

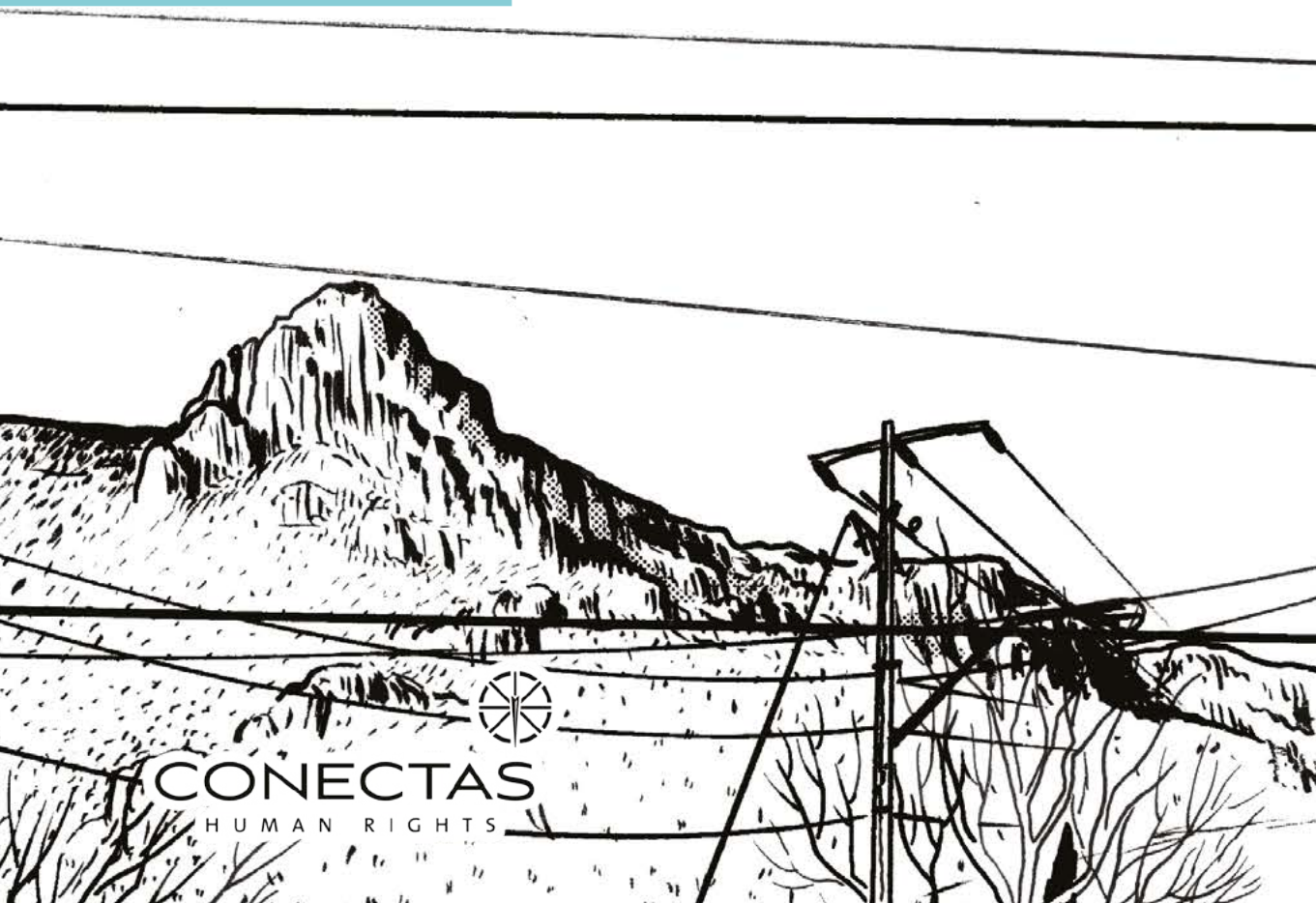
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issue **25**



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HUMAN RIGHTS

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OLIVER HUDSON

Managing Editor

PATRICK ALLEY, GLOBAL WITNESS

Guest Editor

THE SUR FILE ON NATURAL RESOURCES AND HUMAN RIGHTS

Five years ago, on 26 April 2012, Chut Wutty, a courageous Cambodian land rights defender, was shot dead by Cambodian military police. It was this killing that prompted Global Witness to launch a campaign that would document the killings of land and environmental defenders worldwide, on an annual basis, because Chut Wutty was a former colleague of ours and his death brought home to us the stark reality of the threats that many ordinary people face every day defending their land and their rights.

In the intervening years our reports have documented a rising trend in these killings. However, we know that we are probably only scratching the surface as this is a vastly under-reported area, and also the annual report does not include the legal and physical threats and harassment that many thousands more people face, primarily because it is so hard to document.

Land and environmental defenders are ordinary people who suddenly find that their communities' land has been sold off, without their knowledge or consent, to an industrial development, such as a dam, mine, oil block, logging concession or agricultural plantation. These deals are usually corrupt, which means that the politicians and officials involved have personally benefitted in some way and now owe their allegiance not to the citizens they are meant to represent, but to some corporation or other. If the judiciary and law enforcement have been bought off as well, then these local communities are on their own. The organs of state that are meant to protect them have instead become the very mechanism that

threatens them and has deprived them of any legal means of redress. So they do the only thing that is left to them; they protest – by demonstrating, blocking access roads, disabling machinery, and for this they are threatened, beaten up and, too often, murdered.

These killings are a window into a much bigger issue. Natural resources are big money and the scarcer they get the more companies want to control them. The pursuit of natural resource wealth gave rise to the buccaneering corporate and private colonialism exemplified by the East India Company and King Leopold's Congo in the 18th & 19th centuries, and which has continued in a similar fashion ever since, albeit under new management.

Today the system operates according to much the same principles, but in many important ways is far less visible. The resources continue to flow inexorably to rich consuming countries as before – Resource-Colonialism – but much of the money earned disappears into secret bank accounts held by a morass of anonymously owned companies based in tax havens and secrecy jurisdictions; only occasionally, perhaps via some data leak like the Panama Papers, will the true owners of these companies be identified and the scale of looting from some of the poorest countries in the world become known.

The articles in this edition of the Sur International Journal on Human Rights (the Sur Journal) bring together some remarkable and critical case studies that illustrate that natural resource exploitation is one of the major causes of many human rights abuses. Land-grabbing, instability, the exacerbation of poverty, the destruction and pollution of lands essential to indigenous and other communities and, at its worst, murder and war, are too often

the direct results of oil and mineral extraction, renewable energy projects, logging and industrial agriculture.

THE ROLE OF LAW IN PREVENTING EXPLOITATION

Afghanistan has a plethora of legislation and regulations purportedly to protect its vast mineral wealth, resources that the international coalition that is working to bring peace to the country trumpets as its salvation. However, **Javed Noorani (Afghanistan)**, paints a disturbing picture of what natural resource exploitation looks like in the context of corruption, instability and poor governance. His case study describes how – despite a theoretically strong legal framework in the country – corrupt politicians, warlords and Taliban insurgents all have their snouts in the mineral trough, enriching themselves, funding their wars and looting the state. **Silas Siakor (Liberia)** offers a compelling narrative on the damage wrought by corrupt natural resource exploitation in Liberia. He details how the country's civil society banded together to demand an improved legal framework, specifically in the logging sector, to help ensure that the grievous human rights abuses inflicted on the local population cannot happen again. It was Silas's organisation, together with Global Witness, that worked to document, expose and advocate against (then) President Charles Taylor's timber-for-arms trade, which ultimately resulted in United Nations (UN) sanctions on Liberian timber.

THE ROLE OF THE STATE AND PRIVATE ENTERPRISE IN EXPLOITING NATURAL RESOURCES

Aseil Abu-Baker (United States) describes how, in addition to military force and the building of the West Bank wall, Israel exercises ultimate

control of the occupied territories – through the state owned water company Mekorot – by using water as a weapon of power, which strikes at the heart of people’s rights. Military orders, an inequitable water-sharing agreement, and a discriminatory planning and permit regime create and maintain a comprehensive system of control over the water resources, ensuring that Palestinians are prohibited from exercising sovereign rights over their water resources. Aseil goes on to describe how Israel has effectively created a system of “water apartheid”. Similarly, **Renzo Alexander García (Colombia)** offers a brief overview of the recent – and highly innovative – people’s referendum in the municipality of Cajamarca, Colombia. Despite the local population overwhelmingly demonstrating that they do not want a mining presence in their region, the government of Colombia is threatening to overrule a democratic decision, despite the method by which it was sought being protected by the Colombian Constitution. The devastating consequences of both corporate and state greed and inaction are detailed in the contribution by **Michael Power and Manson Gwanyanya (South Africa)**. They lay out in chilling detail the circumstances that led to the 2012 massacre of 34 mine workers by the police at Marikana, in South Africa’s North West province. Finally, **Caio Borges (Brazil)** and **Tchenna Fernandes Maso (Brazil)** discuss how the destruction of the Rio Doce basin following the 2015 collapse of the Samarco mining tailings dam is an emblematic case of the tense relationship between ensuring human rights, within international standards, and the action of companies, especially transnational companies in countries of the Global South.

NATURAL RESOURCE EXPLOITATION AND CLIMATE CHANGE

Events at Marikana, South Africa and Mariana, Brazil illustrate, with devastating clarity, the immediate consequences of the

exploitation of natural resources. However, all too often the effect of exploitation of natural resources on our climate is forgotten. **Tessa Khan (Bangladesh/Australia)** not only illustrates that climate change is one of the most powerful, indeed apocalyptic drivers of human rights abuses, but she also highlights the need to hold those who fail to limit carbon emissions to account, and she lists numerous examples of creative court cases brought against companies and governments that are forcing them to take action. We see the need for holding governments to account in the contribution by **Michael Klare (United States)**. Oil companies are past-masters at wielding their lobbying power and engaging in straightforward corruption to avoid or weaken financial and environmental regulations in the Global South, and now they're employing the same tactics in the US and Canada as part of the fracking boom as they did across the Global South. Meanwhile, in an attempt to illustrate that climate change is already having a very real impact on the lives of individuals, this edition of the journal features the work of two photographers – **Jashim Salam** and **Khaled Hasan (Bangladesh)**. Their beautiful yet haunting images show how two communities in the Ganges Delta are adapting to a new reality as climate changes wreaks havoc with their daily life.

THE ROLE OF INDIVIDUALS IN PROTECTING OUR NATURAL RESOURCES

It is the individual that must be at the centre of any discussion about natural resource exploitation. Not only are these individuals' human rights systematically violated by the exploitation of natural resources but it is these individuals who are resisting the state and private enterprise, often putting their lives at risk while doing

so. The life and mission of Berta Cáceres – one of the foremost human rights defenders of our time – is eloquently celebrated by **Patricia Ardón** and **Daysi Flores**. Far from silencing her, Berta's assassination in 2015 propelled her work to a global level. Her legacy is her inspiration to community-led social movements across the world, and the leading role played by women in these movements. The philanthropist **Alex Soros (United States)**, writes a highly personal op-ed on the critical role played by environmental human rights defenders and the responsibility that those of means have in supporting their work.

Sur 25 also presents the profiles of three women who fight for human and environmental rights, inspired by their religious beliefs and who are from communities that are strongly impacted by natural resource exploitation (deforestation, extractivism, monoculture, etc.). **Beata Tsosie Peña (United States)**, **Jennifer Domínguez de Esquimulas Chiquimulas (Guatemala)** and **Joyce Cleide Santiago dos Santos (Brazil)** were three of the participants in the multi-faith conference "Faith in the Climate" that took place in Rio de Janeiro, Brazil in May 2017. The goal of the meeting was to discuss climate change and strengthen a rights advocacy network.

GRAPHIC NOVEL

Recognising the need to find alternative ways of communicating to new audiences, the Sur Journal is delighted to feature an extract of the graphic novel, *La Lucha: The Story of Lucha Castro and Human Rights in Mexico*, the brainchild of Front Line Defenders. The novel tells the dangers of the day-to-day work of being a human rights defender in Mexico and is contextualised with a preface by Lucha Castro, whose crucial work the novel is based upon.

ESSAYS

Staying in **Mexico**, we are honoured to feature two contributions from the country. Firstly, **Alejandro Anaya Muñoz** examines the development of the international human rights regimes, in an international relations context. The text is of fundamental importance to anyone interested or studying IR or human rights. A suite of authors (**Santiago Aguirre Espinosa**, **Stephanie Brewer**, **Sofía de Robina** and **María Luisa Aguilar**) from the Miguel Agustín Pro Juárez Human Rights Centre (Prodh) discuss the innovative way that the Interdisciplinary Group of Independent Experts, appointed by the Inter-American Commission on Human Rights, went about investigating the case of the 43 disappeared students from Ayotzinapa and examine why its methodology can be seen as a best practice example for similar investigations going forward.

Drawing on a recent report that argues that the violence in Mexico amounts to a crime against humanity, **Marlon Alberto Weichert (Brazil)** asks the same question with respect to Brazil and the disproportionate violence metered out on the young black population. Completing our suite of in-depth articles, **Vincent Ploton (France)** examines recent developments in the UN treaty bodies, in particularly focussing on how their recommendations can be made more effective. He draws on the success of recent innovations made by the Committee Against Torture.

CONVERSATIONS

Juan E. Méndez (Argentina) talks to the Sur Journal about his six years as UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He explained how his early experiences in Argentina formed his life's work, how he came to be appointed Special Rapporteur and his achievements during his tenure.

EXPERIENCES

Sur always aims to include material that its readers can put into practice. **Irit Tamir (United States)** offers excellent suggestions on how to build an effective campaign, based on Oxfam's highly successful Behind the Brands campaign that sought to influence the sourcing policies of the world's ten biggest food and beverage companies.

INSTITUTIONAL OUTLOOK

Doctors' Without Borders (MSF) made international headlines following its decision to refuse further funding from the European Union (EU) in 2016 on the basis that it opposed the EU's migration policy. Here **Susana de Deus (Portugal)** and **Renata Reis (Brazil)** discuss the process – and the controversy – behind the decision.

VOICES

Member of Sur Journal's Advisory Board and internationally renowned human rights academic, **Philip Alston (Australia)** offers his take on the current state of the human rights movement and how it must – urgently – respond in order to retain its relevance.

• • •

Finally, we would like to emphasise that this issue of Sur Journal was made possible with the support of the Ford Foundation, *Instituto Clima e Sociedade* (Climate and Society Institute or iCS), Open Society Foundations, the Oak Foundation, the Sigrid Rausing Trust, the International Development Research Centre (IDRC) and the Swedish International Development Cooperation Agency (SIDA), as well as some anonymous donors.

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And finally the Communication Team from Conectas deserves 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 – Juana Kweitel and Marcos Fuchs.

THE SUR FILE ON NATURAL RESOURCES AND HUMAN RIGHTS



THE ROLE OF LAW IN PREVENTING EXPLOITATION

WEALTH BEYOND REACH

Javed Noorani

REFORMING LIBERIA'S FORESTRY SECTOR

Silas Kpanan Ayoung Siakor

THE ROLE OF THE STATE AND PRIVATE ENTERPRISE IN EXPLOITING NATURAL RESOURCES

WATER-DEPRIVED

Aseil Abu-Baker

CAJAMARCA, COLOMBIA

Renzo Alexander García

MASSACRE AT MARIKANA

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THE COLLAPSE OF THE RIVER DOCE DAM

Caio Borges & Tchenna Fernandes Maso

NATURAL RESOURCE EXPLOITATION AND CLIMATE CHANGE

ACCOUNTING FOR THE HUMAN RIGHTS HARMS OF CLIMATE CHANGE

Tessa Khan

A NEW ENERGY "THIRD WORLD" IN NORTH AMERICA?

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THE ROLE OF INDIVIDUALS IN PROTECTING OUR NATURAL RESOURCES

BERTA LIVES! COPINH CONTINUES...

Patricia Ardón & Daysi Flores

THE REAL HEROES OF THE ENVIRONMENTAL MOVEMENT

Alex Soros

WEALTH BEYOND REACH

Javed Noorani

- *How mining activities in Afghanistan* •
negatively impact local communities

ABSTRACT

Despite possessing a wealth of mineral resources, Afghanistan is one of the poorest countries in the world. Although the country has a relatively well-structured legal framework in relation to mining, rarely is it properly implemented. Consequently, the sector is plundered by corrupt politicians and local warlords. Here Javed Noorani provides an overview of the existing legal framework. He then offers three examples where this framework has failed to protect the local population from human rights abuses. Finally, he suggests how the situation might be improved including, for example, by revising existing legal provisions to include greater emphasis on anti-corruption measures and working to guarantee that community consultations are properly undertaken.

KEYWORDS

Mining | Corruption | Afghanistan | Natural resource legislation

1 • Introduction

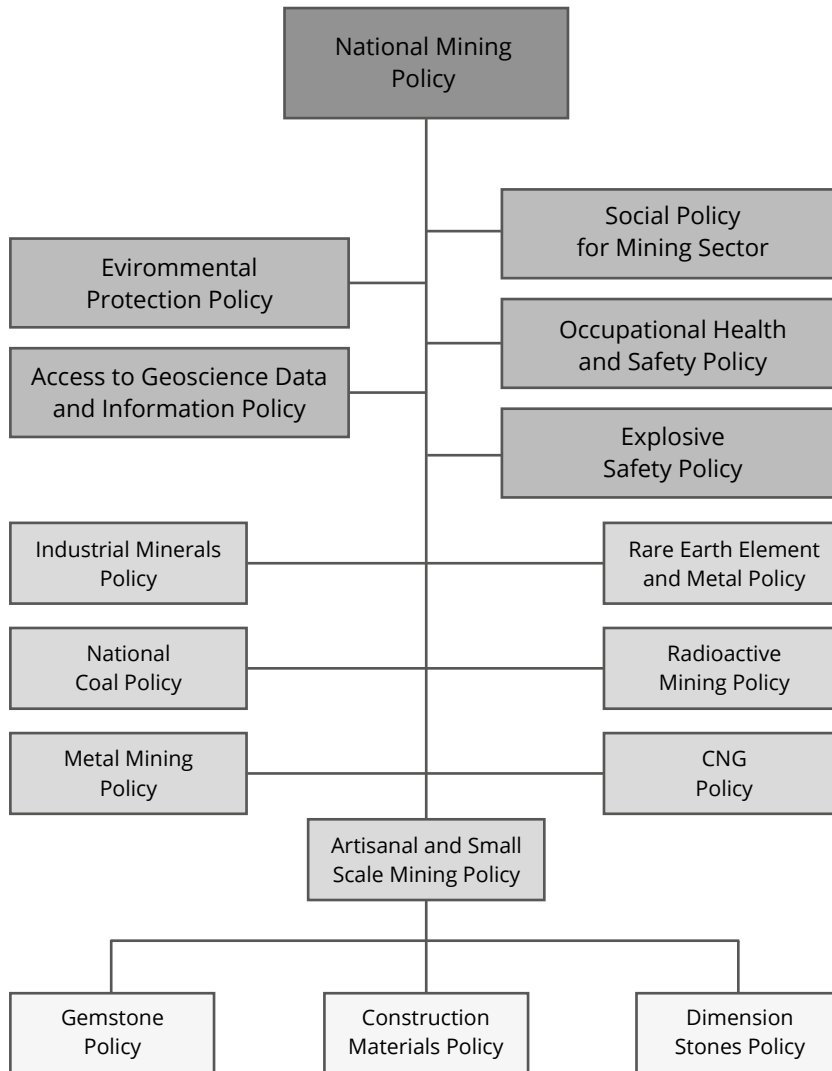
Afghanistan has some of the most complex and varied geology in the world. The country is home to lead, zinc, iron, chromium, tin-tungsten, mercury and uranium as well as several kinds of rare earth elements. The copper belt in Afghanistan stretches for 600 km.^{1 2} Among the 93 types of precious metals found in the country are gold, silver and platinum.³ Furthermore, Afghanistan also has several kinds of precious and semi-precious stones including emeralds, rubies, aquamarine, kunzite and lapis lazuli.⁴ Despite such riches being an enormous potential source of revenue for the country, Afghanistan is still struggling to implement an effective legal framework. The mining process – tendering, contracting, extraction and monitoring – is shrouded in secrecy. This enables political influence and the personal enrichment of the principals and agents involved. Consequently, despite the riches that Afghanistan possesses, the majority of the population lives below the poverty line and Afghanistan ranks as the 167th poorest country in the world and is highly dependent on international aid.⁵

2 • Afghanistan's mineral law and policy framework

While natural resources may be a tempting resource for cash-strapped developing countries to look to in order to quickly raise capital, it is of critical importance to have an inclusive and comprehensive national strategy, a clear legal framework and competent institutions to manage and oversee the process.

Afghanistan has a structured legal framework in relation to its extractive sector. There is both a Minerals Law and a Hydrocarbon Law,⁶ each of which is complimented by a set of accompanying regulations.⁷ Added to this is a range of policy documents addressing various elements of the extractive industry, the organisation of which is set out below.

...



Source: National Mining Policy, Ministry of Mines and Petroleum, <http://mom.gov.af/en/page/3993/7664>.

This suite of legislation, regulations and policy contains admirable language in terms of rights protection and development goals. The Minerals Law, for example, has as its objective *inter alia*:

- To regulate the development and appropriate use of the Mineral resources of Afghanistan;
- The economic self-sustainability of Afghanistan through the development of its Minerals sector;
- To ensure that Mineral resources are developed and managed according to the best international practices and experiences;

- To secure optimal benefit from Mineral extraction and Processing;
- The sustainable development of Mineral resources, the prevention of waste, and the mitigation of negative Environmental and Social Impacts;
- To promote peace and security through development of social and economic activities in the Mining local communities.⁸

Despite these protections on paper, the reality on the ground is very different.

A recent report by Integrity Watch Afghanistan – based on a case study of five mines in the country – found a catalogue of errors throughout the mining process. Tender documents were often prepared in a way that favoured the winning bidder and contracts were eventually awarded to enterprises in which politicians or other Afghani government officials hold an interest, in violation of the Minerals Law that prohibits certain officials being granted licences.⁹ The same report detailed how despite certain legislative and contractual requirements for companies to conduct social and environmental impact studies prior to extraction, none of the mines investigated had done so. In fact, they had all begun extraction before obtaining the necessary permits or paying the required royalties and taxes. Finally, the investigation found that the Ministry of Mining and Petroleum's implementation of monitoring and accountability mechanisms was severely lacking.¹⁰

This inability to translate theory into practice means that Afghanistan is being looted of its natural resources. Despite the government having an enormous amount of information about these abuses it continues to protect the interests of the mining companies. This reality means that Afghanistan scores very low on governance structures for the mining sector. In 2013 for example, it was ranked 49 among 56 countries by the Natural Resource Governance Institute.¹¹

The remainder of this paper looks at several different cases of mineral extraction in Afghanistan that highlight the kinds of rights violations faced by local communities in relation to the extractive industry in Afghanistan. It concludes by examining what action could be taken to improve the situation.

3 • Copper

The world class Aynak Copper mine is one of the many mines in Afghanistan for which private companies have been granted extraction rights. This contract was signed with a Chinese joint venture, China Metallurgical Group Corporation and Jiangxi Copper called MCC-JCL-JCL Aynak Minerals in May 2008.¹² Contrary to National Mining Policy Guidelines,¹³ the government tendered the copper mine without conducting even a preliminary enquiry about the communities living there, their means of livelihood, their land ownership, social structures or the local economy and environment. Although the then Minister of Mines and Petroleum Ibrahim Adel visited the local communities

and made numerous promises to them, the engagement was more misleading than any well-intentioned consultation with local people.¹⁴

Women are specifically affected by the mining activities due to the presence of the Aynak Protection Police, a unit of the Ministry of Interior that provides security to the company. Women already had limited access to public spaces before the extraction began. However, the new developments at the mining site further constrained women's movement since security forces, deployed to protect the mining site, harass them. Consequently, they are forced to stay within precincts of their homes.¹⁵

Some communities in Aynak claim that they inherited the land from their ancestors, and the nomadic Kuchi claim pastoral land entitlement to the surrounding area. There are various claims of a community land title. For example, one of the Aynak community representatives explained that "the main village that now falls in the area reserved for mining operations is named after my great grandfather, Adam."¹⁶ Various locals have confirmed this, stating "the land at Aynak belongs to the great grandchildren of Adam." However, people's properties were seized without compensation and, with exception of two people, the community has been displaced against their will and lost their livelihood.¹⁷ The state has comprehensively played on the side of the private company, protecting private interests and in turn depriving its own citizens of their livelihood making them ever more vulnerable.

