGOs) or national human rights institutions, participate in one way or another in the different stages of the process, leads to a greater impact being made on the ground when it comes to following up on the recommendations made.

The UPR process tends to reflect the forms of social coexistence and political participation in each of the countries, and in turn, when undertaken in good faith, it has the potential to contribute to the strengthening of a democratic society as an opportunity for dialogue and social participation. The risk is that it may be conducted in a superficial manner, as if it were just one more procedure. In this case, responses that are sometimes void of content or insincere may be brought before the Council, without preliminary review at the national level, or the inter-institutional exchange of ideas with all branches of government and civil society representatives afterwards. As such, following up on all recommendations becomes very important. From the outside, treaty bodies, the special procedures of the Human Rights Council, the regional human rights system, as well as the offices of the OHCHR, the U.N., and NGOs - among others - can contribute to the follow-up process.

With regards to the international forum itself, it affords states the opportunity to publicly commit, once again, to its values; show the efforts they have made with the resources they had available; identify shortcomings that merit both new efforts and also the support – eventually - of the international community; and share best practices.

If there is one thing that has become clear, it is that every country - regardless of its level of development - can feel and demonstrate pride in their achievements, which can then serve as an inspiration for other countries.

The states that participate in the dialogue do so by offering constructive criticism as they seek to help their peers improve. This, in itself, represents a change in tone and spirit, moving away from isolated criticisms of issues or states towards stimulating the overall improvement of a country. This also allows for the identification of areas of priority or possible cooperation, in accordance with international human rights standards.

In addition to the UPR, it is worth highlighting the positive evolution of the commitment of countries - with some exceptions that, in our understanding, are

temporary - to democracy. A democratic society is one that is governed by the rule of law and provides guarantees for the enjoyment of human rights.

While this nexus between democracy, the rule of law, and fundamental human rights and freedoms is well known, political leaders have not always valued and articulated it.

There is no doubt that it is just as fundamental for a society to be stable and peaceful to prevent internal and external conflict. This is why, in the future, the human rights agenda should be advanced from the perspective that it is an investment, not an expense, and that it has high impact or prevention potential.

The emphasis on democracy (understood not solely as periodically held elections), the rule of law, and fundamental human rights and liberties is reinforced by various regional or sub-regional commitments. Hence the importance of human rights systems such as the European, inter-American, or African ones - which are strengthened through country reports and thematic analyses on sensitive issues in many societies - and other more recent systems currently under construction. These create synergies with the universal system of the U.N and coordination between these mechanisms must be increased. In addition to offering closer follow-up of situations in the region or sub-region, these systems can generate consensuses on issues, which can later be conveyed as valuable input in the international arena.

This could be the case of the inter-American system, which is working to combat different forms of discrimination, either via legal instruments or as commitments from national authorities, such as when the health sector, for example, addresses the inclusion of LGBTI people. Such was the case in the decision made by the Pan-American Health Organization, which includes Caribbean countries, and which GRULAC later took to the World Health Organization.[1] This case provides an example of the need to go beyond long-standing national practices, policies, and norms that require revision in order to comprehensively and adequately address a health issue in accordance with rights protections. At the Human Rights Council in 2014, some Latin American countries took the initiative by calling attention to the issue of sexual orientation and gender identity in fighting violence and discrimination in order to promote social inclusion and respect for the rights of all people.

Similarly, through the exchange of valuable experiences at the intergovernmental level, countries from a given region can agree on political commitments to advance norms, public policies, or practices that have proven to be effective and efficient. Among these, one can cite the follow-up done in Latin America and the Caribbean, with the support of the Economic Commission for Latin America and the Caribbean, on the U.N. Cairo Declaration on Population and Development of 1994. It led first to the 2013 Montevideo Consensus, and now to an operational guide that addresses a wide range of issues, many of which are still sensitive, such as sexual and reproductive

health - a fundamental issue for women - and especially, the prevention of teenage pregnancy and preventable maternal mortality.

It is clear that developing countries have not avoided debates on sensitive issues in the Human Rights Council. It is true, however, that they tend to become unnecessarily polarised when many delegations reflect their national regulations or the positions of particular political leaders. Sensitive issues require cultural change, which rarely happens overnight as a result of a single public debate. Its public nature engenders the adoption of more rigid positions.

The commitment of other Global South countries can contribute to an evolution of national positions, especially if such a commitment does not impose one way of thinking on everyone, or make all cooperation dependent on the donor's area of interests. On a social level, this has shown itself to have been a success and is respectful of the human rights of all individuals.

The Sustainable Development Goals could serve as a framework for progress in this regard, as the human rights agenda permeates all of the goals.

Developing countries have been more forceful about bringing matters to the Human Rights Council that illustrate the interdependence of the enjoyment of economic, social, and cultural rights and the exercise of civil and political rights and fundamental freedoms. They have been pioneers on several issues such as the right to drinking water and sanitation, human rights and climate change, the right to adequate housing – all examples of social policy strategies to fight extreme poverty and poverty eradication and those strategies' relevance in crisis situations, etc.

Furthermore, because of their historical experiences, developing countries have vigorously worked toward the right to truth, negotiating a Convention on Enforced Disappearance, among others.

Despite there being great diversity in the world, the way forward is not cultural relativism in regard to values that are common to humanity and that are fundamental to the dignity of the person.

The Council has shown that every country in the international community has a role to play while all working toward the same objective, based on the principles and purposes of the U.N., and keeping in mind that the pillars of human rights, peace, security, and development are all interlinked.

NOTAS

1 • The United Nations Regional Group, in this case, is the GRULAC.

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Nations Human Rights Council (from June 2011 to December 2012,
6th cycle, having been nominated by the GRULAC) and the Permanent
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Specialized Organizations in Geneva (from October 2009 to October
2014). She was also President-Rapporteur of the Social Forum 2010
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