4 • Chromite

The government awarded the chromite contract of Kohi Safi in Parwan to an Afghan company named Hewad Brothers' Company.¹⁸ The company had no prior experience in mining. 50 per cent of the company belongs to a powerful warlord, infamous for kidnaping, land grabbing and murdering innocent people.¹⁹ Once again, the government did not consult any communities, nor did it conduct any study before opening the contract to tender. The contract had clear exploration and extraction phases defined. However, the company's armed men and employees moved into the area two days after the contract was signed and started extracting chromite in complete violation of the terms of the contract.²⁰

The district in which the chromite is being extracted is home to 42,000 people.²¹ The mining operation happened only 20 meters from the villages of Gahah Khile and Nouman Khile in Kohi Safi. Once again, the arrival of outsiders – including armed militia – disproportionately affected women's movement in the community. It has become harder for them to carry out traditional work, attend social events, go to the health clinic and girls no longer go to school – all for fear of violence.²²

In addition, the people around the mine have also experienced violent conflict due to the irresponsible behaviour of the company, which led to the deaths of dozens of local people. For example, in 2012 the company recruited guards from a village named Naza Dara.

However, the extraction was happening in another village, Jala Qala.²³ People from Jala Qala felt discriminated against. The elders of Jala Qala told the company that they should be employed as guards because they are the ones being impacted by the mining.²⁴ Hewad Brothers' Company eventually handed over the security to people from Jala Qala. Two months later, six former guards from Naza Dara were killed in a targeted act of violence.²⁵ The elders of Naza Dara suspected that these six individuals were killed by people from Jala Qala who had earlier protested against the company and asked for employment as guards. Two months later, two clergymen from Jala Qala were assassinated, Mullah Salam and Mullah Kabir.²⁶ Following these events, Hewad Brothers' Company disarmed the local people with the help of local police and brought in 40 armed men to protect the mine.²⁷ However, the company kept some elders from the community on its payroll to "manage" the community and to discourage people from protesting against the company. This has led to further suspicion and seeded even more fragmentation amongst the local communities.²⁸

The company's private guards have threatened local people against speaking publicly about the company. The local people felt vulnerable and resorted to insurgents, including the Taliban, to seek justice and protection, eventually forcing the company out of the region. The two communities are now locked in a violent conflict, a direct consequence of irresponsible mining in the area.

5 • Lapis lazuli

Until 1979 the government extracted about four tons of lapis lazuli every year from the mine in Keran-wa-Menjan district of Badakhshan and received good revenues, keeping control over the supply and price. The lapis lazuli extraction was estimated to be worth about US\$ 50 million in annual revenues until Chinese traders started purchasing the stone.²⁹ Lapis lazuli extraction then increased tenfold and the trade reached US\$ 500 million annually.³⁰ However, during the communist regimes in the 1980s, when there was a widespread conflict in Afghanistan and Keran-wa-Menjan was insecure, Ahmad Shah Masood, a jihadi commander, extracted lapis lazuli to generate cash to continue the war against the state.³¹

Since his death, militia commanders loyal to the Northern Alliance Jihadi group, with a strong base in the north of the country, have continued to extract lapis lazuli and pocket the cash. Jihadi Commander Abdul Malik is one the men who has continuously been in control of the lapis lazuli mines, except for a brief period when the contract for lapis lazuli extraction was awarded to the Lajwardin Company, backed by Zalmay Mojadaddi a former governor of Badakhshan.³² Lajwardin Company promised to legally extract and generate revenues for the state and control illegal mining. This contract threatened the monetary interests of the lapis lazuli-mafia both in Kabul as well as in Badakhshan province. Consequently, a conflict ensued over control of the lapis lazuli mine between Zalmay Mojadaddi and Commander Malik, who is backed by both senior officials of government in Kabul and the local insurgent groups and to whom he paid millions of dollars annually in return for protection.³³

The conflict between Malik and Mojadadi has led to deaths of two dozen armed men from both sides. Abdul Malik has now taken complete control of the mine.³⁴ After many attempts to resolve the conflict, local elders, government officials and warlords have managed to agree on some kind of sharing formula where seven people split the rent among themselves.³⁵ Today, the revenue generated from the lapis lazuli mines evaporates into the black economy with some being collected by insurgents to continue their war against the government. The Keran-wa-Menjan area, where the lapis lazuli mines are located, has a population of over 8,000 people and it remains one of the most poverty-stricken districts of the country.³⁶

6 • Coal

Afghanistan has widespread deposits of coal across the country.³⁷ Coal deposits in the north and west of Afghanistan have long been extracted, sometimes under licence but also often illegally by powerful warlords, members of parliament, and other politically connected people. According to a list of illegal mining sites across the country, there are over 350 illegal coal extraction sites in two districts of Samangan.³⁸ The author personally visited the Dan-e-Toor region of Samangan province, where he found about one hundred illegally operated coal tunnels. A senior official from the Ministry of Mines and Petroleum also admitted that five members of parliament were operating 892 coal tunnels and illegally extracting thousands of tons of coal daily but paying very little to the government.³⁹ There are also coal deposits in Sar-i-pul, Takhar, and Bamiyan provinces that are being illegally extracted and supplied to brick-kilns or exported.

Another member of parliament, elected from Herat province, is operating two coalmines through his company, one in Herat and the other in the Western Garmak district of Samangan. He has reportedly been extracting over a million tons annually, exporting most of it to neighbouring countries.⁴⁰ This member of parliament allegedly does not pay royalties or taxes.⁴¹ Local people complained to local elders, the district government and the police but, instead of assisting, these institutions protected the company and pressured the local communities into allowing a smooth mining operation.⁴²

7 • Looking ahead

Despite this somewhat bleak reality, there are several steps that could drastically improve the extraction sector in Afghanistan.

The Ministry of Mines and Petroleum must spearhead these changes, ensuring a long-term vision that does not focus on short-term financial gain. Critically, the Minerals Law must be revised and have greater focus on both anti-corruption measures, in particular by recentralising the licensing system, the decentralisation of which has been a major contributor to increased corruption. In addition, stricter penalties need to be

specified and more actively enforced to discourage operators from breaking the law. The tendering process must also be improved – it must be run by a team of experts according to more stringent transparency and accountability standards.

The Ministry of Finance and the Ministry of Mines and Petroleum should devise a mechanism between them to guarantee that revenues owed by mining companies are collected in a regular, effective and transparent manner.

On social and environmental issues, the Community Development Agreement must be undertaken by the mining company without fail – as is required by law. This type of consultation is the only way to ensure that a community is empowered and informed. Similarly, the National Environment Protection Agency must independently manage the Environmental and Social Impact Report process and insist that companies produce the report before any mining permits are issued.

As seen above, mining operations have a disproportionate impact on women. Consequently, the Ministry of Women's Affairs must conduct an independent assessment to better understand how to mitigate the negative impact of mining on women and ensure that a gender based approach is mainstreamed into all mining policies and legislation.

Afghan civil society needs to continue to develop its knowledge on natural resource governance in order to better equip itself for advocacy, both nationally and internationally.

Finally, the international donor community needs to work with the Afghan government to ensure that improvements are made in the sector – for example, by providing financial support to develop improved governance strategies and also for capacity building activities to guarantee proper implementation of such revised strategies.

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REFORMING LIBERIA'S FORESTRY SECTOR

Silas Kpanan Ayoung Siakor

- *Reflections of a civil society activist* •

ABSTRACT

This article highlights the links between natural resource exploitation, corruption, and human rights abuses in conflict and immediate post-conflict situations in the context of Liberia. After contextualising the conflict in Liberia, the author, Silas Siakor, describes how human rights abuses in the Liberian forestry sector occurred in various forms. Militia commanders committed human rights abuses, supported by international logging companies whose senior executives facilitated the procurement and transfer of weapons and military materials. In addition, the logging companies made payments to individuals involved in training militia groups.

The author then examines how Liberian civil society, working closely with their international counterparts, have championed reforms in the forestry sector as a strategic approach to curtailing human rights abuses and securing rights for those living in poverty.

He describes how, in the decade since the civil war ended, reforms in the sector have led to increased civil society access to logging areas to monitor the conduct of companies, and how once deprived communities now share revenue from logging with central government. The government has also formally recognised certain community rights with respect to the forestry sector. He concludes by noting that despite the progressive legislation in place, some key reform measures have not been fully implemented and argues that the eventual success of these will rely on pressure from the international community.

KEYWORDS

Liberia | Forestry | Charles Taylor | Sanctions | Civil society

1 • Introduction

Founded by freed slaves from the Americas, Liberia declared independence in 1847; it would take more than 100 years before native Liberians were granted the right to vote in 1955.¹ The Americo-Liberians, as the settlers were called, dominated the economy and politics until 1980 when a bloody military coup ended their one-party rule. The failure of successive governments to address poor governance, poverty and inequality, however, contributed to paving the way for an uprising in 1989 that degenerated into civil war in the 1990s.²

In the 1990s and early 2000s, Liberia became synonymous with egregious human rights abuses. Much of the notoriety was linked to natural resource exploitation, especially human rights abuses that characterised the extraction and trade of timber and diamonds. In addition to the human rights abuses committed by key personnel of various logging companies and the militias they supported, the timber trade played a pivotal role in fueling and prolonging Liberia's civil war, responsible for the death of an estimated 270,000 people.³

National and international civil society organisations coordinated efforts to extensively document and report on the situation; complementing the work of a United Nations (UN) Panel of Experts established on Liberia. The UN Security Council subsequently imposed sanctions on Liberian diamonds in 2001 citing the links between the war in neighboring Sierra Leone and the diamond trade.⁴ As stronger evidence of the links between the timber industry, and the conflicts and violation of UN measures emerged, the Security Council expanded the sanctions to include timber in 2003.⁵

Once the timber sanction was imposed on Liberia, Charles Taylor's ability to raise revenue to finance his war against two armed groups fighting his government was significantly constrained. With rival factions holding strategic positions outside the Liberian capital and the international community demanding that he leaves Liberia, Taylor fled Liberia and went into exile in Nigeria.⁶

2 • Logging in the national economy

Liberia contains the largest remnants of the Upper Guinea Forest of West Africa, which spans nine countries from Guinea, through Sierra Leone, Liberia, Cote d'Ivoire, Ghana and into Togo. The Government of Liberia estimates that 42 per cent of the remaining Upper Guinea Forest is found in the country.⁷ The UN Food and Agriculture Organisation estimates that forested areas make up at least 32.7 per cent of Liberia's 9.6 million hectares of land.⁸

Industrial logging for export is the government's preferred model for economic activities in the forestry sector. Before the flare up of the civil war in 1990, logging contributed about 8 per cent of the country's gross domestic product (GDP) in 1989.⁹ The formal logging sector came to a standstill as the war escalated, and in its place a criminal enterprise

emerged, made up of then rebel-leader Charles Taylor's henchmen and loyalists. They conducted logging operations in rebel held territories and exported the timber to Europe and elsewhere. After Charles Taylor was elected President in 1997, in elections that were intended to bring the civil war to an end, logging companies that had ceased operations because of the conflict restarted operations in 1998.

Logging and exports gradually resumed such that by 2001 production had quadrupled and by 2003 production reached the pre-war level of one million cubic meters with a value of approximately \$100 million.¹⁰ By this time, timber export accounted for about half of Liberia's foreign exchange earning and 20 per cent of the country's GDP.¹¹ The industry collapsed in 2003 as timber sanctions were introduced. The UN Security Council lifted the timber sanction in 2006 after the government unveiled a program of reforms in the forestry sector. More than 1 million hectares of forest are under logging contracts, and 785,841 cubic meters of logs valued at just under US\$150 million was exported between 2009 and 2016.

3 • Human rights abuses linked to the forestry sector

Immediately after his election victory in 1997, President Charles Taylor awarded timber-rich forest blocks to formal allies and business associates. Taylor provided logging companies relatively cheap access to Liberia's timber resources and in return logging companies provided him access to international criminal networks trading in guns and gems, as well as logistical and financial support to sustain his militias. Additionally, Liberia's logging industry provided convenient cover for arms dealers trafficking arms into the region.

The largest logging concession ever in Liberia's history was granted to the Liberia Forest Development Corporation (LFDC), a company owned by Dutch national Gus van Kouwenhoven. The contract to the LFDC, awarded in July 1999, was immediately flipped over to the Asian-linked logging company Oriental Timber Corporation (OTC). Mr Kouwenhoven, who engineered these deals, would later be involved in setting up deals for the transfer of assorted arms, ammunitions and military hardware to Liberia along with notorious arms dealer Victor Bout.¹² The UN Panel of Experts on Liberia also reported in 2003 that Kouwenhoven provided a military-style helicopter to the government in lieu of forestry related taxes.¹³ Following a protracted legal battle, in April 2017 a Dutch court found Mr. Kouwenhoven guilty of being "an accessory to war crimes and arms trafficking"¹⁴ for supplying weapons to Taylor during Liberia's brutal civil wars.

The OTC's workforce was made up mostly of unskilled former rebel fighters. OTC security forces comprised mainly of militiamen under the command of former rebel commanders. For example, the company recruited as its Chief of Security General Roland Duo, a former rebel commander that fought for Taylor and maintained a strong role in Taylor's security apparatus after his election.¹⁵ The company's security forces were accused of abuses ranging from beatings to arbitrary arrest, detention and sexual exploitation.¹⁶ These rebel

commanders and militiamen, supported by the OTC, continued fighting on behalf of Taylor when other rebel groups launched renewed attacks in an effort to oust Taylor.

Other logging companies also supported militia commanders that were accused of massacres and other human rights abuses. In one documented instance, UN investigators uncovered a mass grave in Southeastern Liberia holding the remains of about 200 victims of a massacre allegedly committed by forces under the command of a General William Sumo, who served as the Maryland Wood Processing Industries Chief of Security.¹⁷ A Lebanese businessman, Abbas Fawaz, owned the Maryland Wood Processing Industries.¹⁸

The logging companies did not only provide support to rebel commanders and militias that committed human rights abuses, they also paid for arms imports to Liberia in violation of UN arms embargo and mercenaries supporting Charles Taylor's military adventurism in the region. For example, documents presented by an OTC representative to a panel investigating logging companies in 2004 revealed that the company had transferred large sums of monies on behalf of the government of Liberia to individuals listed as mercenaries and arms dealers in various UN reports on Liberia. The UN Panel of Experts on Liberia previously reported on these payments in 2003.¹⁹

According to the documents mentioned above, the OTC made payments to Fred Rindel,²⁰ a retired officer of the South African Defence Force and former South African Defence Attaché to the United States of America, and a Kenyan national of Indian descent Sanjivan Ruprah.²¹ A UN Panel of Experts on Liberia reported that Mr. Rindel (also alleged to have supported the UNITA rebels in Angola²²), was contracted by Taylor to provide training to a militia group called the Anti Terrorist Unit,²³ commonly known in Liberia as "demon forces" due to its role in human rights abuses, including murder. A UN Panel of Experts on Liberia describes Sanjivan Ruprah as "a well-known weapons dealer."²⁴ Ruprah was later arrested by Belgian security and charged with "criminal association"²⁵ related to his role in weapons smuggling in violation of UN Resolutions.

Another individual involved in the logging industry was the Ukrainian Leonid Minin.²⁶ He held an interest in a logging company named Exotic Tropical Timber Enterprise and played an active role in the purchase and delivery of weapons to Liberia in 2000.²⁷ Arrested in Italy in 2000,²⁸ his role in sanction-busting gun-running and arms smuggling operations was laid bare. He had used his connections to then President Taylor and his cover as a businessman in the logging industry to facilitate this role.

4 • Forestry reform and the lifting of sanctions

At the end of 2003, with Taylor gone and an interim government in place, the UN, as a precondition for lifting the sanctions, urged the Liberian government to "take all necessary steps to ensure that government revenues from the Liberian timber industry are not used to

fuel conflict or otherwise in violation of the Council's resolutions but are used for legitimate purposes for the benefit of the Liberian people, including development."²⁹

In 2004, a first attempt by the interim government to initiate reform in the forestry sector faltered as the government tried to exclude civil society from the process. Following pressure from civil society and donors the government established the Forestry Concessions Review Committee to review all existing logging concessions – naming Attorney Alfred Brownell and the author of this article to the committee.

The review, concluded in 2005, documented widespread illegal logging, human rights abuses, extra-budgetary financial transactions involving logging companies, and the active involvement of logging companies in the Liberian civil war. Consequently, the committee recommended that all the concessions it reviewed be cancelled.³⁰ In early 2006 the government of President Ellen Johnson-Sirleaf through Executive Order No. 1 adopted the report, cancelled all logging concessions, and established the Forestry Reform Monitoring Committee to oversee and coordinate the reform process.³¹ The two civil society representatives that participated in the concession review were again named to the committee.

Following peaceful elections in 2005 and the handover of power in 2006, the war in Liberia was declared over. With all logging concessions cancelled by Executive Order No. 1, a new forestry law drafted and validated with stakeholders under the auspices of the Forestry Reform Monitoring Committee in place, and a raft of new regulations under development the UN Security Council lifted the sanctions at the end of 2006.³² It would be another three years before formal logging would resume.

5 • Civil society and reforms in the forestry and land sectors

Following Taylor's election in 1997 he cracked down on opposition figures, pro-democracy and human rights activists forcing many into exile. Independent media became less outspoken as editors were forced to practice self-censorship. This resulted in the creation of an environment of fear and terror. As Liberian activists and human rights defenders took steps to stay safe by engaging in more covert monitoring and reporting, international non-governmental organisations (NGOs) stepped up their reporting on the human rights situation in the country; however travelling to Liberia became more dangerous over time. As the situation deteriorated new partnerships between local activists and international NGOs began to form, as the locals could gather information and pass on to the international NGOs who would then go on to publish – after cross checking multiple sources. These partnerships enabled key civil society actors inside and outside of Liberia to establish strategic relationships and credibility with influential government players and individuals within the international community. These relationships, especially with congressional staffers in Washington and staffers of diplomatic missions at the UN Security Council in New York would become critical political capital for civil society in the immediate post-war context.

With the cessation of hostility in 2003 and disarmament underway in 2004, Liberian civil society, with strong support from international partners, proactively established itself as local champions of forest sector reform. For example, civil society actors got together in April 2004 to develop a reform agenda, which had at its centre a demand for independent, transparent and participatory forestry concession review process.³³ The multi donor Liberia Forest Initiative, following its first mission to Liberia a month later, incorporated the proposal into its reform proposal to the Government of Liberia.³⁴ With this high level endorsement of the calls for an independent review of logging concessions, the National Transitional Government of Liberia established the Forestry Concession Review Committee to conduct the review naming both the Liberian NGOs Sustainable Development Institute and also Green Advocates to the review committee.³⁵ This marked the beginning of a three-way informal collaboration and coordination between Liberian civil society, international civil society and donors; one that would continue right through the review process and up to the drafting of the new forestry legal framework.

Also, desperate to restart the economy and put thousands of restless ex-combatants to work, the government of President Ellen Johnson Sirleaf made the lifting of sanctions a top priority. The resulting high level political-will within the government to see the reform project through created a positive environment to which civil society could make demands and pursue a progressive reform agenda. The sanctions on diamonds and timber remained a critical leverage for civil society and donors, and ensured that the government was cooperative with civil society and the Liberia Forestry Initiative throughout the process and for several years afterwards.

As a result of this collaboration and cooperation, Liberia's new forestry legal framework contains several progressive provisions, including formal recognition of the rights of communities to their customary forestlands, the rights of local populations to participate in forest governance processes and the right to share in forestry revenue. Additionally, access to forestry information is now a right for any member of the public and civil society has the right to independently monitor forestry operations. A complementary reform of the land sector has further reinforced community rights over forestland, through the adoption of a Land Rights Policy in 2013 establishing Customary Land as a formal category of land holding in Liberia.³⁶ A proposed land law,³⁷ currently before the legislature, seeks to grant equal legal protection to customary land. If approved, it could drastically reshape the power-dynamics and relationships between the state, foreign corporations and local communities.

6 • Conclusion

While these changes to law have been progressive, implementation has not been straightforward. Full implementation of the legal framework has been challenging and the newly introduced measures have not fully delivered the expected results. For example, of the approximately US\$6 million that should have been paid to communities by the end of 2016,

just under US\$2 million has been paid leaving an unpaid balance of about US\$4 million.³⁸ Additionally, communities will be unable to reclaim more than two million hectares of customary forest and land under existing concession agreements until those agreements have expired; although some of these agreements will remain valid for another 50 years and more.

With a robust and progressive legal framework in place, Liberia entered into a Voluntary Partnership Agreement with the European Union (EU) to tackle illegal logging and combat the trade in illegal timber, which came into force on 1 December 2013.³⁹ Additional support from the Norwegian government is also providing critical resources to strengthen governance and law enforcement in the forestry sector. However, there are worries that the industry is on the verge of collapse as the existing companies have demonstrated an astonishing lack of capacity and interest in complying with the forestry legal framework. With sanctions gone, the only leverage the international community has over Liberia seems to be the threat of excluding Liberian timber from the EU market under new EU regulations on illegal timber. However, the effectiveness of this leverage will depend largely on whether China will adopt a similar policy to exclude illegal timber from its market – given that China has become the preferred destination of Liberian hardwood.

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WATER-DEPRIVED

Aseil Abu-Baker

- *Israel's occupation dispossessing Palestinians of their land and resources* •

ABSTRACT

Israel's occupation of Palestinian territory, currently in its 50th year, includes its systematic control and exploitation of Palestinian natural resources, preventing Palestinians from fully benefiting from their natural wealth. This article examines how, in the case of water, Israel has deliberately denied Palestinians control over and access to their water resources, in clear violation of its obligations under international law, which require Israel as occupying power to protect the occupied Palestinian population and territory. The author argues that through the imposition of discriminatory policies and practices, Israel has created a comprehensive system of control over the water resource, which prohibits Palestinians from exercising sovereign rights over their water resources and forces the dependence of Palestinians on Israel for much of their water needs. Accordingly, Palestinians suffer from a lack of sufficient access to their most basic need; and a severe imbalance of water usage exists favoring Israelis, both those residing in illegal settlements in the Occupied Palestinian Territory and in Israel. The article finishes by examining what role third party states, companies and civil society should play in resisting the exploitation of water by Israel and the national water carrier, Mekorot.

KEYWORDS

Palestine | Israel | Water | Oslo Accords | Occupying power

1 • Introduction

Israel's occupation of Palestinian territory, currently in its 50th year, includes its systematic control and exploitation of Palestinian natural resources, ranging from water to stone to Dead Sea minerals, preventing Palestinians from fully benefiting from their natural wealth. In the case of water, Israel has deliberately denied Palestinians control over and access to their water resources, forcing the dependence of Palestinians on Israel for much of their water needs. As a result, Palestinians suffer from a lack of sufficient access to their most basic need; and a severe imbalance of water usage exists favouring Israelis, both those residing in illegal settlements¹ in the Occupied Palestinian Territory (OPT) and in Israel.

During the summer of 2016 – like many summers before – thousands of Palestinians in the OPT were deprived of running water as the Israeli national water carrier, Mekorot, restricted the water supply to areas in the northern part of the occupied West Bank.² Lack of access to water not only places a severe strain on everyday life, making the most ordinary activities such as cooking and bathing very difficult, it also has crippling effects on education, healthcare, and Palestinian economic activity.

In this article, I will discuss the various policies and practices that Israel has employed to unlawfully exert and maintain control over and appropriate Palestinian water resources; the impact on Palestinian communities across the OPT, including the West Bank, East Jerusalem, and the Gaza Strip, all of which are occupied, but which face different realities; the relevant international law framework; and a brief discussion of the problematic partnerships between Latin American companies and Mekorot.

2 • Myth v. Reality

Israel has long perpetuated the myth of water scarcity in the region, heralding itself as the nation that has “made the desert bloom.” In reality, the OPT is rich in water resources. There are three main fresh water sources in the area: the Jordan River, running along the eastern border of the West Bank; the Mountain Aquifer, underlying the West Bank and Israel; and the Coastal Aquifer, underlying the Gaza Strip and Israel.³ There is also ample rainfall in the area.⁴ For example, records reflect that Jerusalem receives more rain on average per year than Berlin.⁵ Despite abundant sources of water, Palestinians suffer from a lack of sufficient water due to Israel's control and appropriation of this vital resource via its occupation.

Israel maintains the myth of water scarcity in order to mask its near exclusive (and unlawful) control over Palestinian water resources in the OPT, and specifically in the West Bank. When Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip during the Six-Day war in 1967, it was widely believed that a central reason was to secure control

over ground and surface water resources in the West Bank.⁶ Israel's direct control over water resources increased by approximately 50 per cent immediately following the war.⁷

Since then, Israel has used a variety of discriminatory policies and practices – including military orders, an inequitable water-sharing agreement, and a discriminatory planning and permit regime – to create and maintain a comprehensive system of control over the water resources, ensuring that Palestinians are prohibited from exercising sovereign rights over their water resources.

3 • Formalising Control: Israeli Military Orders and Integration

Within the first 18 months of the occupation, Israel introduced legislative changes in the form of military orders, still in force today, which declared all water resources in the area state property,⁸ placed water resources and water-related issues under the control of the Israeli military commander,⁹ and required Palestinians to obtain permits from the Israeli military (later the Israeli Civil Administration)¹⁰ in order to construct or rehabilitate water infrastructure¹¹ without which any water structure would be subject to demolition or confiscation.¹² Israel also began the process of building an extensive water network in the West Bank, which ultimately served to integrate the Palestinian water system in the OPT into the Israeli system, denying Palestinians control over the resource.¹³ Israel also declared the banks of the Jordan River Basin closed military zones, cutting off Palestinian access to this water source.

In 1982, Israel increased the integration of water resources by transferring ownership of all West Bank supply systems to Mekorot, the Israeli national water carrier, of which the state of Israel owns 50 per cent. This created a situation where Palestinians are forced to purchase water from Mekorot to meet their annual needs. It is estimated that “Mekorot supplies almost half the water consumed by Palestinian communities.”¹⁴ Mekorot also directly extracts water from Palestinian sources for the supply of illegal settlements in the OPT.¹⁵

4 • Oslo Accords Water Regime: Consolidating Israel's Control

Israel's dominion over water resources was further consolidated in 1995 with the signing of the Oslo II Accords,¹⁶ which outlined an inequitable water-sharing agreement. The agreement, which only referenced the Mountain Aquifer,¹⁷ was based on “existing quantities of utilisation,”¹⁸ and thus aimed to legitimise Israel's unlawful use of Palestinian water resources. It allowed Israel's continued utilisation of approximately 87 per cent of the resource, and only allocated 13 per cent to the Palestinians.¹⁹

The Oslo II Accords also divided the West Bank into areas A, B and C,²⁰ and passed the responsibility of supplying water to Palestinian populations in areas A and B to the Palestinian Authority (PA).²¹ Israel restricts the PA's ability to do so in several ways.

First, the Oslo II Accords created the Joint Water Committee (JWC), to oversee all water projects and systems in the West Bank.²² The JWC was to function in a seemingly democratic way, as Palestinians and Israelis would sit on the committee in equal numbers, and all decisions would be made by consensus.²³ In reality, the JWC serves as one of the central ways that Israel maintains control over Palestinian water resources, as Israel has *de facto* veto power over all proposals.²⁴ A study showed that from 1995-2008, Palestinians approved nearly all Israeli water proposals, while Israelis only approved half of the Palestinian proposals.²⁵ In addition, Israeli approval of large Palestinian proposals is conditioned upon Palestinian approval of Israeli proposals for the benefit of the settlements, a situation described as “blackmail” by Palestinians.²⁶

Second, although the majority of “Palestinians reside in Areas A and B, the infrastructure upon which they depend lies inside or crosses into Area C,” which is under full Israeli control.²⁷ This means that Palestinians must obtain permits from both the JWC and the Israeli Civil Administration (ICA) in order to build or rehabilitate any structures, including water infrastructure, in Area C. Such permits are rarely, if ever, granted. The United Nations Office for the Coordination of Humanitarian Affairs reported that the ICA approved only 1.5 per cent of Palestinian permit requests in Area C between 2010 and 2014.²⁸ Together, the JWC and Israel’s discriminatory permit regime, serve to further consolidate Israel’s control over water resources, “which makes integrated planning and management of water resources virtually impossible for the PA.”²⁹

To illustrate, Israel has denied Palestinians the ability to drill any wells in the western basin – the most productive basin - of the Mountain Aquifer.³⁰ Meanwhile, Israel has drilled 39 wells in the West Bank, 29 of which are located in the Jordan Valley that service Israel’s illegal residential and agricultural settlements.³¹ Israel also has access to 500 wells in Israel that over extract water from the shared Mountain Aquifer, affecting the quality and quantity of water available to Palestinians.³² Therefore, Israel not only controls the Mountain Aquifer, but it obstructs Palestinian use of the aquifer by diverting the flow of water into Israel.³³

Accordingly, Palestinian water use significantly decreased over the years, with Palestinians having access to only 11 per cent of the Mountain Aquifer, less than the allocations per the Oslo II Accords.³⁴ Ultimately, the Oslo II Accords water regime protects and perpetuates Israel’s control over water resources in the West Bank and enables its illegal exercise of sovereign rights over the same.

5 • ‘Water-Apartheid’:

Impact of Israel’s Control on the Palestinian Population

This combination of discriminatory Israeli policies and practices has resulted in severely inequitable allocation of water resources between Palestinians and Israelis; a situation that has been described as ‘Water-Apartheid’.³⁵

The violation of Palestinians' right to water is clearly demonstrated in a comparison of consumption between Palestinians and Israelis. Israeli settlers in the West Bank, numbering over 500,000, consume approximately six times more water than 2.6 million Palestinians residing in the West Bank.³⁶ The World Health Organization recommends a minimum domestic consumption of 100 liters per capita per day (lpcd), but consumption by Palestinians in the West Bank is an average of 72 lpcd,³⁷ compared to 300 lpcd³⁸ for Israelis in Israel and 369 lpcd for Israeli settlers residing in illegal Israeli settlements in the occupied West Bank.³⁹

Palestinians residing in Area C are the most affected and vulnerable, as Israel has refused to connect 180 Palestinian communities in Area C to a water network, and 122, while connected, have an inconsistent supply or none at all.⁴⁰ This is due to Israel's discriminatory planning and permit system, which makes it impossible for communities (and the PA) to develop and maintain water infrastructure without it being subjected to demolition or confiscation by the Israeli authorities. In 2016, Israeli authorities demolished or confiscated 103 water-related infrastructures, citing lack of permits.⁴¹

Not only does Israel prohibit Palestinians from developing their water infrastructure, but it also prevents them from benefitting from the natural water resources that they have historically relied on, such as rain harvesting cisterns, which are also confiscated or demolished. As a result, average consumption in these communities is as little as 20 lpcd.⁴² Palestinians in these communities are forced to purchase tankered water to meet their needs. Due to high transportation and other costs, these families pay up to 400 percent more for water than those connected to a water network.⁴³

An affidavit collected by Al-Haq from a livestock breeder residing in al-Hadidiyya village in Toubas governorate illustrates the suffering caused by Israeli water policies:

"I reside in the village of al-Hadidiyya, which is located in the northern Jordan Valley...there are no services in al-Hadidiyya and we receive our education and health services from neighbouring villages around Toubas. This is because al-Hadidiyya is located in Area C. We obtain our water resources from other villages, such as Ain al-Bayda, which is approximately 15 kilometers away; obtaining this water is very expensive, as we require water not just for personal use but also for our livestock, which is our only source of livelihood.

In October of 2016, a donor organisation sought to provide water to our village through plastic pipes that were connected to a town west of al-Hadidiyya, approximately 11,300 meters away – around the length of the water pipeline. The pipeline provided for 200 people and 1,000 sheep. Prior to this pipeline,

we paid over 20 shekels per cubic meter of water, as we were forced to transport water in tankers and store it in containers. The water pipeline eased the suffering of the residents in the area, both personally and financially.

On 20 February 2017, at around 7am, I saw three bulldozers, a large number of Israeli soldiers, members of the Israeli Civil Administration, a number of military jeeps, and workers in civilian clothing in the area. I watched as they cut different sections of the pipeline. I also watched the bulldozers dig out the water transport lines that were underground, completely destroying the water pipeline. Israeli forces stayed in the area destroying and removing the pipeline until approximately 1pm.⁴⁴

East Jerusalem

Palestinians residing in East Jerusalem, which was illegally annexed⁴⁵ by Israel in 1967 and where Israeli civil law applies, also suffer from Israel's control over water resources. As with other parts of the West Bank, Israel's discriminatory planning and construction laws, which make it difficult for Palestinians to obtain permits to build, also affect access to water services.⁴⁶ Over half of Palestinian households are not connected to a licensed water network, as Israel refuses to connect them due to a lack of building permits.⁴⁷ This forces many families to resort to unlicensed water networks, despite the fact that Palestinian residents of East Jerusalem are entitled to full services from the Jerusalem Municipality, as they pay taxes pursuant to their status as permanent residents.⁴⁸

Palestinian residents of East Jerusalem residing in areas east of the Annexation Wall⁴⁹ are especially vulnerable, as they receive limited municipal services after Israel excluded these areas from the boundaries of Jerusalem. The water infrastructure in these areas is in disrepair and does not meet the needs of the growing population in the area.⁵⁰ Despite this, the Jerusalem Municipality has failed to rehabilitate or update the infrastructure over the years, causing regular disruptions in the water supply.⁵¹

Gaza Strip

The depletion of the Coastal Aquifer and Israel's oppressive closure of the Gaza Strip, now in its 10th year, are the central reasons that 1.8 million Palestinians suffer from an acute lack of access to water. The Coastal Aquifer, shared by Israel and the Gaza Strip, is the only source of freshwater available to the Palestinians in Gaza. Due to over-extraction and pollution,⁵² the water quality has increasingly deteriorated, leaving 95 per cent of the Aquifer unfit for human consumption.⁵³ In addition, since the closure, Israel has prohibited the entry of materials necessary for Palestinians in Gaza to

develop, maintain, and rehabilitate their water and sanitation infrastructure, much of which was deliberately targeted by Israel during the last three wars on the Gaza Strip.⁵⁴

As a result of these factors, 100,000 Gazans are not connected to a water network.⁵⁵ Meanwhile, those who are connected do not receive water on a regular basis, and when supplied, it is highly saline and not fit for consumption. As a result, 95 per cent of the population in Gaza depends on desalinated water purchased from private vendors for their drinking needs.⁵⁶ It is reported that Gazans spend nearly one third of their income on water, a steep amount given the poor economic situation in the Gaza Strip.⁵⁷

Lack of access to water plays a large role in the humanitarian crisis in the Gaza Strip, which the United Nations (UN) has estimated will be uninhabitable in the year 2020.⁵⁸

6 • International Law

As demonstrated above, Israeli policies and practices of controlling Palestinian water resources and denying Palestinians the ability to fully utilise this vital resource have severe and detrimental effects on the protected Palestinian population, regardless of their status and where they reside. Such Israeli actions do not simply reflect a humanitarian crisis or a gross injustice they also violate international law. More specifically, Israel, as occupying power, is bound by both international humanitarian law (IHL) and international human rights law (IHRL).

International Humanitarian Law

Under IHL, Israel, as occupying power, has specific obligations toward the occupied Palestinian population and the occupied Palestinian territory.⁵⁹ This includes a duty to administer the territory in the interest of the Palestinian population, but it does not grant sovereign rights over the territory and its natural resources.⁶⁰ Customary IHL requires that any use of the natural resources by Israel is limited to military needs and should not exceed the rate of use prior to the occupation, as Israel is required to “safeguard the capital” of the occupied territory for the interest of the Palestinians.⁶¹ IHL also prohibits the destruction of public and private property in occupied territory for any reason other than military necessity.⁶²

Israel’s near exclusive control over Palestinian water resources and extensive appropriation of the water for the benefit of Israeli settlers in the OPT and Israelis residing in Israel, violates Israel’s duty to administer the occupied territory for the benefit of the Palestinian population, and exceeds the permissible use of the natural resources of the occupied territory. Israel’s confiscation and destruction of water infrastructure for “administrative” purposes (i.e. lack of a permit) also violates the obligation to administer the territory for the *benefit* of the Palestinians and proves that military necessity does not justify the confiscation or destruction of water infrastructure.

International Human Rights Law

The right to water, although not a standalone right in IHRL, is essential for sustaining life, health, and human dignity.⁶³ Ensuring access to safe drinking water and sanitation is an implicit obligation in a number of rights including the right to life, the right to the highest attainable standard of health, and the rights to an adequate standard of living, to adequate housing, and to adequate food.⁶⁴

The right to self-determination⁶⁵ is a fundamental right in IHRL and is necessary for the enjoyment of all other human rights.⁶⁶ As an *erga omnes* right,⁶⁷ it imposes positive obligations on all states toward all peoples who have been deprived of the possibility of exercising the right to self-determination.⁶⁸ Several UN General Assembly resolutions have stated that permanent sovereignty over natural resources is a fundamental component of self-determination.⁶⁹ Permanent sovereignty over natural resources prohibits Israel from illegally exploiting and disposing of Palestinian natural resources.⁷⁰ Israel's integration of the Palestinian water system into Israel's and its near total control over Palestinian water resources, reflect Israel's policies aimed at dispossessing Palestinians of their natural wealth, and therefore impedes the right of the Palestinian people to self-determination.

7 • Third State Responsibility and Business and Human Rights

Israel is the primary duty bearer with respect to the OPT and the protected Palestinian population, but third states also have obligations under international law. The Draft Articles on Responsibility of States for Internationally Wrongful Acts, which reflects customary international law, affirms that in the case of breaches of peremptory norms of international law, such as the right to self-determination, all states are obligated not to recognise the situation as lawful, not to render aid or assistance in maintaining the illegal situation and to actively cooperate in order to bring it to an end.⁷¹

In addition, while upholding international human rights standards is traditionally the responsibility of states, businesses also have a responsibility to respect human rights in their operations. Over the last several years, the issue of business impacts on the enjoyment of human rights has received a great deal of attention. In 2011, the UN Human Rights Council endorsed the Guiding Principles on Business and Human Rights (UNGPs), a set of non-binding rules applicable to business enterprises requiring compliance with IHRL and IHL in situations of armed conflict. The UNGPs specify that business enterprises should “identify, prevent and mitigate... adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, *or which may be directly linked to its operations, products or services by its business relationships*”⁷² (emphasis added). The UNGPs go on to state that if a business cannot use its leverage to put an end to the human rights abuses, it should consider ending the business relationship.⁷³

Therefore, both states and businesses can and should play important roles in holding Israel accountable for its violations of international law, and ensuring that Palestinians are afforded their right to self-determination, and ultimately their dignity and freedom.

8 • Mekorot and Latin America: What Civil Society and Responsible Business Can Do

Where states have failed to act, civil society has taken it upon itself to advocate for the rights of the Palestinian population by reminding both states and businesses of their obligation to respect human rights.⁷⁴ In Latin America, for example, civil society has galvanised support for various campaigns relating to the protection of Palestinian rights. Over the last few years, particular attention has been paid to the issue of Palestinian water resources, as Israel has been promoting itself as a water innovator around the world, including across Latin America.⁷⁵

Israel's propaganda fails to take into account or mention that it has developed this sector at the expense of the Palestinian population and through the appropriation of Palestinian water resources. More specifically, Mekorot, a central player in the appropriation of Palestinian water resources and discriminatory allocations, has capitalised on this by entering into partnerships with companies and utilities in Brazil, Argentina,⁷⁶ and Mexico.⁷⁷

Brazil

In 2013, Mekorot entered into a cooperation agreement with the Bahia state water utility, Embasa, to provide technical consultations to help improve water resource management in Bahia.⁷⁸ Bahia's urban development secretary stated that "the goal of the partnership is to share know-how in groundwater exploration, water loss control, desalination technologies, and water resource management."⁷⁹

International and Brazilian civil society engaged in advocacy and awareness-raising campaigns, calling on Bahia to cancel the agreement, highlighting Israel's violations of international law through its oppressive policies and practices against the Palestinians, and Mekorot's appropriation of Palestinian water resources.⁸⁰ State representative Marcelino Galo, vice president of the Environmental Commission, Drought and Water Resources, demanded a review of the agreement with Mekorot, which eventually led to the cancellation of the agreement.⁸¹ On 11 April 2016, it was announced that Bahia had ended its cooperation with Mekorot.⁸²

Argentina

In 2012, Argentina's Buenos Aires governor, Daniel Scioli, met with Israel's ambassador to Argentina and the CEO of Mekorot to discuss cooperation for developing strategic water

and sanitation plans, including the design of a wastewater treatment plant in La Palta.⁸³ The talks culminated into an agreement between the parties.⁸⁴

Soon thereafter, Argentine civil society mobilised and formed various campaigns to inform the public of Israel and Mekorot's illegal practices, as well as the fact that Argentine money would be contributing to Mekorot's continued violation of Palestinian rights. This included a virtual campaign called *Fuera Mekorot Argentina* ("Mekorot, Get Out of Argentina") which criticised governor Daniel Scioli for signing the deal with Mekorot for the construction of the water treatment plant in La Plata and demanded that the cooperation come to an end.⁸⁵

In 2014, it was reported that Buenos Aires suspended the US\$ 170 million water treatment plant contract with Mekorot due to pressure from activists, the Argentine Workers' Central Union, and social movements, who argued that Mekorot was attempting to export the discriminatory water policies it uses against the Palestinian people to Argentina.⁸⁶

Mexico

In November of 2013, Mekorot signed an agreement with the Mexican Environmental Protection and Natural Resources Ministry to provide the Mexico National Water Commission, La Conagua, with "technical assistance in protection of groundwater quality, carrying out rehabilitation of the underground reservoirs and quality control of the restoration of water resources."⁸⁷ The agreement was dubbed "historic" as it is one of Mekorot's largest agreements in years.⁸⁸ In addition, the Head of La Conagua and the Ambassador of Israel to Mexico, signed a Cooperation Agreement on water technologies and water resource management, which will be used to carry out joint projects relating to research, monitoring and evaluation of water use.⁸⁹ Unfortunately, there have been no reports of civil society campaigns against Mexico's cooperation with Mekorot.

As highlighted by the UNGPs, companies are responsible for identifying, mitigating, and preventing negative human rights impacts, even when those impacts are a result of their business relationship. Therefore, Latin American companies should be aware of the risks that are associated with entering into agreements with Mekorot, given its control over and appropriation of Palestinian water resources, and the resulting negative human rights impacts on the Palestinian population. As demonstrated, civil society can play a vital and necessary role in reminding businesses and states of their obligations and in assisting in the protection of Palestinian human rights.

9 • Conclusion

For 50 years of occupation in the OPT, Palestinians have suffered through violations of nearly all of their human rights. Israel's control over Palestinian water resources

is therefore just one facet of Israel's oppressive occupation aimed at dispossessing Palestinians of their land and natural wealth.

Israel and Mekorot have not only exploited Palestinian water resources unchecked, but have developed an expertise in water technology solutions at the expense of the protected Palestinian population, and is marketing this to the world. Beyond the moral and humanitarian issues that Israel and Mekorot's actions present in this context, they are illegal. Therefore, the international community, both states and businesses, must not condone or assist in the continued exploitation and appropriation of this vital resource. Indeed, states' failures to abide by their international law obligations to hold Israel accountable for its human rights violations, and businesses' continuation to entertain agreements with Mekorot, reinforce Israel's illegal practices and dominion over Palestinian water resources, and ultimately ensure the continuation of Israel's oppressive occupation. If Palestinians are to fully exercise their human rights, that to water and others, the occupation must come to an end.

NOTES

1 • This includes residential communities, industrial zones, and agricultural areas illegally established in the OPT for the benefit of Israeli citizens, and integrally, the activities that help to sustain, promote, and expand the settlements. Settlements are illegal under international law as recognised by the United Nations and by the International Court of Justice. See United Nations Security Council Resolution 2334, UN Doc. S/RES/2334, 23 December 2016, accessed May 22, 2017, <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>; see also "Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory," International

Court of Justice Report, paragraph 120, 2004, accessed May 22, 2017, <http://www.icj-cij.org/docket/files/131/1671.pdf>.

2 • See "Summer 2016 – Israel Cut Back on the Already Inadequate Water Supply to Palestinians," BTselem - The Israeli Center for Human Rights in the Occupied Territory, September 27, 2016, accessed May 22, 2017, http://www.btselem.org/water/201609_israel_cut_back_supply.

3 • These are considered transboundary water resources; aquifers and basins that are shared by two or more politically, economically, or culturally distinct communities. Shared resources are governed by international water law (IWL), as

previously documented by Al-Haq and which will not be discussed in this article. Due to Israel's near exclusive control over the shared resources and a lack of "equitable and reasonable utilisation", Israel violates IWL. For more information, see Elisabeth Koek, "Water for One People Only: Discriminatory Access and 'Water-Apartheid' in the OPT." Al-Haq, 2013, 83-85, accessed May 22, 2017, <http://www.alhaq.org/publications/Water-For-One-People-Only.pdf>.

4 • The climate in the West Bank is considered semi-arid or sub-humid, with 60 per cent of the rainfall concentrated during a two-month period. Clemens Messerschmid, "Till the Last Drop: The Palestinian Water Crisis in the West Bank, Hydrogeology and Hydropolitics of a Regional Conflict." Juragentium, 2005, accessed May 22, 2017, <http://www.juragentium.org/topics/palestin/en/water.pdf>.

5 • Rain records from Jerusalem since 1846 show rainfall with an annual average of 599.8 mm – more than Berlin which receives an annual average of 568 mm. See Clemens Messerschmid, "Hydro-Apartheid and Water Access in Israel-Palestine: Challenging the Myths of Cooperation and Scarcity," in *Decolonizing Palestinian Economy*, eds. Mandy Turner, and Omar Shweiki (Basingstoke: Palgrave Macmillan, 2014), 61.

6 • Israel also occupied the Golan Heights and the Sinai Peninsula during the 1967 Six-Day War, – occupying lands that allowed it strategic control over the natural resources in the area. For a discussion of the role water played in the war see Lisdey Espinoza Pedraza and Markus Heinrich, "Water Scarcity: Cooperation or Conflict in the Middle East and North Africa," *Foreign Policy Journal*, September 2, 2016, accessed May 22, 2017, <https://www.foreignpolicyjournal.com/2016/09/02/water-scarcity-cooperation-or-conflict-in-the-middle-east-and-north-africa/>.

7 • Rose M. Mukhar, "The Jordan River Basin and the Mountain Aquifer: The Transboundary Freshwater Disputes between Israel, Jordan, Syria, Lebanon

and the Palestinians," *Annual Survey of International and Comparative Law* 12, no. 1 (2006): 59-85.

8 • These military orders provided the Area Military Commander in the West Bank with full authority over the West Bank and declared that all property, whether moveable or immovable, that belonged to the state was under the control of the Area Military Commander. "Proclamation Regarding Regulation of Administration and Law," Jerusalem Media and Communication Center (JMCC), June 7, 1967; Jamil Rabah and Natasha Fairweather, "Israeli Military Orders in the Occupied Palestinian West Bank 1967-1992." JMCC, 1995, vii.

9 • Military Order 92 "Order Concerning Jurisdiction over Water Regulations," August 15, 1967.

10 • The Israeli Civil Administration is the body responsible for the implementation of Israel's government policies in the West Bank, and is part of the Coordinator for Government Activities in the Territories, which is a unit in the Israeli Ministry of Defense.

11 • This includes, but is not limited to pipes, wells, pumps, and rain harvesting cisterns.

12 • Military Order 158 "Order Concerning the Amendments to the Supervision Over Water Law," November 19, 1967, an amendment to Water Law 31, 1953. Israel also imposed Military Order 291 which declared are prior water agreements invalid, giving military commander regulatory jurisdiction over water. Military Order 291 "Order Concerning Settlement of Disputes over Land and Water", December 19, 1968, is an amendment to the Land and Water Regulation Law 40, 1952.

13 • Yehezkiel Lein, "Disputed Waters, Israel's Responsibility for the Water Shortage in the Occupied Territories," B'Tselem, September 1998, 5, accessed May 22, 2017, http://www.btselem.org/publications/summaries/199809_disputed_waters.

14 • "Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural

rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem," International Fact-Finding Mission on Settlements, February, 2013, UN Human Rights Council 22nd Session, paragraph 101.

15 • According to the World Bank, unofficial estimates reflect that Mekorot supplies 75 mcm of water to the settlements, of which 44 mcm are extracted from wells in the OPT. "Assessment of Restrictions on Palestinian Water Sector Development," World Bank, 2009, 34, accessed May 22, 2017, <http://siteresources.worldbank.org/INTWESTBANKGAZA/Resources/WaterRestrictionsReport18Apr2009.pdf>.

16 • In 1993, the Palestine Liberation Organization and Israel signed the *Declaration of Principles on Interim Self-Government Arrangements* (Oslo I), which was designed to be an initial step in a multiphase process to transfer power from Israeli military authorities and the Israeli Civil Administration to the Palestinian Authority. In follow-up to Oslo I, the parties signed the *Israel-Palestinian Interim Agreement on the West Bank and the Gaza Strip* (Oslo II) to further develop plans for transfer of power. The gradual transfer of power to the Palestinian Authority has never occurred. While designed to be interim measures due to expire after five years, the Oslo Accords continue today as a smokescreen that facilitates Israel's prolonged occupation of Palestinian territory.

17 • Limited only to the portions of the Mountain Aquifer that underlies the West Bank, it does not include the portion that underlies Israel which is under unilateral Israel management.

18 • "Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip," Office of the United Nations Special Coordinator for the Middle East Peace Process, 1995, Annex III Protocol Concerning Civil Affairs, Article 40, accessed May 22, 2017, <http://www.unsco.org/Documents/Key/Israeli-Palestinian%20Interim%20Agreement%20on%20the%20West%20Bank%20and%20>

[the%20Gaza%20Strip.pdf](#).

19 • *Ibid*, Appendix I, Schedule 10. See also Jan Selby, "Dressing up Domination as 'Cooperation': the Case of Israel-Palestinian Water Relations," 29 *Review of International Studies* 29, no. 1 (2003): 121, 131.

20 • Area A covers approximately 18 per cent of the West Bank, includes six major Palestinian cities, and is under full Palestinian civil and security control although Israel has not abdicated full authority over area A. Area B covers approximately 22 percent of the West Bank and is under full Palestinian civil control and joint Israeli-Palestinian control. Area C covers approximately 60 per cent of the West Bank and is under full Israeli civil and military control, including land registration, planning, building and designation of land use. It is also where the majority of Palestinian natural resources lie, including agricultural land, water sources and underground reservoirs. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 1995, Chapter 2, Article XI.

21 • The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 1995, Annex III Protocol Concerning Civil Affairs.

22 • This includes the drilling of new and alternative wells, the rehabilitation of existing wells (including routine maintenance, such as cleaning), laying of pipes, etc. The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 1995, Annex III Protocol Concerning Civil Affairs, Article 40 (11, 12).

23 • The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 1995, Annex III Protocol Concerning Civil Affairs, Article 40 (13, 14).

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25 • Jan Selby, "Cooperation, Domination, and

Colonisation: The Israel-Palestinian Joint Water Committee," *Water Alternatives* 6, no. 1 (2013): 11. 26 • "According to the PWA, '[m]ore recently, Israel has begun conditioning JWC approval for urgently needed Palestinian water projects on prior Palestinian approval of water projects benefiting illegal Israeli settlements. This has since become consistent Israeli policy, in effect undermining the JWC by reducing it to a forum for blackmail.'" "Water for One People Only," 2013, 42, *citing* Palestinian National Authority (PNA), PWA, 'Palestinian Water Sector: Status Summary Report September 2012' (In preparation for the Meeting of the Ad Hoc Liaison Committee (AHLIC), 23rd September 2012, New York (September 2012), page 3). 27 • "Water for One People Only," 2013, 36. 28 • "Under Threat. Demolition Orders in Area C of the West Bank," United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), 2015, accessed May 22, 2017, https://www.ochaopt.org/documents/demolition_area_c_3-9-2015.pdf. 29 • "Assessment of Water Restrictions," 2009, vii, 33-4. 30 • "Hydro-Apartheid and Water Access in Israel-Palestine," 2014, 64. See also "On the Occasion of Water Day 2017: Israeli Apartheid, The Case of Water," State of Palestine, Negotiations Affairs Department, March 22, 2017, accessed May 22, 2017, <http://www.nad.ps/en/publication-resources/faqs/occasion-international-water-day-2017-israeli-apartheid-case-water>. 31 • "Status Report of Water Resources in the Occupied State of Palestine – 2012," Palestinian Water Authority, October 2013, 9, accessed May 22, 2017, <http://www.pwa.ps/userfiles/file/%D8%A%D9%82%D8%A7%D8%B1%D9%8A%D8%B1%D8%AA%D8%B5%D9%86%D9%8A%D9%81%201/WR%20STATUS%20Report-final%20draft%202014-04-01.pdf>. See also Al-Haq, "Water for One People Only," 2013, 46. 32 • "Status Report of Water Resources in the

Occupied State of Palestine," 2012, 9. 33 • "Water for One People Only," 2013, 14. 34 • Palestinian water supply in the West Bank for the year of 2012 was 104 mcm, compared to 118 mcm during pre-Oslo years. See "Status Report of Water Resources in the Occupied State of Palestine," 2012; see also "Water for One People Only," 2013, 36. 35 • "Water for One People Only," 2013, 88-93. 36 • "Joint Parallel Report submitted by the Emergency Water, Sanitation and Hygiene group (EWASH) and Al-Haq to the Committee on Economic, Social and Cultural Rights on the occasion of the consideration of the Third Periodic Report of Israel," Al-Haq and Emergency Water, Sanitation and Hygiene Group (EWASH), September 2011, paragraph 81, accessed May 22, 2017, http://www2.ohchr.org/english/bodies/cescr/docs/ngos/EWASH-Al-Haq-Israel_CESCR47.pdf. 37 • "Status Report of Water Resources in the Occupied State of Palestine," 2012, 1. 38 • "How Dispossession Happens. The Humanitarian Impact of the Takeover of Palestinian Water Springs by Israeli Settlers," UN OCHA, March 2012, 14, accessed May 22, 2017, https://www.ochaopt.org/documents/ocha_opt_springs_report_march_2012_english.pdf. 39 • Jad Isaac and Jane Hilal, "Palestinian Landscape and the Israeli-Palestinian Conflict," *International Journal of Environmental Studies* 68, no. 4 (2011): 422-23. 40 • "Water Tankering Projects Target the Most Vulnerable Communities in Area C," UN OCHA, August 10, 2016, accessed May 22, 2017, <https://www.ochaopt.org/content/water-tankering-projects-target-most-vulnerable-communities-area-c>. 41 • "Demolition System Database," UN OCHA, 2017, accessed March 29, 2017, <http://data.ochaopt.org/demolition-sys.aspx>. 42 • "Troubled Waters: Palestinians Denied Fair Access to Water. Israel: Occupied Palestinian Territories," Amnesty International, 2009, 3,

accessed May 22, 2017, <https://www.amnestyusa.org/pdf/mde150272009en.pdf>.

43 • “Status of Environment in the State of Palestine,” The Applied Research Institute Jerusalem, December 2015, accessed May 22, 2017, https://www.arij.org/files/arijadmin/2016/Final_SOER_2015_opt_r.pdf. In addition, it is reported that Palestinians in the Jordan Valley spend half of their monthly income on water, while their neighboring Israeli settlers, who receive piped water on a regular basis, only spend 0.9 per cent of their monthly income on water. See “Hydro-Apartheid and Water Access in Israel-Palestine,” 2014, 67.

44 • Excerpts from Al-Haq Affidavit Number 141/2017, given by ‘Abd-al-Rahim Husein ‘Bsharat, a livestock breeder and resident of al-Hadidiyya village, Toubas governorate, West Bank, on February 21, 2017.

45 • When Israel occupied the West Bank, including East Jerusalem in 1967, it expanded the boundaries of Jerusalem and applied Israeli civil law (as opposed to military law), to the area, effectively annexing East Jerusalem to the state of Israel. The international community does not recognise Israel’s annexation of this territory and it is still deemed occupied. See “Resolution 478 (1980) of 20 August 1980,” UN Doc. S/RES/478, August 20, 1980, accessed May 22, 2017, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/DDE590C6FF232007852560DF0065FDDB>.

46 • Between the years 2005-2009, only some 55 per cent of requests for building permits in the Palestinian neighborhoods were approved, compared with some 85 per cent in the Israeli neighborhoods. “East Jerusalem: Facts and Figures,” Association for Civil Rights in Israel (ACRI), May 12, 2015, accessed May 22, 2017, <http://www.acri.org.il/en/wp-content/uploads/2015/05/EJ-Facts-and-Figures-2015.pdf>.

47 • “Report of the Independent International Fact-finding Mission,” February 2013, UN Human Rights Council, 22nd Session, paragraph 85.

48 • Upon illegally annexing East Jerusalem, Israel issued permanent residency cards to those who were present in the new municipal boundaries of Jerusalem. Due to Israel’s discriminatory policies, their status as permanent residents is constantly under threat. For more information, see Natalie Tabar, “The Jerusalem Trap,” Al-Haq Organisation, 2010, accessed May 22, 2017, <http://www.alhaq.org/publications/publications-index/item/the-jerusalem-trap>.

49 • In 2002, Israel began the construction of the Annexation Wall, a combination of 8 to 9-meter-high concrete slabs, razor wire fencing, and surveillance equipment, approximately 80 per cent of which is located inside the occupied West Bank, appropriating Palestinian land, restricting freedom of movement, and fragmenting Palestinian communities, including cutting off East Jerusalem from the rest of the occupied West Bank. In 2004, the International Court of Justice issued an Advisory Opinion deeming the Annexation wall illegal. See “Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,” ICJ Report, 2004.

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56 • *Ibid.*

57 • *Ibid.*

58 • "Occupied Palestinian Territory Slides into Recession, Gaza Becoming Uninhabitable," UN Conference on Trade and Development (UNCTAD), September 1, 2015, accessed May 22, 2017, <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1068>. See also "Gaza in 2020: A Liveable Place?," August 2012.

59 • Derived from Article 43 of the Regulations Annexed to the Hague Convention IV Respecting

the Laws and Customs of Wars on Land of 1907 (Hague Regulations): "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely necessary, the laws in force in the country."

60 • Iain Scobbie, "Natural Resources and Belligerent Occupation: Perspectives from International Humanitarian and Human Rights Law," in *International Law and the Israeli-Palestinian Conflict: A Rights-based Approach to the Middle-East Conflict*, eds. Susan M. Akram, Michael Dumper, Michael Lynk, and Iain Scobbie (London/New York: Routledge Publishers, 2010), 231. In addition, Israel must protect the Palestinian population and their property, including natural resources, from exploitation and depletion by the occupying power. Antonio Cassese, "Powers and Duties of an Occupant in Relation to Land and Natural Resources" in *International Law and the Administration of the Occupied Territories*, ed. Emma Playfair, (Oxford: Clarendon Press, 1992), 422.

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65 • The right to self-determination holds that all people have the right “freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the [UN] Charter.” “2625 (XXV). Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,” United Nations General Assembly Resolution 2625, UN Doc. A/RES/2625, October 24, 1970, accessed May 22, 2017, <http://www.un-documents.net/a25r2625.htm>.

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70 • *Ibid.*

71 • The International Court of Justice recognised these obligations in its Advisory Opinion on the Wall in relation to the consequences arising from the construction of the Annexation Wall. See “Advisory Opinion on the Legal Consequences of the Construction of a Wall in

the Occupied Palestinian Territory,” ICJR Report, 2004, paragraph 161; 163.

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report-feasting-on-the-occupation-highlights-eu-obligation-to-ban-settlement-produce.

75 • Mickey Chelsa, "Israel's Water Industry - Answering the World's Wake-Up Call." Israel NewTech, November 4, 2015, accessed May 22, 2017, <http://israelnewtech.com/2015/11/04/israels-water-industry-answering-the-worlds-wake-up-call/>. In addition, the CEO of Mekorot described how "the water technology market amounts to at least \$250 billion a year. We understand water; we're the best in the world. So we made ourselves a strategic plan to make Mekorot a global company. The president of Guatemala came to us and sat with us for two and a half hours. He studied our water sector, and said, 'I want you to help us.' They want us in Paraguay, Argentina, Mexico, Kazakhstan, Myanmar, and Africa. We advised Azerbaijan, Mexico, Ghana, and Argentina, but the really big money is in construction. We built two desalination facilities in Cyprus." See Amiram Barkat, "Mekorot CEO: We Could Earn Billions Abroad." Globes Israel's Business Arena, February 19, 2017, accessed May 22, 2017, <http://www.globes.co.il/en/article-mekorot-ceo-we-could-earn-billions-abroad-1001177666>.

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CAJAMARCA, COLOMBIA

Renzo Alexander García

- *An example of dignity and hope for social and environmental movements in Colombia and Latin America*

ABSTRACT

This case study narrates the victory of a popular referendum against mining in Cajamarca – a small Colombian town that demonstrated its capacity to mobilise to defend the environment in March 2017. In addition to discussing the impacts of this initiative, the case study highlights the obstacles that the region must still tackle to ensure that the will of the people will prevail over the interests of extractivism.

KEYWORDS

Cajamarca | Popular referendum | Mining | Environmental movement

On 26 March 2017 (after over 10 years of debate, hearings, forums, workshops, peaceful demonstrations and deplorable incidences of human rights violations), the citizens of the municipality of Cajamarca-Tolima – a small Colombian village specialised in peasant farming – organised the first popular consultation on mining as a citizens’ initiative in Colombia. Residents categorically rejected the La Colosa mining project and other mining operations in their territory. To the question, “Do you agree with mining projects and activities being carried out in the municipality of Cajamarca?”, 6,165 people responded by voting “no”, and only 76 voted “yes”.

This was clearly a victory for the communities of Cajamarca. The defence of the collective right to a healthy environment, the area’s vocation for agriculture and the peasant way of life and culture were the winners of the vote. The triumph of the promoters of the “no” campaign has undoubtedly strengthened the hope and dignity of the Colombian people.

The residents of Cajamarca invoked this constitutional mechanism to oppose the attempts of the AngloGold Ashanti transnational corporation to execute a large-scale open-pit, cyanide leaching, gold mine called La Colosa. Technical studies carried out by various researchers and state institutions in Colombia¹ noted that the environmental damage would be much greater than the economic benefits it would generate. The mine would be established in an agricultural region in the Central Forest Reserve that is home to fragile ecosystems, cloud forests, alpine tundra and the headwaters of a water basin that supplies water to over 800,000 residents in seven municipalities of the department of Tolima.

Despite the peaceful, democratic and constitutional actions of the people of Cajamarca, the national government intends to ignore the results of the popular referendum and the legal framework that sustains it. In relation to this, it is important to note that the popular referendum is a mechanism for citizen participation recognised by the Political Constitution of Colombia, article 33 of Law no. 136 of 1994, statutory laws no. 134 of 1994 and 1757 of 2015 and ruling T-445/16 of the Constitutional Court.

According to the Minister of Mining and Energy, Germán Arce, (in declarations to the press on 27 March 2017)

The referendum on mining in Cajamarca cannot change the law. It cannot be applied retroactively – that is, invalidate decisions made on an earlier date. This decision, which is political in nature, does not have the capacity to affect an administrative procedure.²

The declarations of the minister and other high-level government officials are reasons for concern, as they disregard citizens’ rights and the country’s legal system. The minister intentionally forgets that the La Colosa Regional project does not have the permits it needs to operate, which, in the Colombian case, is the environmental licence. Without this licence, the corporation has no entitlements. The democratic process of the popular referendum

cannot be ignored, since – as was clearly indicated in the ballot boxes on 26 March 2017 - the mining project has not obtained a social licence from the people of Cajamarca

We are equally concerned with paramilitary groups' systematic threats against members of the Environmental Committee and other social and media organisations that have supported the popular referendum process and the defence of the people of Cajamarca and Tolima's collective right to a healthy environment. Even though denunciations of these incidents have already been brought before the Attorney General's Office and other national bodies, we are worried by the fact that even today, there are still no guarantees for the right to life of those who promote and participate in these democratic and constitutional processes.

We also denounce that some employees of the AngloGold Ashanti corporation have stigmatised the opponents of the La Colosa Regional project as guerrilla members and "environmental Jihadists". This type of act shows that the company and its employees ignore and violate the human and fundamental rights of the communities.

By using the popular referendum mechanism, the communities embodied the fundamental right of citizens to participate in defining the future we want to build in our territories. Instead of calling for violent actions, the *Comité Ambiental en Defensa de la Vida* (Environmental Committee in Defence of Life) and the *Comité Ambiental y Campesino de Anaime y Cajamarca* (Environmental and Peasant Committee of Anaime and Cajamarca) have been organising peaceful, non-violent and inclusive mobilisation processes, which have helped strengthen democracy and the prevalence of human rights in society in general. This process can undoubtedly be classified as an example of peace for Colombia, as it is an emblematic case that shows how a socio-environmental conflict can be resolved within a democratic framework.

Unfortunately, the national government, under the leadership of the president and the minister of mining, intends to disregard the popular referendum and, with it, democracy, the Political Constitution and the will of the people of Cajamarca. It is regrettable that these high-level government officials defend extractivism at all costs and try to impose a development model that is alien to the territories' vocation for production, the local culture and the will of the people. The Nobel Peace Prize Winner³ talks about the need to advance the peace process, but imposes, at the same time, the violence of extractivism, making it impossible for the communities to exercise their fundamental right to citizen participation. By ignoring the popular referendums, democracy and the Colombian constitution, the president is declaring war on the territories, social leaders and the current and future generations who reclaim their collective right to a healthy environment. We hope that the strength of the social movement will continue to grow and succeed in defeating greed and the mining dictatorship imposed by the presidency and mining and energy corporations.

NOTES

1 • See: <https://comiteambiental.com/libros/>.

2 • See: <http://www.elespectador.com/noticias/nacional/consulta-minera-en-cajamarca-no-tiene-la-capacidad-de-cambiar-la-ley-gobierno-articulo-686515>.

3 • Editor's note: In 2016, Colombian President

Juan Manuel Santos received the Nobel Peace Prize for the agreement reached between the government and the FARC (*Fuerzas Armadas Revolucionarias de Colombia*, or Revolutionary Armed Forces of Colombia) to put an end to the armed conflict.



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MASSACRE AT MARIKANA

Michael Power & Manson Gwanyanya

- *A failure of oversight and the need for direct community involvement* •

ABSTRACT

This paper assesses the findings of the Marikana Commission of Inquiry against Lonmin – the mining company at the centre of a wage dispute that led to the deaths of 34 protesting mineworkers in South Africa’s platinum belt – and the South African Department of Mineral Resources (DMR), particularly in relation to: (1) Lonmin’s failure to provide adequate housing to mineworkers; (2) DMR’s failure to exercise appropriate oversight over Lonmin; (3) how Lonmin and the DMR helped create an environment conducive to the massacre; and (4) how little will change without direct community involvement and oversight.

KEYWORDS

Marikana | South Africa | Department of Mineral Resources | South African Police Service | Lonmin

1 • Introduction

On 16 August 2012, 34 protesting mineworkers were shot and killed by members of the South African Police Service (SAPS) near a *koppie*¹ in Marikana,² located in South Africa's North West Province. A further 79 mineworkers were injured and 259 were arrested. The mineworkers, employed to mine platinum at Lonmin's Marikana operations,³ were protesting against Lonmin for a "living wage" of R12,500 per month (approx. \$930). During the week preceding the shootings, 10 people were killed, including two private security guards and two police officers.

The Commission of Inquiry (Marikana Commission) that was appointed by South African President Jacob Zuma following the massacre found, among other things, that Lonmin's failure to comply with its housing obligations "created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct."⁴

This paper assesses the findings made against Lonmin by the Marikana Commission, particularly in relation to Lonmin's failure to provide adequate housing to mineworkers in terms of its Social and Labour Plan (SLP), and considers the DMR's failure to exercise its legal oversight obligations over Lonmin. It argues that this may be an additional component of the so called "toxic collusion between the State and capital"⁵ argued at the Marikana Commission and it was one of the primary contributing factors that led to the wage dispute and subsequent Marikana Massacre. This paper concludes by arguing that despite the continuing public outrage, neither Lonmin nor the DMR have substantially redressed these systematic failures and, as a result, direct community involvement and oversight is necessary to avoid future fatalities.

2 • SLPs & findings relating to Lonmin and the DMR

In its terms of reference, the Marikana Commission was tasked to determine "whether [Lonmin] by act or omission, created an environment which was conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct".⁶ The original terms of reference also required the Marikana Commission to investigate the role played by the DMR and determine whether it had acted in terms of its legal obligations.⁷ This obligation was, however, removed from the Marikana Commission's updated terms of reference published on 5 May 2014 and deferred for consideration to "a later stage".⁸

In its report, published on 26 June 2015, the Marikana Commission devotes a full chapter to Lonmin's conduct – ultimately finding that Lonmin was responsible for creating tensions within its workforce, which led to the wage dispute and contributed to the resultant massacre. The Marikana Commission found that Lonmin's responsibility was, primarily, as a result of its failure to implement its housing obligations in terms of its SLP.

What is an SLP?

“SLPs can be viewed as part of a broader project aimed at addressing the legacy of colonialism and apartheid.”⁹ In terms of the 2010 Revised Social and Labour Plan Guidelines (SLP Guidelines), published in terms of South Africa’s Mineral and Petroleum Resources and Development Act 28 of 2002 (MPRDA), SLPs “require applicants for mining and production rights to develop and implement comprehensive Human Resources Development Programmes, Mine Community Development Plans, Housing and Living Conditions Plans, Employment Equity Plans, and processes to save jobs and manage downscaling and/or closure” in South Africa’s extractives industry.¹⁰ Importantly, SLPs are legally required for the exercise of mining rights.

Lonmin’s implementation of its SLP at Marikana

Lonmin’s Marikana operations predated the enactment of the MPRDA. As a result, in order for Lonmin to convert its old-order mining rights in respect of the Marikana Mine to mining rights compliant with the MPRDA, it had to have a SLP approved by the DMR.¹¹ In terms of its proposed SLP, Lonmin committed itself to “phasing out all existing single sex hostel accommodation, converting most existing hostels into bachelor or family units and building an additional 5,500 houses for their migrant employees.”¹² In 2006, the DMR approved Lonmin’s proposed SLP and, as a result, it became legally binding on Lonmin. It is worth noting that an SLP can only be amended with the written consent of the DMR, which, in the case of Lonmin, was never given or sought.¹³

According to the findings of the Marikana Commission, following the conversion of its mining rights, Lonmin defaulted consistently in the performance of its SLP obligations, particularly in relation to housing:

- By the end of the 2009 financial year, Lonmin had built only 3 “show houses” of the proposed 3,200 houses it had undertaken to build in the first three years of its 2006 SLP. It had also only converted 29 of the 70 proposed hostels.¹⁴
- By 16 August 2012, Lonmin had built only 3 of the proposed 5,500 houses it had undertaken to build by September 2011 in terms of its 2009 SLP.¹⁵
- It was common knowledge that large numbers of Lonmin workers lived in “truly appalling” squalid informal settlements surrounding the Lonmin mine shafts, lacking basic social services.¹⁶

In justification of its conduct, Lonmin argued that as a result of the 2008 financial crisis, it could not afford to construct houses for its employees, and, contrary to its legal obligations, its employees did not want to purchase houses. However, Lonmin’s justification in relation to the 2008 financial crisis was considered implausible by the Marikana Commission as a result of it having paid \$607 million in dividends to its shareholders between 2007 and 2011, with the estimated cost of its proposed housing project totalling only R665 million (approx. \$65 million).¹⁷

As a result, the Marikana Commission found that that Lonmin's failure to comply with its housing obligations helped create an environment conducive to the massacre.¹⁸ This finding was ultimately corroborated by Lonmin's appointed representative at the Marikana Commission who, in cross-examination, conceded that:

[T]he board and executive of Lonmin understood that the tragic events at Marikana were linked to that [housing] shortage.¹⁹

The oversight role of the DMR

Following the 5 May 2014 amendments to the terms of reference of the Marikana Commission, the Commission was no longer mandated to enquire into the role played by the DMR. However, in its findings, the Commission states that:

- 1. Lonmin's failure to comply with the housing obligations under the SLPs should be drawn to the attention of the [DMR], which should take steps to enforce performance of these obligations by Lonmin.²⁰*
- 2. In view of the fact that the Commission has found that Lonmin did not comply with housing obligations in the SLPs...it is recommended that the topics dealt with in the deleted paragraph [of the amended terms of reference], in particular the apparent failure by the [DMR] adequately to monitor Lonmin's implementation of its housing obligations should be investigated.²¹*

Despite the findings made against Lonmin by the Marikana Commission, the DMR is mandated in terms of the MPRDA to play an oversight role and, where necessary, suspend or terminate mining rights where non-compliance with an SLP is established. At no stage between 2006 and the massacre did the DMR adequately exercise this oversight function, despite clear violations by Lonmin of its SLP obligations. As discussed below, the DMR continues to threaten Lonmin with legal sanctions but – 11 years since Lonmin's submitted its 2006 SLP – it is yet to act.

3 • The exploitation of natural resources and human rights standards

The Marikana Commission found that it is generally accepted that the wage dispute at Marikana, led by migrant labourers,²² and the subsequent killing of the protesting mineworkers was, in part, as a result of deplorable living conditions and the lack of basic services in the Marikana community. A large number of Lonmin's employees lived and still live in squalid informal settlements surrounding Lonmin mine, despite domestic and international obligations on Lonmin and the DMR to ensure compliance with human rights standards. The call for a "living wage" of R12,500 that initiated the wage dispute should not be viewed

only in monetary terms, but also as a call for better living conditions, an abandonment of the *status quo*, and a demand to be treated in a humane and dignified manner.

Domestically, the right to adequate housing is provided for in South Africa's Bill of Rights.²³ In terms of South Africa's Companies Act,²⁴ and the MPRDA, Lonmin has a duty to ensure that in its operations it promotes compliance with the Bill of Rights as provided for in the Constitution. The Constitution and the MPRDA further require the DMR to exercise oversight over mining operations. International standards such as the United Nations (UN) Guiding Principles of Business and Human Rights (UN Guiding Principles) and various other international and regional human rights treaties,²⁵ which South Africa is party to, provide for the right to adequate housing, and dignity. The UN Guiding Principles, in particular, urge companies to have in place a "human rights due diligence process to identify, prevent, mitigate and where necessary redress human rights abuses connected to their operations."²⁶

Through the testimony of its appointed representatives at the Marikana Commission, Lonmin was well aware of the prevailing living conditions and housing shortages in Marikana, as was the DMR. The South African government blatantly failed to enforce the law by holding Lonmin accountable for their failure to implement their SLPs and the human rights violations that stemmed from the failure to uphold its obligations in terms of its SLPs. More so, the failure to hold Lonmin accountable undermines the objectives of South Africa's Mining Charter, which seeks to promote equitable access to the nation's mineral resources to all the people of South Africa as well as to the socio economic welfare of mining communities and labor sending areas, amongst other things.

Regrettably, as a recent Amnesty International report²⁷ correctly states, the current state of affairs for the mineworkers in Marikana remains fundamentally unchanged, despite the events of 2012, the findings of the Marikana Commission, and South Africa's legislative framework. In December 2016, South Africa's Presidency issued a progress work on the implementation of the recommendations of the Marikana Commission. Notably, it indicates that following a DMR inspection on 25 June 2015:

- Lonmin has completed the conversion of all of its hostels.
- Lonmin's revised 2014 SLP is "broad and without clear timelines on building houses and Lonmin has been directed... to revise this plan to address the living and housing conditions of mineworkers."
- Lonmin's revised 2014 SLP proposes the construction of infill apartments to replace the outstanding 5,500 houses that Lonmin committed to building.
- "A compliant housing plan will be requested from Lonmin, failing which immediate action in terms of suspension or cancellation of the mining right will be taken."²⁸

By 7 October 2016, the last known DMR inspection, 100 family units and 225 bachelor units had been built by Lonmin, a far cry from the 5,500 houses proposed in its 2006 SLP.

Despite the findings of these inspections and Lonmin's culture of non-compliance, it continues to mine.

4 • “Toxic Collusion” and the persistence of the *status quo*

One of the primary arguments made at the Marikana Commission, particularly by the legal representatives of the victims, was that there had been a “toxic collusion” between the state, primarily the SAPS, and Lonmin in an attempt to end the wage dispute. This collusion, it was argued, went beyond acceptable legal limits and was “*causal of the massacre and unlawful*”.²⁹ In relation to the so-called collusion between the SAPS and Lonmin, the Commission rejected the argument. However, the question of “toxic collusion” when applied to the relationship between Lonmin and the DMR was not directly considered.

The failing by the DMR to regulate Lonmin, particularly in relation to the implementation of its SLPs, and the failure of Lonmin, and its shareholders, to self-regulate is self-evident. The questions that remain is why did the DMR fail to act, why have state officials not been held accountable for their oversight failures, and how does Lonmin continue to mine?

Furthermore, the reasons why paragraph 1.5 of the original Terms of Reference, which initially enjoined the Commission to “investigate whether the role played by the [DMR] was appropriate in the circumstances, and consistent with their duties and obligations according to law” was subsequently deleted has not been sufficiently explained.³⁰ As a result of the amendment, the Commission was unable to make any direct findings on collusion, or otherwise, as the Commission was no longer mandated to investigate the role played by the DMR, or any other department or agency in relation to the massacre. Whether toxic collusion existed or the DMR, absent any collusion, failed to hold Lonmin accountable through its inaction remains formally undecided. Either way, the *status quo* persists for the people of Marikana.

5 • Conclusion

The Marikana Massacre has been compared to the Sharpeville and Soweto uprisings of 1960 and 1976, in which Apartheid police killed people protesting against the Apartheid system. In Marikana, 18 years after South Africa transitioned to a democratic state, people protested against the indignity of the living conditions imposed by a mining company, over which the state exercised oversight. Both pre- and post-Apartheid the police reacted with live ammunition. After Marikana, Lonmin has continued to default on its obligations, as has the DMR.³¹

Since the massacre, promises to alleviate the socio-economic conditions in Marikana have been made by the state and Lonmin. However, little if anything has been done to substantially address these issues. At the core of this inaction, is the blatant failure by the state to enforce its policies and legislation governing mining in South Africa. However, the public outcry and continued civil society and political pressure as a result of the Marikana Massacre and the state’s inaction in the extractives industry have had some positive effect. The massacre has led to renewed public calls for wide-spread reform in the extractives industry in South

Africa; it has led to the establishment of a new political party – the Economic Freedom Fighters – in South Africa’s party political space; the Association of Mineworkers and Construction Union – a labour union established shortly before the massacre – continues to challenge the dominance of the National Union of Mineworkers in both the gold and platinum mining sectors; and public order policing practices in South Africa are subject to a comprehensive review as a result of the continuing work of the Marikana Panel of Experts, established as a result of the report of the Marikana Commission. Importantly, Marikana has, in many ways, become a political symbol for the need for change, amidst state apathy.

Reform in South Africa’s mining sector still needs greater attention and Marikana has made it patently clear that additional checks and balances are needed in the extractives industry. Despite state inaction, mining companies need to ensure that their Corporate Social Responsibilities initiatives and, in particular, strategies for managing labour relations and their SLP obligations are met. Most importantly, the extractives industry, and the state, must put mining affected communities first. The extent to which communities are integrated into mining ventures is central to securing tangible socio-economic benefits for the host communities,³² and will allow necessary community oversight over mineral extraction and living conditions, with or without adequate state or civil society engagement. The struggle for accountability in South Africa’s extractives industry must be community-led. Communities, with vested interests, are best placed to ensure accountability: as an addition to, or in the event of the failure of, state oversight mechanisms.

Hopefully, the legacy of the Marikana Massacre – over time – will play a central role in empowering mining-affected communities and act a case study for the failures of corporate accountability and state oversight. In the interim, the struggle for accountability at Marikana, and in South Africa’s extractives industry, must continue.

NOTES

1 • A “koppie” is a South African noun denoting a small hill in a generally flat area.

2 • Marikana is located in South Africa’s platinum belt, which produces around 80 per cent of the world’s platinum supply.

3 • Alongside Anglo American Platinum (Amplats) and Impala Platinum (Implats), Lonmin is the third largest platinum producer in South Africa, and the fourth largest platinum producer in the world.

4 • “Marikana Report,” Marikana Commission of Inquiry, June 26, 2015, page 542.

5 • Marikana Commission of Inquiry, days 1-3, page 18, transcript.

6 • “Marikana Report,” 2015, 522.

7 • *Ibid*, 523.

8 • *Ibid*, 554-5.

9 • “The Social and Labour Plan Series, Phase 1: System Design and Trends Analysis Report,” Centre for Applied Legal Studies, March 2016, page 23, accessed May 28, 2017, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/>

cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf.

10 • “Revised Social and Labour Plan Guidelines,” Department of Mineral Resources, October 2010, page 2, accessed May 28, 2017, <http://cer.org.za/wp-content/uploads/2013/03/SLP-guidelines-2010.pdf>.

11 • Section 23(1)(e) and 25(2)(f) and (h) of the MPRDA.

12 • “Marikana Report,” 2015, 526.

13 • According to the Revised Social and Labour Plan guidelines, 2010 a SLP may not be amended or varied without the consent of the Minister after the granting of the mining or production right to which the SLP pertains. See further the “Marikana Report,” 2015, 527.

14 • *Ibid*, 534-5.

15 • *Ibid*, 527.

16 • *Ibid*.

17 • *Ibid*, 539.

18 • *Ibid*, 542.

19 • *Ibid*, 527-8.

20 • *Ibid*, 554-5.

21 • *Ibid*, 555.

22 • See page 7 for an overview of South Africa’s migrant labour: “Smoke and Mirrors: Lonmin’s Failure to Address Housing Conditions at Marikana, South Africa,” Amnesty International, August 2016, accessed May 28, 2017, [https://](https://www.amnesty.org.nz/sites/default/files/AMNESTYLONMINREPORTFINAL11082016.pdf)

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23 • “Republic of South Africa Constitution,” South Africa, sec. 26, 1996, accessed May 28, 2017, <http://www.gov.za/sites/www.gov.za/files/images/a108-96.pdf>.

24 • “Companies Act 71 of 2008,” South Africa, sec. 7, 2008, accessed May 28, 2017, <http://www.justice.gov.za/legislation/acts/2008-071amended.pdf>.

25 • South Africa is party to the International Covenant of Economic, Social and Cultural Rights and the African Charter on Human and People’s Rights, which speak to the right to adequate housing.

26 • “Smoke and Mirrors,” August 2016, 4.

27 • *Ibid*, 12.

28 • Jacob Zuma, “Marikana: A Progress Report on Farlam’s Recommendations – Jacob Zuma.” PoliticsWeb, December 11, 2016, accessed May 28, 2017, <http://www.politicsweb.co.za/news-and-analysis/marikana-a-progress-report-on-farlams-recommendati>.

29 • “Marikana Report,” 2015, 505.

30 • “Proclamation 30 of 2014,” *National Gazette* 587, no. 37611 (May 5, 2014); deleted subparagraph 1.5 from the Original Terms of Reference, amongst other things.

31 • “Smoke and Mirrors,” August 2016, 45-51.

32 • Manson Gwanyanya, “The South African Companies Act and the Realisation of Corporate Social Responsibilities,” PER 18, no. 1 (2015): 3106.

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THE COLLAPSE OF THE RIVER DOCE DAM

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- *The use of international strategies as a way of reducing asymmetric distribution of power between human rights and business interests*

ABSTRACT

The destruction of the Rio Doce basin in 2015, when the mining waste dam owned by the company Samarco collapsed, is emblematic of the tense relationship between ensuring human rights within international standards with particular attention to transnational, business activity in the countries of the Global South. As the situation unfolded the fragility of the state, and its various institutions, in ensuring the rights of the communities affected, in the face of the economic power of those companies involved, became clear. In effect, the companies responsible for the violations are the ones that are reconstructing life in the regions, as they see fit. The work of civil society and international bodies has focused on seeking to break state inertia and violatory practices, such as curtailing debate on ensuring access to legal processes and social participation. This article recounts a part of the efforts to gain international visibility for the case, using it as the basis to propose reflection on the deepening scenario of social environmental setbacks and violations of human rights, the result of the implementation of the current mineral extraction model in Brazil.

KEYWORDS

Mining | Technological disaster | Rio Doce | International Strategies | Business and Human Rights

1 • Introduction

“It rained drops of mud”.

This was how a resident of Bento Rodrigues described the moment when he realised that the Fundão dam had burst, in the municipality of Mariana in Minas Gerais. The “rainfall of mud” was caused by a wave of waste material from the breached dam hitting a rocky bulkhead, before flowing down the valley. En route, it ran into other rock formations, causing whirlpools, backflow and currents that swept away trees, objects and people, which increased its destructive force.¹

That moment, at around 4pm on 5 November 2015, marked the start of a long, difficult path for the affected communities, civil society organisations and for the supervisory bodies for diffuse and collective rights (Public Prosecution and the Public Defenders Office), to hold the public authorities and the companies involved, Samarco, Vale and BHP Billiton, accountable for their actions and omissions, as well as for full redress and compensation for the violation of rights and for the environmental impact of the disaster.

Almost two years after the fateful event there is still no light at the end of the tunnel. There are thousands of claims for individual damages, collective claims and a number of judicial and extrajudicial agreements, as well as inquiries and criminal proceedings to establish penal responsibility for what happened. In addition to all this, the set of measures taken by the authorities and the companies represents a collection of palliative actions, insufficient to deal with a disaster of this magnitude.²

The size and gravity of the collapse of the Fundão dam meant that the scope of the damage went far beyond the 850 km stretch of the Rio Doce river between Mariana and its mouth at the Atlantic Ocean. This section of the river was contaminated with over 40 million cubic metres of mud that spilled from the dam. The collapse of the dam in Mariana/Rio Doce, considered to be the worst socio-environmental tragedy in Brazilian history and the most serious case of a technological disaster involving a mining waste dam in the last two centuries,³ immediately drew intense attention from press around the world and there were repercussions on the international financial markets. BHP Billiton shares dropped on the New York exchange following the event.⁴

Even under the scrutiny of the international community, local public and private players initially adopted a “defensive attitude”⁵ either for the sake of convenience or because of an incapacity to deal with the consequences of the disaster. Among the actions that best demonstrate a reactive spirit and a lack of empathy towards the victims of the disaster immediately following the breach include the attitude of the Minas Gerais state governor who gave his first press conference at the Samarco headquarters; the Minas Gerais State Secretary for Economic Development’s statement that the company had been the victim of the collapse and the seven-day delay before President Dilma Rousseff flew over the affected area (and only in Minas Gerais, not in Espírito Santo).

From the outset it was clear to civil society organisations and to those representing the people who had been affected that full redress of damages and the revitalisation of the area and of the Rio Doce Basin would only possibly happen at the national level under international pressure. This article recounts a part of the effort to gain international visibility for the case and considers human rights violations, the origins of which are found in the implementation of the current mineral extraction model in Brazil.

This article is divided into three sections, in addition to this introduction. The following section places the collapse of the Fundão dam in context within the framework of the responsibility of the companies in terms of human rights, with attention to systemic repercussions. Next, some of the strategies and actions adopted to gain greater international visibility for the case are presented. The following section discusses the importance that this approach had on the demarcation of some of the more serious hurdles observed during the process of remediating violations. The final considerations point to possible future paths bearing in mind the current scenario, almost two years after the collapse.

2 • The emblematic case of Rio Doce

Samarco Mineração S.A is a closed capital company, founded in 1973 and has always been a joint venture, with Vale S.A and BHP Billiton Brasil Ltda each holding 50% of capital. It is an icon of the subordinate insertion of Brazil into the global market, being a mine-pipeline-pelletizing-port complex, ensuring extraction of natural resources, semi-transformation and total exportation as a commodity on the international market.⁶

The Fundão dam is part of the operations complex, Alegria, in Mariana, Minas Gerais, composed of two dikes, one for sand and one for slime, with a capacity for 79.6 million m³ and 32.2 million m³ respectively⁷ (According to the Minas Gerais Civil Police report the cause of the collapse was the liquefaction of the sandy waste that supported the dam. According to the inquiry, the factors that led to the collapse were the following (i) increased saturation of sandy waste deposited in the Fundão dam; (ii) failures in the continuous monitoring of the water level and of the pore water pressure of waste products; (iii) several pieces of monitoring equipment were not working properly, so the readings needed for the dam's safety report were not carried out; a high annual level raising at the dam, because of the large volume of slime inside, not reaching full; (iv) sedimentation of dike 02 which meant water could get in; (v) insufficient water drainage. In addition, the emergency plan of action in the event of a breach, presented to environmental control groups was never put into practice.⁸

Summing up, researchers have underlined the relationship between the failure of safety control systems at the dam and maintaining company profit margins, which meant a reduction in investment in these areas. The price of iron mining fell after 2013. In a ploy to meet profit expectations the companies stopped investing in more advanced technology

and safety methods. They pinpoint the direct relationship between the companies' responsibility in the risk activity of mining and the disaster caused, in addition to state inertia in its role of carrying out inspections to meet environmental constraints.⁹

In terms of efforts in the region following the disaster, relations between those affected and the companies are strained. Initially, the companies attempted to exempt themselves from liability, leaving many communities in degrading conditions for days, homeless, without food or information about their family members. No preventative measures were taken to stop the mud from reaching the sea on 16 November, nor were there any bulletins or alerts to warn communities. Later, when the families had been placed in hotels, attempts were made to preclude the organisation of those affected into movements, associations and commissions to construct collective claims.

The central dispute of the conflict involves recognition of those affected and to this effect the company has offered compensation according to its own criteria, without any publicity, randomly, without the consultation or participation of the victims. Socioeconomic records in which recognition was, or was not given, to the families were utterly abusive. In some cases elderly people and victims who had been unable to retrieve anything were expected to provide proof.

This situation was reported to the Inter-American Commission for Human Rights (IACHR) in a hearing during the 158th period of extraordinary sessions, in which civil society bodies and those affected explained that records of the families were controlled exclusively by Samarco and that those who were not registered had no access to emergency aid.

Control of conflict management by the companies, without the participation of those affected, along with the Brazilian state's inertia, compose a scenario of a profound imbalance in power relations between the companies and the victims, with the latter taking the brunt of the risks and damages of the whole disaster. This meant that conflict, rather than being seen from the angle of human rights standards, was seen as a problem of recovering economic activity.

In this sense, the *Acordão* (big agreement)¹⁰ signed by states and governments with the companies in March 2016 is emblematic of a lack of respect for the central importance of the victims in the reconstruction of their lives, in that: they were not consulted about the development and negotiation of the agreement; private foundations of companies were created with whom victims are obliged to negotiate directly, without the presence of public officials to mitigate the imbalance of power between the parties, exposing those affected to adjudication meetings without the necessary technical assistance; contractual mechanisms were put in place that exclude victims from access to legal recourse and from the chance to bring the subject back to the table in the event of supervening factors, such as evidence of contamination affecting long term health.

Even though the *Acordão* is not valid in the eyes of the Brazilian legal system, it is being wholly implemented by the companies and is recognised by the government. In these regions the *Fundação Renova* (Renewal Foundation) has taken full control of the management of redress and impact mitigation policies, bringing numerous private and technical consultancy companies into the area. These are not equipped with the social skills needed to deal with the communities, which has caused even more discomfort and psychological violence to the affected families.

The Federal Public Ministry proposed a Public Civil Action in June 2016, estimating compensation costs at an average 155 billion real, firmly based on the participation of the communities. However, in January 2017 the Federal Public Ministry signed a Preliminary Agreement with the companies in which they would finance diagnostic research to quantify demand. This proposal, however, was not previously discussed with those affected and they did not have the opportunity to suggest organisations in which they trusted to carry out this research. This occurrence was a warning to civil society regarding the difficulties of effective participation even with the main body that defends the collective and diffuse interests that were impacted by the disaster.

Almost two years after the disaster the families affected still do not know which rights and demands will be met, even more so given that no integral restructuring plan for the Rio Doce Basin has been put together. Nor is there any reliable forecast of the impact on the health of the families, given that the water carries heavy metals. There is also no estimate of when the productive capacity and income of groups of fishermen, indigenous people, traditional people and communities will be restored.

On the committees of the decision-making spaces of the conflict, in other words, the numerous negotiating groups created for this issue, such as *Fundação Renova*, The Interfederal Council (CIF), the mediated compensation programme (PIM) and public hearings, there is a notable absence of the priority of human rights as the central driver of conflict resolution. In the light of this fact, we found all the measures being taken to resolve the problems to be completely ineffective, as they disregard the central importance of the victim in his/her restitution, marked by the absence of active participation. In this sense mitigating actions do not meet the expectations and needs of those affected and become merely uncertain obligatory actions that could cause impoverishment and increased vulnerability among diverse social groups.

This scenario demonstrates the Brazilian state's inability to ensure human rights in the face of transnational companies. Although there is clear underpinning environmental legislation, providing that accountability should be pursued in a case like this, the mechanisms of flexibility for environmental licences, inspection controls, in carrying out measures, the relationship between the funding of these companies for government candidates and the absence of mechanisms providing victims with swift access to justice, all lead to the perpetuation of a system that favours corporate impunity for human rights abuses.

3 • International action and strategies: the case of Rio Doce, a prime example of corporate irresponsibility

Immediately after the dam collapsed, those responsible failed to react.¹¹ Humanitarian emergency assistance was mostly carried out by civil society itself, with the support and mobilisation of people all over the country who sent food and essential items. While Samarco clung to the theory that the collapse had been an unpredictable, exceptional event caused by factors entirely beyond its control, Vale and BHP Billiton maintained the approach that they were legally distinct from their subsidiary, in order to shun their own responsibility.

In the second phase after the collapse of the Fundão, governments and companies signed commitments for the recuperation of the Rio Doce Basin and for the compensation of victims, who were not brought to the negotiating table. This agreement, later deemed null by the Federal Court, was signed by the states of Minas Gerais, Espírito Santo and the Federal Government on the one hand and Samarco, Vale and BHP Billiton on the other, is a prime example of failure to fulfil basic rights to effective redress in procedural and substantive terms. Indeed this is a practice described by the UN Working Group on Companies and Human Rights as endemic in Brazil in cases of violations of human rights by companies.

Given the inertia or refusal of government authorities and private companies in respecting the principle of the central importance of victims in processes of remediation and the impossibility of awaiting the final decisions of legal actions, civil society and those affected were forced to take the case to international mechanisms of protection of human rights. Some of the actions put together since the collapse of the dam in November 2015 are presented here, with a view to recounting part of the efforts carried out by victims and civil society to gain international visibility for this case and thus to raise levels of accountability among national institutions.

The international strategy adopted by the organisations and movements had two primary objectives. Firstly, it aimed to push the local players, responsible for the tragedy, out of the “comfort zone”, thus reducing the imbalance between the parties, notably between victims and the involved companies. As exposed earlier the latter have, in practice, wielded considerable power over the design and implementation of recovery measures for environmental and socioeconomic damages, within a well known framework of abandonment of conflict mediation by the State in mining projects and, more widely, in economic development.

The other objective was to draw the attention of external observers to the human cost of the tragedy. The collapse of the Fundão was widely seen as primarily an environmental disaster rather than a textbook case of the violation of human rights by businesses. If it is true that the environmental devastation caused by the wave of tailings waste

caused irreversible damage to the Rio Doce Basin, the harm caused to the traditional communities that depended on the river water for their subsistence and to the entire population of millions of people living in the towns along the Rio Doce, exposed to heavy metals and other health hazards, are also enormous.

The evaluation of which international channels would be approached took a number of factors into consideration, among them the chances of successfully obtaining public notifications strongly condemning failures in emergency assistance and redress for the victims, as well as causing public discomfort for the public and private players involved.

Regional and international channels for the protection of human rights were used. The first was the request for a public hearing at the Inter-American Commission on Human rights (IACHR) which took place at the 158th period of sessions in Santiago, Chile, in June 2016. The hearing addressed the human rights violations resulting from the Brazilian mining model. Civil society organisations presented emblematic cases showing environmental and socioeconomic impacts of mining extraction in Brazil. Among them the case of Piquiá de Baixo, in Maranhão, where air, water and soil are contaminated by the extraction of pig-iron and coal; and the Minas-Rio Project in Conceição do Mato Dentro, where environmental licensing was split into three separate processes, mining, pipeline and the Açú Port. This practice, according to the organisations, was a deliberate attempt to mask the cumulative impact of the whole complex, if regarded as a set of parts that fit together, in order to enable an economic project with a high potential for environmental degradation and violations of rights.

The document sent to the IHRC¹² recounted the process of making communities and local economies financially and socially dependent on mining. This is carried out through the centralisation of activities (products and services) in meeting direct and indirect demands for the functioning of mineral extraction. Towns and villages where the mining companies set up business, quickly become dependent on this economic activity, with dependency being taken as normal and it being considered a privilege to count on the resources gained through the presence of this sector in the region, undermining the existence of other sources of income. This is the actual effect of the presence of the mining companies. This characterises the relationship of local economic dependence and the pattern of impoverishment in the mineral extraction regions.¹³ Concerning the dependency of the communities in mining regions on this economic sector, the document highlights that patterns of poverty and social inequality are the principal facilitators for the companies' actions, as populations tend to accept the negative consequences of mining activities more easily in these circumstances.¹⁴

With regards to political and economic support from the state for mining activity, the document lists policies of financial and tax incentives, as well as flexibility in environmental licensing and socio-environmental legislation. According to the document sent to the IHRC,¹⁵

The Brazilian State performed a crucial role in this scenario. The option to prioritise the exportation of raw material led to the central position that the Banco Nacional de Desenvolvimento Econômico e Social (BNDES) held in financing these projects and also the infrastructure that is essential for this to work; exemption from taxes for mining companies; environmental licensing norms that have become more flexible in the last few years; as well as the undermining and scrapping of licensing and inspection bodies for mining activities.

At the UN-level the first measure taken was to trigger Human Rights Council protective mechanisms (HRC) of the intergovernmental body. The HRC is the main UN human rights body and its headquarters are in Geneva, Switzerland. It is made up of 47 member states, elected by the General Assembly for a mandate of three years, according to criteria of geographical representation and distribution. In order to assist the Council in its mission to strengthen protection, to promote human rights and to confront real issues of violations of rights, the body nominates independent specialists who issue recommendations and advice to the States, either from the perspective of a given theme or of a country. These specialists, also known as Special Procedures, are able to make official visits to member countries and to send “communications” to States (in some cases to companies too) questioning actions taken in the light of actual allegations of human rights violations. There are currently a total of 43 thematic specialists and 13 whose mandates are country-related.

The first Special Rapporteur called upon was the Rapporteur on Toxic Wastes. Baskut Tuncak is the current holder of the mandate. Representatives from civil society informed the Rapporteur of the lack of reliable information about the composition of the “toxic mud” that formed after the collapse of the dam and the absence of emergency measures. Along with another five Special Rapporteurs, the Rapporteur for toxic waste sent a communication to the Brazilian government less than ten days after the disaster. In the communication –that is transmitted confidentially under UN regulations and is only disclosed after a certain period of time¹⁶ – the experts displayed concerns over health, safety and the well-being of those affected by the wave of mud and of those exposed to toxic waste contained in it. The experts requested the Brazilian state to provide information on the chemical composition and the heavy metals in the waste that leaked from Fundão. The Brazilian state was also questioned about plans to ensure the right of victims and the affected communities to an effective remedy.

The day after the confidential communication was sent, the Rapporteurs on Toxic Waste and on Human Rights and the Environment issued a public press release condemning the “defensive attitude” taken and the insufficient measures to contain damages adopted by the companies and by the Brazilian state. Against a backdrop of a total absence of trustworthy information from the authorities and the companies, the experts recalled that, under international human rights standards “the State has an obligation to generate, evaluate, update and divulge information about impacts on the environment and about dangerous

substances and waste products, and the companies are responsible for respecting human rights, including conducting the necessary due diligence on human rights.¹⁷

A second public notice came from the Rapporteur on the Human Right to Safe Drinking Water and Sanitation.¹⁸ The press release sent out just over one month after the disaster drew attention to the disorganised and insufficient distribution of bottled water at distribution points in the towns where the mains supply had been cut off due to the contamination of the Rio Doce. The Rapporteur, the Brazilian Leo Heller, urged authorities to provide clear information to the population and to monitor the quality of the river water and treated water supplies to homes in the affected areas.

In the month after the disaster, the Working Group on Companies and Human Rights included the towns of Mariana and Belo Horizonte on the itinerary of their official visit to Brazil, the first to a Latin American country. The Group's visit to the region happened after a formal request from dozens of Brazilian civil society organisations, as it had not been included on the original WG agenda. In Mariana the UN working group met with Samarco, with public authorities and with affected communities. In a public hearing with representatives from the worst hit districts – Bento Rodrigues, Paracatu, Barra Longa and Gesteira – the two members of the WG who were present, Dante Pesce and Pavel Sulyandzigaque, heard inhabitants' testimonies reiterating the allegations that had been sent to the UN. Among them the story of a person who lived in Barra Longa and who, on hearing of the collapse of the dam had questioned Samarco employees about the possibility of the mud reaching his town. He was told by the company that there was no danger of it going that far. Sadly, a few hours later the mud reached homes, devastating them, leaving no time for people to save their personal belongings.

In his official report on the visit to the country,¹⁹ presented to the HRC of the UN in June 2016, the WG on Business and Human Rights regretted the absence of any contingency plan and the failure to alert communities other than Bento Rodrigues. The Group concluded that, given the scale of the disaster, the Federal authorities should have taken better action straight after the collapse. The WG emphasised the need to restore confidence to improve inquiry procedures and to guarantee access to essential information and services, as well as recommending the creation of grievance channels so that communities and employees could freely express their opinions without fear of suffering reprisals.

The second phase of interaction between civil society and the UN system took place after the *Termo de Transação e Ajustamento de Conduta* (TTAC), or *Acordão*, which was signed by the Federal and State Public Prosecution and the three companies, and ratified by the Federal courts in May 2016. Immediately after its ratification by the Federal Regional Court of the 1st District, located in Brasília, eight civil society organizations sent an urgent appeal to the four UN Special Rapporteurs²⁰ and the Chair of the WG on Business and Human Rights. In the document, the entities labelled the agreement “illegitimate and illegal”, and stated that it aggravated the human rights violations caused by the collapse

of the dam. After this urgent appeal, the Minister for the Environment in Brazil, Sarney Filho, publically stated that he would propose a review of the agreement to ensure that the companies would do more to take the demands of the victims into account.

According to the appeal, the agreement aimed to limit the obligation of the Brazilian state to protect citizens' human rights within its territory from violations committed by corporations. One of the items considered to be most problematic was the preambular clause that listed as one of the purposes of the document, the termination of all legal action related to the disaster, as well as a clause that explicitly discharged the three companies from any responsibility for adverse consequences of the collapse of the dam.

In July 2016, the Superior Justice Court (STJ according to its Portuguese acronym) issued an injunction suspending approval of the agreement. The STJ held that the failure to consult with the people who had been affected as defined in the terms of the agreement made it illegal and illegitimate. The court concluded that the extent of the damage caused by the catastrophe warranted a wider debate on the negotiation of a solution of the conflict. According to this decision, the public authorities and the companies should have conducted public hearings with the participation of citizens, civil society, the scientific community and other bodies representing local interests, such as the municipal authorities.²¹

The suspension of the agreement was welcomed by the UN experts on human rights who were following the case.²² In a new public notice, harsh criticisms of the agreement were laid down. Stating something that had already been widely criticised by the Human Rights Commission of the Chamber of Deputies and by the judicial authorities, UN mechanisms noted that the "The Executive powers and companies appeared to have, in their haste, ignored the rights of the victims to information, participation and an effective remedy, and to provide assurance of accountability". The experts demonstrated particular concern with the institutional governance created by the agreement and with the exclusion of the affected communities at decisive moments. On this, they stated:

*If put in place, the mining company would have the power to take decisions about compensations to be given to the affected population without any possibility for these decisions to be questioned or appealed. In addition, the agreement does not plan for sufficient mechanisms to ensure the participation of all the communities affected by the implementation of the foundation.*²³

Activities paying tribute to the victims and to the memory of the first year of the disaster involved local events articulated with international advocacy. At a local level, the Movement of those Affected by Dams (MAB) organised a march that started at the mouth of the Rio Doce in Espírito Santo and reached Bento Rodrigues on 5 November 2016, exactly one year after the collapse of the dam. Bento Rodrigues was the district most devastated by the force of the wave of tailings and its reconstruction is not forecast until the year 2019.

At an international level a number of actions were carried out, starting with the denouncement of the disaster at the World Social Forum, in August 2016, in Montreal in Canada.

Following a strategy already used by the Movement of those Affected by Vale, affected people participated in a BHP Billiton shareholders' meeting in October 2016. MAB delivered the four principal demands of the families affected in the whole Basin to the company and to shareholders: (i) to not build the S4 dike and the removal of the mud deposited on the river bank; (ii) recognition of all the families affected; (iii) to restructure the agreement and the foundation so that those affected can participate in decisions and (iv) to speed up actions to redress damage, especially house building, health care and the return of the production work of the agricultural population.²⁴

At the level of the UN, based on updated information about the unsatisfactory progress of the reparation processes, five Special Rapporteurs²⁵ issued a public communication criticising the measures taken by the State and by the companies as “not being sufficient to deal with the huge dimension of the human and environmental costs resulting from the collapse”.²⁶ According to the experts, after one year, the current situation of the tragedy is a lack in access to safe drinking water, the pollution of the rivers and uncertainty about the futures of communities forced to leave their homes. They believe the human rights of the six million people affected were disrespected.

The first year of the disaster was also the focus of an action during the 5th Forum of the United Nations on Business and Human Rights, the world's most important event on this theme, bringing together 2,000 representatives from governments, companies and civil society at the Palace of Nations, in Geneva. In memory of the disaster Conectas held an advocacy action at the Forum, distributing flyers with basic information about the disaster, such as the number of victims, the estimated economic cost of damages and the number of people directly and indirectly affected. It was noted that many of the participants were unaware of the precise scale of the tragedy and its ranking as the biggest disaster of this type in mining history.

Still focusing on events in the first year, an online platform was launched “Rio Doce Vivo” –, to which anybody can send reports, research, technical documents, photos, videos, legal cases and other public data that may help people and organisations to (re)build a living memory and monitor accountability of the companies and organisations whose acts and omissions caused the tragedy of the Rio Doce.²⁷

4 • The international arena: untying domestic knots

The collapse of the Samarco/Vale/BHP Billiton dam in the Rio Doce is an emblematic case of business' social irresponsibility and of corporate-related human rights abuse. One of the main lessons learnt from this episode is that even in cases of grave violations of human

rights and environmental impact, the accountability of the perpetrators depends on an extremely well orchestrated articulation between the affected communities, organised civil society, the press (above all agencies of investigative journalism) and the bodies for the defence of rights and collective interests (in the case of Brazil, public defence and the State and Federal Public Prosecutor).

Once again the fragility of market mechanisms was made evident along with the tools of Corporate Social Responsibility (CSR) as drivers of respectful behaviour in terms of human rights by corporations. In its own market Samarco was even considered a benchmark by what were previously considered the CSR's high standards.²⁸

Even more sophisticated tools of benchmarking with regards to corporate policies and practices on human rights were not capable of ensuring appropriate penalisation of companies for the Rio Doce disaster. The Corporate Human Rights Benchmark, a multi-stakeholder initiative led by respected organisations such as the Business and Human Rights Resource Centre, presented BHP Billiton in the group of companies that scored highest in their ranking, in their first set of results in 2017. This result demonstrates that the methodology of ranking, indexes and benchmarks measuring business performance in terms of human rights is still suffering from a degree of insensitivity towards the plight of victims. Contrary to good sense and reasonableness, BHP Billiton is ranked as a top performer in human rights, among almost one hundred global business enterprises, flying in the face of the clear evidence that the processes to redress violations and the recuperation of the Rio Doce Basin fall far short of those demanded by international standards. Ultimately, these tools may pay a disservice to the efforts of the victims and their representatives to promote state and corporate accountability.

In the face of this state inertia combined with the inability of the CSR tools (and of businesses and human rights mechanisms) to force perpetrator companies to observe international standards on the right to effective remediation, the declarations of international mechanisms of human rights brought international visibility to a case that would perhaps otherwise have remained a local incident. International attention provoked a fall in BHP Billiton shares, thus ensuring the attention and scrutiny of private international players.

More importantly, the declarations of international mechanisms were crucial to creating counter-narratives on the causes of tragedy and the responsibilities of public bodies and private companies. In the immediate aftermath, they shifted the focus of the debate, which failed to focus on the occurrence or absence of a seismic shock to bring to the forefront the lack of reliable information and insecurity of the population of the Rio Doce basin. It was also through the communications that took place between the international mechanisms, the Brazilian state and the companies that it was established one of the only lines of reporting and accountability, given the fragility of domestic dialogue processes and lack of confidence on the part of those affected.

Almost two years on, civil society has returned to the Rio Doce tragedy to alert the population about the risks of weakening environmental regulations in Brazil. Sadly, contrary to what

would be expected, Brazilian socio-environmental regulations and the inspection bodies for dams have not been strengthened, as highlighted by the UN Working Group for Business and Human Rights in its report on the visit to the country. In fact an attack on the rights of traditional communities and on environmental rights is underway, as denounced by three independent HRC specialists and a ICHR rapporteur in a joint communication of 8 June 2017.²⁹ According to the experts, proposals to weaken the legal regulations are being wielded “by members of a rural lobby group, a coalition that represents associations of rural producers.”

The meme *#Fábrica de Marianas* (*#MarianaFactory*, in its original Portuguese meaning), that has been used in campaigns against the approval of a new general law on environmental licensing in Brazil which includes serious setbacks in relation to the current system, alludes to the real possibility that changes intended by groups of interest in the Legal and Executive powers could result in other disasters.³⁰

Among the main threats to licensing in Brazil are the substitutes to the PL (draft bill) 3.729/2004, which is being passed urgently through the National Congress and aims to establish a new General Law on Environmental Licences in Brazil. Should it be approved in its current format, the project would create a series of exemptions to the environmental licensing process, including for potentially damaging activities, including mineral research and the expansion of highways. The project also eliminates the location aspect of the licence, removing geographical, territorial and human criteria that influence in the licensing process. This would mean that a project such as the mineral extraction and waste deposit of Samarco in Mariana, located close to a community, would undergo the same licensing process as another location in an area that presented a lower risk to the environment, to health and human lives. Instead of standardising procedures and the licensing process, the project would also open up the possibility for an “environmental war” between the states of the federation, whereupon they would have increased power to waive rules and individual regulations for their own jurisdiction.

The scenario of weakened socio-environmental legislation in Brazil merely reflects the force of certain small organized segments that benefit from the dismantling of the State’s monitoring and sanctioning powers, in order to carry out high risk activities without taking due precautions and to commit violations without being held accountable for their respective responsibilities. It is clear that, apart from these limited groups, such measures would not be at all beneficial. They would only generate legal uncertainty, increasing the risk of further disasters such as that in Mariana. They would also violate principles set out in international treaties, such as non-retrogression, precaution and effective and full remediation for human rights violations.

5 • Conclusions

The history of the Rio Doce Basin overarches the contradictory and patchy history of the colonisation and emancipation of Brazil. Over 300 years of mining in the region has led to serious environmental degradation; a break with means of traditional means of production and

reproduction in the region; deep-rooted dependency of communities on external elements to ensure their survival; the systematic loss of their autonomy and sovereignty and the extraction of resources from the region for exportation, without generating local development. There have been centuries of exploitation and oppression, characterised by the ethnic/racial classification that determines specific roles and places for the social and daily existence of representativity.

Socio-environmental disputes represent a conflict of interests between individual and collective levels with regards to the use of land and the relationship between production and nature. As a rule, the solution presented for this problem is the institutionalisation of the issue as environmental and, therefore, a problem of state public policies, through which pragmatic solutions for conflicts are sought using a measure of administrative reasoning, in other words, between that which is politically acceptable and economically feasible.

This situation is exacerbated when the nation-state's control of the territory, its sovereignty, are relativized because of the arrival of social players who are beyond the territoriality of their own control, for example transnational companies.³¹ This makes the mechanisms of enforcement difficult. States take on the role of stimulating the promotion of investments in the region, through the provision of tax incentives, flexible environmental legislation, reduced inspections and the possible weakening of oversight bodies. And for communities they present weak mechanisms of mitigation and remediation for impacts, without properly ensuring information and participation in the decision-making process about projects in their regions.

The collapse of the waste tailings dam of the Fundão is an emblematic example of the meeting of the past, present and future of mining in Brazil, in that it shows us a model of production of secular wealth in the region, that led to a technological disaster of as yet immeasurable proportions and forces us to ponder about the future of thousands of other waste dams in the country.

Despite the legal complexity surrounding the Rio Doce case, it is noticeable that the domestic channels to ensure justice to the affected communities are *en route* to become exhausted. Only some of the communities' rights have been recognised and this only by means of an intense struggle, in which the presence of international players and mobilisation has been fundamental in guaranteeing that their voices are heard by decision makers. In the institutional arena these voices are still absent.

There is still much to be done to fully understand how the companies responsible are working towards the reconstruction of the region, the causes that led to the collapse, the impacts generated and the participation of those affected in the process. In the same way, it is fundamental to understand this case also in terms of what it represents for the formation and consolidation of alliances, the creation of networks of solidarity and mutual support between civil society and international mechanisms for the protection of human dignity.

For its harshness and its simplicity, the Rio Doce case teaches valuable lessons about how to avoid and overcome injustices in mining in Brazil and in the world.

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ACCOUNTING FOR THE HUMAN RIGHTS HARMS OF CLIMATE CHANGE

Tessa Khan

- *The use of strategic litigation is a key tool in holding governments responsible for inaction on climate change* •

ABSTRACT

This paper discusses the increasing recognition of the grave human rights harms entailed by climate change, and the role that national courts and commissions have played – and are likely to continue to play – in holding governments and corporations accountable for those harms.

KEYWORDS

Climate change | Accountability | Government | Big business

1 • Introduction

In early November 2013, Typhoon Haiyan, the strongest tropical cyclone in recorded history, laid waste to central areas of the Philippines. The typhoon resulted in the deaths of over seven thousand people, displaced more than four million, and created a humanitarian disaster.¹ It has since been determined that climate change, which has caused ocean temperatures to warm and sea levels to rise, contributed to the intensity of the storm.²

Typhoon Haiyan is only one example of the increasingly pervasive consequences of climate change. Fifteen of the sixteen hottest years on record have occurred during the twenty-first century, and 2016 had the highest temperatures of any year ever recorded.³ This paper outlines the increasing recognition of the grave human rights harms entailed by climate change, and the role that national courts and commissions have played – and are likely to continue to play – in holding governments and corporations accountable for those harms.

The human rights implications of climate change are immense. It poses a direct threat to the enjoyment of a wide range of human rights, including the rights to life, food, housing, health, clean water and sanitation, and self-determination and development. Already, climate change is contributing to the degradation of natural resources that millions of people rely on for their food security, livelihood and well-being. This includes declining freshwater resources that are suitable for drinking and supporting agriculture; forest dieback; and the degradation of marine ecosystems including fisheries. These changing conditions are also expected to drive other threats, including an increase in the risk of vector-borne diseases,⁴ and profound levels of stress upon critical physical infrastructure such as public transport and power transmission systems.⁵ Further, there are increasing fears that competition over natural resources caused by climate change will lead to mass displacement, social upheaval, and armed conflict.⁶

The rights of indigenous peoples, women and children are particularly vulnerable in this context, as are individuals and communities who lack the resources to adapt to the impacts of climate change.⁷ Of equal concern are responses to climate change which themselves have the potential to undermine the enjoyment of human rights, often through their impact on access to and use of natural resources.⁸ For example, efforts to reduce or sequester greenhouse gas emissions through the development of hydroelectric dams or the growth of biofuels have led to the acquisition of land that displaces indigenous and small-scale farming communities.⁹

It is therefore imperative that governments and private actors adopt a human rights-based approach to mitigating and adapting to climate change. Civil society and human rights experts have been calling for such an approach for years, whether through the channels of international climate diplomacy; national and community-level advocacy; or innovative, strategic litigation.

The central role that human rights must play in the response to climate change was recently affirmed in the Oslo Principles on Global Climate Change Obligations, a set of legal principles authored by eminent international lawyers, scholars and judges. The Principles

state that international human rights law is one of the sources grounding the obligations of governments and enterprises to “respond urgently and effectively to climate change in a manner that respects, protects and fulfils the basic dignity and human rights of the world’s people and the safety and integrity of the biosphere.”¹⁰

2 • Shaping a human rights-based response to climate change

Due in large part to the tireless advocacy of the global human rights community, the Paris Agreement – the most recent agreement that governments have reached under the auspices of the United Nations (UN) Framework Convention on Climate Change – includes an important acknowledgement of the link between climate change and the human rights obligations of governments.

The preambular text states that States Parties “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.”¹¹ The operative part of the Agreement also “acknowledges” that adaptation and capacity-building should be “gender-responsive”¹² and that the former should also be based on “as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems.”¹³

This language, while far from being a comprehensive statement of the nexus between climate change and human rights, is an important step towards ensuring coherence between governments’ human rights obligations and their obligations to address climate change.

But what does a human rights-based response to climate change look like in practice? Building on a series of resolutions issued by the UN Human Rights Council since 2008,¹⁴ as well as on the statements of UN Special Procedures Mandate-Holders and treaty bodies,¹⁵ the Office of the UN High Commissioner for Human Rights has articulated ten separate considerations that should be reflected in all climate action.¹⁶ This includes mitigating climate change to prevent its negative human rights impacts; ensuring that all persons have the necessary capacity to adapt to climate change; ensuring accountability and effective remedy for human rights harms caused by climate change; protecting human rights from business harms; and ensuring meaningful and informed participation. Several other responsibilities outlined pertain to the international obligations of governments, including in relation to the provision of finance and technology transfer.

States therefore have substantive and procedural obligations in this context. While they enjoy some discretion in deciding how to protect human rights against climate-related effects, as stated by the UN Environment Programme, “there may be some minimum measures that would be required as a matter of international, regional or domestic human rights law.”¹⁷

3 • Ensuring accountability for the human rights harms of climate change

Emboldened by the growing recognition of the human rights implications of climate change, individuals and communities are increasingly turning to national courts and institutions to seek redress and ensure that governments and businesses mitigate increasing global temperatures. This new wave of climate litigation¹⁸ builds on existing efforts by environmental lawyers to ensure that, among other things, the climate change impacts of specific projects are considered when governments and corporations undertake environmental impact assessments.¹⁹ Recent cases – spurred on by the rapidly diminishing window for averting dangerous climate change – have focused on more systemic harms, including human rights harms, posed by government and corporate inaction on climate change. In the last two years alone, climate change cases have been filed in countries including the Netherlands, Belgium, Switzerland, Sweden, New Zealand, the USA, Pakistan, India and the Philippines.

A number of factors have facilitated the development of such claims. First, the degree of scientific consensus around the causes and current and projected impacts of climate change is increasingly robust. This includes a new level of certainty regarding attribution of particular trends or extreme weather events to climate change. Second, the adoption by governments of the Paris Agreement, which has already been ratified by 144 States, marks a new level of commitment to collective action on climate change, including an ambitious – but necessary – long-term temperature goal of keeping warming to “well below 2°C” compared to pre-industrial levels. This makes it almost impossible for governments to deny in court that they are not aware of the dangers posed by climate change, or to claim that have already done enough to avert those dangers.

The case of *Urgenda Foundation v the Netherlands*²⁰ has arguably been the most successful of the recent climate change cases drawing on human rights standards and other duties. The case was brought on behalf of the Urgenda Foundation, a Dutch sustainability non-governmental organisation (NGO), and 900 individual plaintiffs against the Dutch government. After hearing arguments that the Dutch government was not doing enough to avert dangerous and foreseeable impacts of climate change, the court ordered the government to significantly reduce its level of greenhouse gas emissions by 2020 – specifically, by 25% compared to 1990 levels. It marked the first time that a court has ordered a government to observe an absolute minimum emissions reduction target. While the court was ultimately persuaded by the argument that the government was acting negligently, human rights – as enshrined in the European Convention on Human Rights – played an important part in the court’s construction of the government’s duty of care to the plaintiffs.²¹

Human rights also underpinned a recent successful claim brought by a Pakistani farmer, Ashgar Leghari, alleging that the Pakistani government was not doing enough to address

the local impacts of climate change.²² Leghari argued that the government's inaction on climate change, which threatens the country's food, water and energy security, amounts to a violation of the constitutionally-protected rights to life and dignity. Citing the fundamental rights of Pakistani citizens, as well as the right to intergenerational equity and the precautionary principle, the Lahore High Court's Green Bench ordered the government to implement the National Climate Change Policy and convened a Climate Change Commission to oversee the government's progress.

Several ongoing lawsuits also rely on human rights standards to substantiate their claims that governments and corporations must do more to prevent and remediate the harms caused by climate change. In the US, 21 young people are suing the federal government on the basis that the government's policies endanger the climate and infringe upon their rights to life, liberty and property in violation of their substantive due process rights.²³ Further, they argue that the government has violated its obligation under the public trust doctrine to guarantee the viability of shared atmospheric and oceanic resources for the benefit of future generations. Among the remedies being sought is an order from the court directing the government to develop a plan to reduce carbon emissions. In an intermediate judgment affirming that the claim should proceed to trial, the court stated that there is "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."²⁴

The Philippines Human Rights Commission is also undertaking a landmark investigation into the accountability of 50 fossil fuel companies, including Chevron, ExxonMobil and Rio Tinto, for the human rights implications of climate change and ocean acidification. These include violations or threats of violations of Filipinos' rights to life, food, water, sanitation, adequate housing and self-determination. The vulnerability of these rights to climate change was clearly demonstrated by the devastating impact of Typhoon Haiyan, mentioned above. The Commission's investigation is a response to a Petition filed by fifteen Filipino and international NGOs. The preface to the Petition states:

In the era of climate change, the Petitioners feel that the real value of the statistics and reports of disaster-related casualties has not been given adequate expression. The real life pain and agony of losing loved ones, homes, farms – almost everything – during strong typhoons, droughts, and other weather extremes, as well as the everyday struggle to live, to be safe, and to be able to cope with the adverse, slow onset impacts of climate change, are beyond numbers and words.²⁵

Aside from the impact of extreme weather events caused by climate change, the Petition draws attention to the consequences of ocean acidification, which is a result of increased levels of atmospheric carbon being absorbed by the ocean. As the Petition states, approximately 25 to 30 per cent of the carbon dioxide emitted by human activities

has been absorbed by the oceans, which has brought about fundamental changes to the ocean's chemistry.²⁶ This has significant negative consequences for the viability of marine ecosystems, which is in turn expected to have serious social and economic consequences for communities that depend on fisheries and coastal ecosystems for their livelihoods.²⁷

The Petition builds on recent research confirming that 90 fossil fuel companies are responsible for 63 per cent of cumulative global emissions of carbon dioxide and methane between 1854 and 2010.²⁸ It cites the UN's Guiding Principles on Business and Human Rights as authority for the duties of the companies, including the duty to undertake human rights due diligence, and also relies on core international human rights instruments for further support. Among the remedies that are requested is a recommendation from the Commission that policy-makers adopt effective accountability mechanisms easily accessed by those affected by climate change.

Human rights norms are also integral to climate change actions being brought against the governments of Belgium, Switzerland, Norway, and Sweden, some of which also draw on the right to a clean or healthy environment that exists in domestic legislation.

These climate change cases face considerable, but not insurmountable challenges. In most cases, these include a lack of legal precedent on the issue, as well as the David versus Goliath dynamic involved in individuals and communities taking on governments and fossil fuel companies – some of the most powerful and well-resourced corporate actors in the world. This has not, however, deterred the growing number of climate litigation efforts, many of which recognise the powerful potential of the human rights framework for ensuring accountability for the harmful consequences of climate change.

4 • Conclusion

If governments fail to rapidly reduce carbon emissions, human rights norms will provide an increasingly important bulwark against the exacerbation of social and economic inequalities caused by climate change. It is true that human rights obligations alone do not offer a ready answer to some of the most vexing aspects of climate change inaction, including persuading governments to accept their “fair share” of global responsibility for reducing greenhouse gas emissions.

However, the international human rights framework – which includes obligations of international assistance, cooperation, and broader duties to address extraterritorial or transboundary harm – exhorts governments to enact a just and equitable response. As stated by the Office of the UN's High Commissioner for Human Rights (OHCHR) in the months preceding the adoption of the Paris Agreement, “Simply put, climate change is a human rights problem and the human rights framework must be part of the solution.”²⁹

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A NEW ENERGY “THIRD WORLD” IN NORTH AMERICA?¹

Michael T. Klare

- *How big energy companies plan to exploit the United States • just as they have done to countries in the Global South*

ABSTRACT

Michael T. Klare examines how big energy companies are increasingly focusing their efforts on untapped energy resources in North America, such as shale oil and gas. This is as a result, he argues, of increased regulations and resistance from countries in the Global South, which have been the focus of Big Oil since the 1970s but which have recently become more effective in protecting their energy reserves against foreign exploitation. The author argues that Big Oil's focus on North America brings with it serious environmental and human rights concerns – due, for example, to the technique of hydro-fracking, which risks contaminating water supplies, and the attempts to open up coastal and wilderness areas to drilling that were previously protected. The recent shift in US administration only increases the likelihood that the demands from big energy will be met. All this, the author argues, risks leaving the US exploited by big energy and by the political elite, in the same way that so many Global South countries have been.

KEYWORDS

Big energy | Fracking | Environmental regulation | Big oil

The "curse" of oil wealth is a well-known phenomenon in the petro-states of the Global South, where millions are forced to live in poverty and tiny elites rake in the energy dollars while corruption rules the land.² Recently, North America has been hailed as the planet's twenty-first-century "new Saudi Arabia" for its mammoth reserves of "unconventional" energy – deep-sea oil, Canadian tar sands, and fracked oil and natural gas.³ But here's a question no one considers: Will the oil curse become as familiar on this continent in the wake of a new American energy rush as it is in Africa, Latin America, and elsewhere in the Global South? Will North America, that is, become not just the next boom continent for energy bonanzas, but a new energy "Third World"?

Once upon a time, the giant oil companies from the United States of America (US) – Chevron, Exxon, Mobil, and Texaco – got their start in North America, launching an oil boom that lasted a century and made the US the planet's dominant energy producer. But most of those companies have long since turned elsewhere for new sources of oil. Eager to escape ever-stronger environmental restrictions and dying oil fields at home, the energy giants were naturally drawn to the economically and environmentally wide-open producing areas of the Middle East, Africa, and Latin America – what was then called the Third World – where oil deposits were plentiful, governments compliant, and environmental regulations few or nonexistent.

Here, then, is the energy surprise of the twenty-first century: with operating conditions growing increasingly difficult in the Global South, the major firms are now flocking back to North America. However, to exploit previously neglected reserves in this region, Big Oil will have to overcome a host of regulatory and environmental obstacles.

Knowledgeable observers are already noting the first telltale signs of the oil industry's "Third-Worldification" of the US. Wilderness areas from which the oil companies were once barred are being opened to energy exploitation and other restraints on invasive drilling operations are being dismantled. Expectations are that, in the wake of the 2016 election season, environmental regulations will be rolled back even further and other protected areas made available for development. In the process, as has so often been the case with the petro-states of the South, the rights and wellbeing of local citizens will be trampled underfoot.

1 • The Oil Majors Look South

Up until 1950, the US was the world's leading oil producer – the Saudi Arabia of its day. In that year, the US produced approximately 270 million metric tons of oil, or about 55 per cent of the world's entire output. But with a postwar recovery then in full swing, the world needed a lot more energy while America's most accessible oil fields – though still capable of growth – were approaching their maximum sustainable production levels. Net US crude oil output reached a peak of about 9.2 million barrels per day in 1970 and then went into decline (until the shale boom of the 2010s).⁴

This prompted the giant oil firms, which had already developed significant footholds in Indonesia, Iran, Saudi Arabia, and Venezuela, to scour the Global South in search of new reserves to exploit – a saga told with great gusto in Daniel Yergin’s epic history of the oil industry, *The Prize*. Particular attention was devoted to the Persian Gulf region, where in 1948 a consortium of American companies – Chevron, Exxon, Mobil, and Texaco – discovered the world’s largest oil field, Ghawar, in Saudi Arabia.⁵ By 1975, producers in the Global South were producing 58 per cent of the world’s oil supply, while the US share had dropped to 18 per cent.

Environmental concerns also drove this search for new reserves in the Global South. On 28 January 1969, a blowout at Platform A of the Union Oil Company’s offshore field in California’s Santa Barbara Channel produced a massive oil leak that covered much of the area and laid waste to local wildlife. Coming at a time of growing environmental consciousness, the spill provoked an outpouring of public outrage and helped to inspire the establishment of Earth Day, which was first observed one year later.⁶ Equally important, it helped spur the passage of various legislative restraints on drilling activities, including the National Environmental Policy Act (NEPA) of 1970, the Clean Water Act of 1972, and the Safe Drinking Water Act of 1974. In accordance with the NEPA, President Richard Nixon established the Environmental Protection Agency (EPA) in 1970. In addition, Congress banned new drilling in waters off the Atlantic and Pacific coasts and in the eastern Gulf of Mexico near Florida.

During these years, Washington also expanded areas designated as wilderness or wildlife preserves, protecting them from resource extraction. In 1960, for example, President Eisenhower established the Arctic National Wildlife Range and, in 1980, this remote area of northeastern Alaska was redesignated by Congress as the Arctic National Wildlife Refuge (ANWR). Ever since the discovery of oil in the adjacent Prudhoe Bay area, energy firms have been clamoring for the right to drill in ANWR, only to be blocked by one or another president or House of Congress.

For the most part, production in the Global South posed no such complications, at least back then. The Nigerian government, for example, has long welcomed foreign investment in its onshore and offshore oil fields, while showing little concern over the despoliation of its southern coastline, where oil company operations have produced a massive environmental disaster. As Adam Nossiter of the New York Times described the resulting situation, “The Niger Delta, where the [petroleum] wealth underground is out of all proportion with the poverty on the surface, has endured the equivalent of the *Exxon Valdez* spill [of March 1989] every year for 50 years by some estimates.”⁷

As vividly portrayed by author Peter Maass in his book *Crude World*, a similar pattern is evident in many other petro-states where anything goes as compliant government officials – often the recipients of hefty bribes or other oil-company favours – regularly look the other way. The companies, in turn, don’t trouble themselves over the human rights abuses perpetrated by their foreign government “partners” – many of them dictators, warlords, or feudal potentates.⁸

But times change. Many countries in the Global South are becoming ever more protective of their environments, ever more inclined to take larger cuts of the oil wealth of their own countries, and ever more inclined to punish foreign companies that abuse their laws. In February 2011, for example, a judge in the Ecuadorean Amazon town of Lago Agrio ordered Chevron to pay \$9 billion in damages for environmental harm caused to the region in the 1970s by Texaco (which the company later acquired).⁹ Although the Ecuadorians are unlikely to collect a single dollar from Chevron, the case is indicative of the tougher regulatory climate now facing these companies in the Global South. More recently, in a case resulting from an oil spill at an offshore field, a judge in Brazil seized the passports of 17 employees of Chevron and US drilling-rig operator Transocean, preventing them from leaving the country while the spill was being investigated.¹⁰

In addition, production is on the decline in some Global South countries like Indonesia and Gabon, while others have nationalised their oil fields or narrowed the space in which private international firms can operate. During Hugo Chávez's presidency, for example, Venezuela forced all foreign firms to award a majority stake in their operations to the state oil company, *Petróleos de Venezuela S.A. (PdVSA)*. Similarly, the Brazilian government, under former President Luiz Inácio Lula da Silva, instituted a rule that all drilling operations in the new "pre-salt" fields in the Atlantic Ocean – widely believed to be among the biggest oil discovery of the twenty-first century – be managed by the state-controlled firm, *Petróleo de Brasil (Petrobras)*.¹¹

2 • Fracking Our Way to a Toxic Planet

Such pressures in the Global South have forced the major US and European firms – BP, Chevron, ConocoPhillips, ExxonMobil, Royal Dutch Shell, and Total of France – to look elsewhere for new sources of oil and natural gas. Unfortunately for them, there aren't many places left in the world that possess promising hydrocarbon reserves while also welcoming investment by private energy giants. That's why some of the most attractive new energy markets now lie in Canada and the US (or in their offshore waters), where governments are proving more receptive to oil and gas extraction. As a result, both are experiencing a remarkable uptick in fresh investment from the major international firms.

Both countries still possess substantial oil and gas deposits, but not of the "easy" variety – deposits close to the surface, close to shore, or easily accessible for extraction. All that remains for large-scale exploitation are "tough" or "unconventional" reserves – those found deep underground, far offshore, or deemed hard to extract and process. Although plentiful, these tough reserves can only be exploited using aggressive technologies that are likely to cause extensive damage to the environment and, in many cases, human health as well. They must also find ways to gain government approval to enter environmentally protected areas now off limits.¹²

The formula for making North America the “Saudi Arabia” of the twenty-first century is grim but relatively simple: environmental protections must be eviscerated and those who stand in the way of intensified drilling – from landowners to local environmental protection groups – must be bulldozed out of the way. Put another way, North America will have to be “Third-Worldified”, in the same way that countries of the Global South were exploited by foreign companies with little or no regard for the local environment or the people living there.

Consider the extraction of shale oil and gas, widely considered the most crucial aspect of Big Oil’s current push back into the North American market. Shale formations in Canada and the US are believed to house massive quantities of oil and natural gas, and their accelerated extraction is already helping reduce the region’s reliance on imported petroleum.

Both energy sources, however, can only be extracted through a process known as hydraulic fracturing (“hydro-fracking,” or just plain “fracking”) that uses powerful jets of water in massive quantities to shatter underground shale formations, creating fissures through which the hydrocarbons can escape. In addition, to ease the escape of the oil and gas from these fissures, the fracking water is mixed with a variety of often poisonous solvents and acids. This technique produces massive quantities of toxic wastewater, which can neither be returned to the environment without endangering drinking water supplies nor easily stored and decontaminated. Failures by the drilling companies to ensure the safe removal and storage of the wastewater has resulted in numerous reports of leakages, in some cases endangering local drinking water supplies.¹³ The pumping of wastewater into underground storage basins can also trigger earthquakes, a danger noted with greater frequency in Ohio and Oklahoma, where the practice is widespread.¹⁴

The rapid expansion of hydro-fracking would be problematic under the best of circumstances, which these aren’t. Many of the richest sources of shale oil and gas, for instance, are located in populated areas of Texas, Arkansas, Ohio, Oklahoma, Pennsylvania, and New York. In fact, one of the most promising sites, the Marcellus shale formation, abuts the watershed area for one of New York City’s largest reservoirs. Under such circumstances, concern over the safety of drinking water should be paramount, and federal legislation, especially the Safe Drinking Water Act of 1974, should theoretically give the EPA the power to oversee (and potentially ban) any procedures that endanger water supplies.

However, oil companies seeking to increase profits by maximising the utilisation of hydro-fracking banded together, put pressure on Congress, and managed to get itself exempted from the 1974 law’s provisions. In 2005, under heavy lobbying from then Vice President Dick Cheney – formerly the CEO of oil services contractor Halliburton – Congress passed the Energy Policy Act, which prohibited the EPA from regulating hydro-fracking via the Safe Drinking Water Act, thereby eliminating a significant impediment to wider use of the technique.¹⁵

3 • Third Worldification

Since then, there has been a virtual stampede to the shale regions by the major oil companies, which have in many cases devoured smaller firms that pioneered the development of hydrofracking. In 2009, for example, ExxonMobil paid \$31 billion to acquire XTO Energy, one of the leading producers of shale gas.¹⁶ The other large firms, including Chevron, have also acquired the drilling rights to vast swaths of shale lands in Texas, Pennsylvania, and elsewhere.

As the extraction of shale oil and gas has accelerated, the industry has faced other problems. To successfully exploit promising shale formations, for instance, energy firms must insert many wells, since each fracking operation can only extend several hundred feet in any direction, requiring the establishment of noisy, polluting, and potentially hazardous drilling operations in well-populated rural and suburban areas. While drilling has been welcomed by some of these communities as a source of added income, many have vigorously opposed the invasion, seeing it as an assault on neighborhood peace, health, and safety.¹⁷ In an effort to protect their quality of life, some communities in Texas and Pennsylvania adopted zoning laws that banned fracking within town limits. Viewing this as yet another intolerable obstacle to their pursuit of profit, the industry has put intense pressure on friendly members of state legislatures to adopt laws depriving most local jurisdictions of the right to exclude fracking operations. "We have been sold out to the gas industry, plain and simple," said Todd Miller, a town commissioner in South Fayette Township, Pennsylvania, who opposed the legislation.¹⁸

If the energy industry has its way in North America, there will be many more Todd Millers complaining about the way their lives and worlds have been "sold out" to the energy barons. Similar battles are already being fought elsewhere in North America, as energy firms seek to overcome resistance to expanded drilling in areas once protected from such activity.

In Alaska, for example, the industry is fighting in the courts and in Congress to allow drilling in coastal areas, despite opposition from Native American communities which worry that vulnerable marine animals and their traditional way of life will be put at risk. In his last months in office, President Barack Obama employed a long-forgotten law, the Outer Continental Shelf Lands Act, to ban most drilling activities in Alaskan waters.¹⁹ However, under his "America First Energy Plan," President Donald Trump has announced plans to open up these waters to oil and gas drilling.²⁰

And this is just the beginning. To gain access to additional stores of oil and gas, the industry is seeking to eliminate virtually all environmental restraints imposed since the 1960s and open vast tracts of coastal and wilderness areas, including ANWR, to intensive drilling. It also seeks the construction of the much disputed Keystone XL pipeline, which is to transport synthetic crude oil made from Canadian tar sands – a particularly "dirty" and environmentally devastating form of energy – to Texas and Louisiana for further processing. President Obama sought to prevent installation of the Keystone pipeline, but President Trump has given it his approval and construction is expected to begin shortly.²¹

Indeed, the energy industry expects unstinting support from President Trump as it moves to eliminate any and all impediments to oil and gas extraction on US territory. “For too long, we’ve been held back by burdensome regulations on our energy industry,” the administration’s “America First Energy Plan” avows.²² “President Trump is committed to eliminating harmful and unnecessary policies such as the Climate Action Plan”²³ – a measure adopted by President Obama to reduce carbon emissions from the burning of fossil fuels. Moreover,

*The Trump Administration will embrace the shale oil and gas revolution to bring jobs and prosperity to millions of Americans. We must take advantage of the estimated \$50 trillion in untapped shale, oil, and natural gas reserves, especially those on federal lands that the American people own.*²⁴

This includes wilderness areas like the Arctic National Wilderness Area, which Trump hopes to open for drilling in the near future.²⁵

During the presidential election campaigns of 2012 and 2016, the oil and gas industry – through its trade association, the American Petroleum Institute (API) – ran advertisements suggesting that the increased domestic production of fossil fuels offered the US its best option for securing economic prosperity and energy independence, whereas greater environmental regulation and an emphasis on green energy would endanger those objectives. “There [are] two paths that we can take” on energy policy, the API campaign site proclaimed. “One path leads to more jobs, higher government revenues, and greater US energy security – which can be achieved by increasing oil and natural gas development right here at home. The other path would put jobs, revenues and our energy security at risk.”²⁶

According to the energy industry, we are at a fork in the road and can either choose a path leading to greater energy independence (via fossil fuels) or to ever more perilous energy insecurity (without them). But there is another way to characterise that “choice”: on one path, the US will increasingly come to resemble an old-fashioned Third World petro-state, exploited by big energy companies, with compliant government leaders, an increasingly money-ridden and corrupt political system, and negligible environmental and health safeguards; on the other, it would prioritise greater investment in the development of renewable alternative energies, and guaranteeing strong health and environmental regulations and robust democratic institutions.

How we characterise our energy predicament in the coming decades and what path we ultimately select will in large measure determine the fate of the US, and every other nation.

NOTES

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BERTA LIVES! COPINH CONTINUES...

Patricia Ardón & Daysi Flores

- *A legacy for life and the Earth* •

ABSTRACT

Berta Cáceres was assassinated one year ago. COPINH both celebrates and mourns at the same time: we cry for the loss of Berta while we celebrate the birth of the organisation she began and left as a legacy to inspire us in this harsh context where persecution and death await those who defend nature and life. Its past marked by war and inequality, Central America is now dealing with large-scale extraction projects that are at the heart of the economic model being imposed in the region. Women activists are on the frontline of resistance. They defend their communities from the destruction that large mining, monoculture and mega-dam projects cause, and at the same time challenge traditional roles and build a new paradigm of life together with their communities. With our allies, JASS promotes and supports the construction of women's collective power and the strengthening of their movements so they may withstand the attacks of megaprojects that tear apart mountains, dry up rivers, consume the water and prevent them from growing their own food.

KEYWORDS

Women human rights defenders | Honduras | Central America | Indigenous peoples | Land activists

One year ago, one of the most extraordinary women from our continent was assassinated. Her death was a heavy blow to the heart and soul, but it also mobilised thousands of women and men all around the world. It outraged and touched the hearts of everyone who feel and believe that the Earth, the rivers and all natural assets shelter and accompany us. We know that human life is in danger of extinction unless we begin to understand that we, humans, are one with nature and that our life is the life of our natural surroundings.

Berta Cáceres: friend, mother, daughter, fighter, winner of the Goldman prize and founder of COPINH (Civic Council of Popular and Indigenous Organisations of Honduras).¹ She founded the organisation 24 years ago together with other Lenca indigenous people (one of the indigenous groups in Honduras) with the goal of ensuring that their voices of emancipation and empowerment, their analysis and their spiritual, artistic and cultural celebrations strengthen our existence. It has left us an exceptional vision. Her slogan “against capitalism, patriarchy and racism” strikes at the heart of the power dynamics and structures that oppress and are imposed on the vast majority of people. It also aims to expose a system that works to prevent us from achieving a life of equality among humans; subordinates women, indigenous peoples and other groups of people; and drives the destruction of life by pillaging and destroying the Earth for the sake of accumulating money.

Since March 2016, COPINH both celebrates and mourns at the same time: we mourn the loss of Berta, while we celebrate the birth of a legacy that is an inspiration to us in a context where the women and men who defend the Earth from pillaging and destruction are assassinated, persecuted and expelled for defending life. Their courage and persistence in the struggle can be seen on their faces, in their stews (*guisos*) and in their songs. That is why we gather – just as we did on 3 March 2016 – on the second day of every month – with others at the Utopia Centre (*Centro de Encuentros y Amistad del COPINH*, or the COPINH Meeting and Friendship Centre) to experience the coexistence of joy and pain, struggle and repression, the cause and solidarity and, above all, the strength and courage that the Lenca people lend to humanity. For them, and for many other women united in the fight for life, resistance has involved the loss of personal and collective aspirations. This is why it is inspiring to hear the voices of people like Betina Cruz, a member of *Alquimia* – JASS’s School of Feminist Alchemy.² Betina travelled with other comrades from Mexico to meet with others from various territories and struggles to say, “You are not alone! We are in a time when the women who are at the forefront of the movements to defend their rights and those of their peoples are assassinated and persecuted. What is more, they are the target of all kinds of rumours spread to discredit and marginalise them. Defending life on the planet today is a life-threatening task. However, in the words of Marlene Reyes,³ ‘After 24 years of existence, COPINH was born and reborn. Berta multiplied and we women are determined to continue to resist.’”

1 • Mesoamerica – A region of blood and fire

In the 1980s, Central America went through gruelling wars that left thousands of people dead or disappeared and deep wounds in the societies in the region. The military

dictatorships and their allies brutally repressed all attempts that were made against injustice and inequality, and subjected any attempt to violence. The repression left no room for democratic space or ways of living in diversity.

In the 1990s, peace processes were held and agreements were negotiated in the countries where war had been declared, namely Guatemala, El Salvador and Nicaragua. Honduras, the laboratory and base of counterinsurgency forces backed by the United States at the time, initiated a democratisation process. Yet, the country continues to maintain the military bases and a culture of militarisation. Similar to Guatemala and El Salvador, Honduras has one of the highest rates of violence in the world.

With the signing of the peace agreements and the sense of hope that emerged with the democratic opening up of Central America, two actors clearly emerged as political subjects with rights and specific aspirations: women and indigenous peoples. Other organisations and movements also addressed – and many continue to do so – the causes of the wars waged in the region in the framework of the *dirty war*,⁴ namely the inequalities that put some Central American countries at the top of the list of the most unequal countries in the world.

Throughout the region, we have watched organised crime and drug trafficking penetrate our societies. This is accompanied by a complex series of dynamics in which groups yielding significant economic and political power engage in unprecedented levels of corruption and plunge the majority of the population even further into poverty. To this, one must add the emergence of gangs that often respond to these interests and establish themselves, in the absence of policies offering glimpses of hope for the youth and their families. The ability of states in the region to protect their peoples' rights is being constantly weakened; instead, the states are being turned into an instrument for furthering the interests of corporations and the elite, both of which are increasingly involved in governing and using public resources for their own ends. In this context, women continue to be the ones who are most impoverished and have the heaviest workloads. They are also the ones to assume a growing number of responsibilities to sustain their households in light of the migration phenomenon, as their male partners leave in search of opportunities elsewhere. Often, due to the violence this situation exposes them to, they are the ones who end up being forced to migrate together with their children.

Furthermore, large-scale extraction projects controlled by transnational corporations, which in many cases involve national capital,⁵ are at the heart of the economic model. These corporations defend their colluded interests by hiring security forces or ex-soldiers that were trained during the dirty war. Taking advantage of the fear instilled in the social imagination and fuelled by the large media groups, they persecute and criminalise opposition to these projects, particularly the indigenous peoples of the region, labelling them as “terrorists” or “opponents to development”.⁶ Established as a tool to oppress and subordinate indigenous people in order to subjugate them to the hegemonic economy and culture, racism is fuelled and used to defend these interests and to justify the persecution of activists who defend the communal assets of nature.

In this context, discrimination against women – a tool for maintaining privileges and justifying the violation of the rights of women, their families and their communities – is reaching unprecedented levels in Mexico and Central America. With the complicity or the indifference of states, women's bodies are used – through sexual violence and femicide – to divide communities, increase fear and generate enormous dividends that bring little or no benefits to the people. In five of the countries in the region, the incidence of femicide is very high: they are among the 25 countries with the highest rates of femicide in the world. This phenomenon is part of a continuum of violence that is naturalised everywhere from the home to the public sphere. The region has high rates of human trafficking for sexual exploitation (one of the three most lucrative illegal activities in the world, according to the ILO). In 2012, “86% of human trafficking cases identified in Central America were women, the majority of which were girls and adolescents.”⁷ Sexual torture is systematically used by security forces. A recent study by Amnesty International in Mexico demonstrated the frequency with which authorities resort to sexual violence to obtain confessions with the goal of raising the percentage of people detained for organised crime.⁸

Currently, the closure of democratic spaces for people's participation and the defence of their rights is threatening the few advances that have been made. This increases inequalities and substitutes dialogue and the search for solutions with the criminalisation of the groups that demand justice, which only aggravates conflict and violence. That is why Miriam Miranda, the *Garifuna*⁹ coordinator of *Organización Fraternal Negra de Honduras* (the Black Fraternal Organisation of Honduras) and inseparable comrade-in-struggle of Berta Cáceres, emphasises that “to strengthen democracy, it is vital that we strengthen social movements and their proposals that challenge the system that is devouring us.”¹⁰

As we strive to build the way that men and women want to live and relate to one another, we face enormous challenges. The systematic destruction and deterioration of the environment by private interests, which are a minority, are given priority over the very survival of the planet. In this fight for survival and life, women continue to play a central role by showing their strength and resisting the system that aims to deprive them of the immediate means for sustaining life.

2 • Women human rights defenders/activists

For decades, women have been the voice that reclaims the rights of not only women, but all of society. In recent years, all over the world and especially in Latin America,¹¹ women have been on the frontline defending their communities from the destruction caused by large-scale mining projects, monocultures and hydroelectric dams that destroy the natural surroundings, make water increasingly scarce and disrespect the organisational forms, culture and life of their communities. More and more women call themselves women human rights defenders, as they defend not only their own rights, but also those of their communities, organisations and movements. In the words of Alda Facio,¹² calling ourselves women human rights defenders:

turns us into one enormous movement. In other words, it is possible that feminists, the women who defend the territories, the women who fight against impunity and corruption, against male violence and for education for all, the indigenous women who defend their culture while questioning the patriarchal elements in it and so many other women in various social movements are a minority. But if we unite all of the women who are part of different movements together under the name of 'women human rights defenders', there are many more of us. By doing so, the movements and their members complement and strengthen one another without losing their specificity.

Many of women's struggles against oppression, though fraught with indignation, have also been marked by efforts to build a just peace and harmonious relations that transform inequality and put love and affection at the centre, thereby contributing to the construction of a world without violence. This is why in the current context, women human rights defenders and their organisations are seen as a threat: not only because they question and put at risk the gender-based structure of discrimination and all the privileges and power it generates, but also because they bring to light, in a way that is simple and related to daily life, just how harmful it is to continue sustaining a system that preys on life of the planet. The *IM-Defensoras'* report on violence noted that, between 2012 and 2014, the number of assaults recorded in El Salvador, Guatemala, Honduras and Mexico nearly doubled (45.7 per cent).¹³ In these cases, it was noted that for the defenders, the violence was a product of both repressive policies and also of the patriarchal structure.¹⁴

"We, as women, must decide to resist when a corporation comes into our community and have the strength to do whatever is necessary to defend our rivers and our rights. It doesn't matter how many times they change their name, we will always be strong." Paulina Gómez,¹⁵ Rio Blanco.

The fear of women leaving their traditional roles to defend their communities occurs within the framework of a historical process and a model that portrays women as beings with little or no value to society and denies them their rights and freedoms in the different areas of their life – from their homes to the political arena. Historically, women have organised themselves in all areas of life. Isolating women in the home and away from the public sphere is one way of limiting awareness of their condition and their contributions to the economy and to caring for society and the surroundings. *"Let us remember this seed of rebelliousness that must continue to germinate in all women. Let us make Berta's dream in relation to healing and justice a reality not only for the peoples, but for the women."* (Lilian López)¹⁶

Women human rights defenders defend the right to build a just and equal world. The activists and defenders of land and territory are largely, but not exclusively, indigenous and rural women - women who, often at the cost of their own lives, defend the communal

assets of nature for their sons, daughters and communities and fight to keep alive their visions of the world in which humans coexist with the rivers, mountains, forests and oceans in ways that guarantee our common survival.

Women human rights defenders and activists organise based on the daily life of their communities and the webs they weave among themselves. They organise with women from other communities and territories to share experiences, support each other and build safe spaces in which women feel free to speak and heal their traumas, share strategies for family life and organisations and to give each other strength. These spaces are as diverse as the women are. Whether through women's assemblies, networks that fight to end violence or the search for spaces of reflection, it is the power of building collectively that pushes them to continue challenging a context that constantly questions their place in the world and in the struggle.

Many of these women participate in mixed organisations in their community and are part of a variety of communities and networks¹⁷ that form movements and go beyond borders. Indigenous women, especially in the fight for land and territory, act in solidarity among themselves and with other women and peoples from other regions. For example, with the people of Dakota in the United States and other regions of the world.¹⁸ They speak out in support of the common aspirations that unite them. Together with our allies, JASS – Just Associates promotes and supports the construction of collective power among women and the strengthening of their communities and organisations. We do so by reflecting on the power and practices of a holistic and community-based approach to protection, investigating the situations that are specific to women, organising feminist popular education and living schools, consolidating networks and engaging in efforts to make women's voices heard in struggles or online dialogues. We promote and give visibility to the contributions that women make to both the struggles and life itself.

Women activists and defenders of land and territory find among themselves, and in those who support them, the strength they need to face the attacks of the capitalist and racist system. They face, on a daily basis, the threats of a system that exposes them to greater difficulties in mobilising than their male counterparts, as women are the object of sexual discrimination and abuse.¹⁹ They are also subject to defamation for coming out of the traditional roles that limit them to the home and for raising their voices in contexts where their activism is attacked by conservative and fundamentalist voices that see women exercising their rights as a threat to traditional power.

3 • Where we are headed

Day after day, indigenous and rural women protect their communities from environmental destruction. Not only do they seek to withstand the onslaught of megaprojects that tear up the mountains, dry up rivers, consume the water and stop them from growing their own food, but they also propose – together with their communities and their peoples – a

paradigm for a new way of life. The Buen Vivir or the “Living Well” paradigm:²⁰ this dream of an alternative way of life lays the foundation for reflecting on how we can live in harmony with nature and have harmonious relationships that are free from violence while building collective power and leadership that bring us tenderness, wisdom and community life. Feminism has also made fundamental contributions to ensuring that these paradigms take into account all dimensions of life and historical specificities when rebuilding the fabric that enables us to confront the violence we face daily.

The words COPINH general coordinator Tomás Gómez shared during the organisation’s anniversary celebration still echo in our hearts: *“When we demand respect for nature, we do so not only for ourselves as a people, but also for life – even for the life of the sons and daughters of all those who want to end life. This is why our struggle is not only just; it is inclusive.”* These words fill our hearts with love, affection, music, healing and energy and reinvigorate us so we can continue building feminist alchemy with others who are also building life.

NOTES

1 • COPINH (<https://www.copinh.org/>) has been active for 24 years. It is one of the most important organisations in Honduras. It works with 200 communities in the territory of the Lenca people, one of the national ethnic groups. Its work to defend the rights of indigenous peoples is known for its struggles and organisation.

2 • The School of Feminist Alchemy (<https://justassociates.org/es/mesoamerica-escuela-alquimia-feminista>) is JASS Mesoamerica’s initiative on learning and education. It emerged from a network of relationships of solidarity and political and working ties among women activists, educators and scholars from various regions of the world who have a broad experience in popular education, feminist training, advocacy, social movements and struggles to end inequality. It was born out of JASS’s accumulated experience and intention to promote feminist popular education processes to respond to the need to support and develop collective learning and knowledge-building processes in order to strengthen the capacities and political

actions of the women and their movements.

3 • Marlene Reyes is a COPINH member from the La Esperanza community. The quote was taken from an interview given to JASS’s *Tercas con la Esperanza* (Determined to Hope) radio programme during COPINH’s anniversary celebration.

4 • After the victory of the *Frente Sandinista de Liberación Nacional* (Sandinista National Liberation Front or the FSLN) on 19 July 1979. With its interests at stake, the United States could not afford to allow other revolutionary groups to triumph in the area and did everything in its power to stop this from happening: from funding counter-revolutionary armies to making agreements with the armed forces of other countries on the training of death squads on the Isthmus. “Operation Charly”, or the “dirty war”, was the response to prevent this from happening. It consisted of implementing state terrorism by adopting the illegal methods of repression used by the Argentine army during the dictatorship.

5 • Two cases worth highlighting are: the case of peaceful resistance to La Puya mine in Guatemala,

exploited by Exploraciones Mineras de Guatemala, S.A. (EXMINGUA), which is currently a subsidiary of the Canadian mining corporation Radius Gold Inc.; and the Agua Zarca hydroelectric dam in Rio Blanco, Honduras, which is managed by the Honduran corporation Desarrollos Energéticos S.A de C.V (DESA). Initially, the project was executed by the Chinese company Sinohydro and is now receiving financing from El FINFUND, BCIE and FMO.

6 • This kind of declaration can be found in the national news media: "Video de Elsie Paz en Frente a Frente 11 Octubre 2016," video on Youtube, 14:25, published by Ultima Hora Hn, October 11, 2016, <https://www.youtube.com/watch?v=p52e45o2KxU>; "Opinión de Elsie Paz: A Oxfam se le Acabó la Fiesta en Honduras y las Razones son Espantosas," Tiempo Digital, April 5, 2017, accessed May 21, 2017, <http://tiempo.hn/elsia-paz-oxfam-se-le-acabo-la-fiesta/>, as well as accusations such as the one Suyapa Martínez is facing: "Denuncia contra Suyapa Martínez es persecución y criminalización denuncian las mujeres defensoras de derechos humanos," Criterio, March 7, 2017, accessed May 21, 2017, <http://criterio.hn/2017/03/07/denuncia-suyapa-martinez-persecucion-criminalizacion-denuncian-las-mujeres-defensoras-derechos-humanos/>.

7 • "Violenciay Trata de Personas en Centroamérica," Save the Children, 2012, accessed May 21, 2017, <https://www.savethechildren.es/publicaciones/si-lloras-te-matamos>.

8 • "Sobrevivir a la Muerte. Tortura de Mujeres por Policías y Fuerzas Armadas en México," Amnesty International, 2016, accessed May 21, 2017, <https://www.amnesty.org/es/documents/amr41/4237/2016/es/>.

9 • The Garifuna people are one of the largest ethnic groups living on the coast of Honduras. The population is estimated at approximately 300,000 inhabitants. They are distributed among 47 communities located along the northern coast of Honduras in the departments of Cortés, Atlántida, Colón, Gracias a Dios and Islas de la Bahía. There are also Garifuna people living in Guatemala,

Nicaragua and Belize.

10 • Interview with JASS's *Tercas con la Esperanza* (Determined to Hope) radio programme in the lead up to the regional summit of indigenous peoples on extractivism.

11 • To mention only a few: Honduras: Berta Cáceres: Lenca indigenous leader, COPINH; Miriam Miranda: Garifuna leader, OFRANEH; Magdalena Morales: peasant leader, CNTC. Guatemala: Las mujeres de la resistencia pacífica La Puya; Las mujeres de Sepur Zarco. Panama: mujeres indígenas Ngöbe Bougle.

12 • Chair of the UN Working Group on the issue of discrimination against women in law and in practice and JASS advisor.

13 • "Violence against Women Human Rights Defenders in Mesoamerica 2012-2014 Report," Mesoamerican Initiative of Women Human Rights Defenders (IM-Defensoras), 2016, accessed May 21, 2017, <http://im-defensoras.org/wp-content/uploads/2016/04/286224690-Violence-Against-WHRDs-in-Mesoamerica-2012-2014-Report.pdf>.

14 • Marusia López Cruz, JASS-Just Associates.

15 • Paulina Gómez, member of COPINH and of the Río Blanco community – the community resisting the attempts to build a dam on the Gualcarque River and the struggle for which Berta Cáceres was awarded the Goldman prize and assassinated.

16 • Member of the COPINH coordination team and participant in the *Escuela de Alquimia Feminista* (School of Feminist Alchemy).

17 • Networks of women human rights defenders, healers, indigenous and rural women; Mesoamerican or continental alliances; indigenous, peasant, teachers, feminist, workers, artists and ecologist movements.

18 • Such as in global talks where the experiences and actions against extractive industries are being shared. Exchanges such as the one promoted in Mexico, the events of the AWID Forum, the exchanges with regions in Southeast Asia, such as Cambodia, and South Africa and those with other allies such as WOMIN, are particularly important for advancing and promoting the struggles that we

women are involved in.
 19 • IM-Defensoras, 2016.
 20 • “Paradigma del buen vivir. L. Chávez. [ponencia completa] – Curso Calcuta Ondoan – UPV 2014,”

video on Youtube, 1:37:28 (minute 11:33), published by Calcuta Ondoan ONGD, accessed November 28, 2014. <https://www.youtube.com/watch?v=1BjplCB4Mg8>.



PATRICIA ARDÓN – *Guatemala*

Patricia Ardón is a Guatemalan feminist who studied social anthropology. Founder of JASS, she is currently the co-director of JASS Mesoamerica and participates in JASS's global coordinating team. A peoples' rights activist since a very early age, Patricia participates in many social movements. Over the past 15 years, she has focussed more specifically on women's rights. She has worked on organisational and political education processes from the community to the international level, mainly in Guatemala and Central America.

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THE REAL HEROES OF THE ENVIRONMENTAL MOVEMENT

Alex Soros

- *Human rights awards are an important tool* •
- *that shine a global spotlight on local struggles*

ABSTRACT

In this op-ed, Alex Soros explains the importance of human rights awards in drawing attention to the struggle of indigenous activists whose work so often goes unnoticed. He notes that aside from the simple recognition – itself an important element – the awards often create international attention, which the activist can then leverage to apply more pressure on the government and private sector. As an example, the author looks at the work of Papua New Guinea activist Paul Pavol Palosualrea and shows how receiving the Alexander Soros Foundation Award rapidly changed the course of his struggle. Soros concludes that having the resources to assist environmental defenders is accompanied by a duty to act; failing to do so is akin to being complicit in the injustices that they and their communities face.

KEYWORDS

Philanthropy | Indigenous rights | Activists | Environmental rights

When you hear the term “environmentalist”, who comes to mind? Hollywood celebrities. Philanthropists (like me). International non-governmental organisations (NGOs). In short, a small collective of interested parties that want to save the planet for generations to come. They attend conferences, fundraisers and press conferences. While they may be dedicated and at one time or another visit the communities they seek to help, they live far from the front lines of the fight to protect the environment.

These groups and individuals are not the heroes of the environmental movement. The real heroes of the environment are the indigenous peoples that have peacefully lived off their land for hundreds, even thousands of years, and who are under threat from organised criminals, multinational corporations, and other entities seeking to turn a profit off their land. Companies want to mine valuable resources from the ground, cartels want to use the land to grow, transport and harvest drugs, and rogue loggers want to cut the trees down and sell them for money, all at the expense of livelihoods of indigenous peoples living in harmony with mother earth.

Paul Pavol Palosualrea is one of these people. Paul was born and raised in the village of Mu in the District of Pomio on the island of East New Britain in Papua New Guinea. One day a little over six years ago, a subsidiary of the Malaysian logging giant Rimbunan Hijau appeared on Paul's land and began clearing virgin forest that, under the Papua New Guinea constitution, rightfully belonged to Paul and his clan. Many other indigenous communities in the area found themselves in the same situation. After fighting the company in the courts, protesting the logging operations, and advocating to local magistrates, all with the help of civil society organisations, Paul found that nothing was working. Vast areas of rainforest were being replaced with palm oil plantations. Armed with government contracts called Special Agriculture and Business Leases (SABLs, for short), manipulative legal strategies, massive balance sheets, and support from police on its payroll, the loggers kept logging. There was nothing Paul could do.

When I learned about Paul's story, I decided to give him the 2016 Alexander Soros Foundation Award for Environmental and Human Rights Activism. I started giving this award when the plight of environmental defenders first became known to me in 2012. Since then, I have given this award to activists in Liberia, Cambodia, Peru and the Democratic Republic of Congo, in addition to Papua New Guinea. My foundation continues to support environmental defenders in all of these countries.

Paul flew from Papua New Guinea to New York to accept the award at a ceremony in his honor. From New York, he travelled to Washington DC for meetings with members of both houses of congress, the State Department, USAID, and the Department of Justice. Paul told his story during each of these meetings, and various employees of the US government listened and tried to come up with ways to help.

After word about Paul's award spread late last year (media coverage regarding the award was widely disseminated across Papua New Guinea and Australia), the communities of East New

Britain island felt empowered to stand up for their rights and prevent encroachment of logging operations onto their customary land. Logging blockades appeared in various villages, which have effectively impeded logging efforts. Social media exposure of illegal logging operations and police intimidation compelled a local magistrate to speak out in parliament. This attention helped prompt the Papua New Guinea Prime Minister Peter O'Neill to publicly declare all SABLs illegal. Communities are pursuing renewed legal challenges as additional outside support becomes available to them. In short, while the struggle is far from over for this community, the tide may be turning. Paul and his fellow defenders are finally winning some battles against one of the largest logging conglomerates in the world.

Paul is one of only a handful of environmental defenders who have managed to win even one victory in the name of protecting their land. Most environmental defenders' campaigns fall on deaf ears. More than three environmental defenders were killed a week in 2015, making it deadliest year in history for environmental defenders. In Honduras, more than 120 people have died defending the environment since 2010, according to Global Witness research, making it the deadliest country for environmental defenders in the world. One of these individuals was Berta Cáceres, a Goldman Prize-winning environmental activist who was killed for protesting against the construction of a dam that would endanger the livelihood of the indigenous community. Her murder was addressed on the floor of the US House of Representatives, and in a statement by then-Secretary of State John Kerry.

If we want the environmental movement to continue to gain momentum, we are going to have to give it a face. Celebrities, politicians, philanthropists, and other large actors are not the environmental movement's heroes. The movement's heroes are those fighting on the front lines to protect their homes from industries and organisations motivated by greed. If those lucky enough with the resources do not help to recognise these true environmental defenders for their bravery, courage and sacrifice, we will not only willfully allow them to die in obscurity, but we will fail to draw the world's attention to the environmental movement. As Donald Trump continues to roll back international treaties and environmental protections, and as other world leaders follow suit, the immediate recognition of environmental defenders is more important than ever.



ALEX SOROS – USA

A promoter of open society values, Alex Soros graduated from New York University in 2009 with a BA in history and is currently pursuing a doctorate in modern European history at the University of California, Berkeley. He sits on various boards both in the United States of America (US) and internationally including Bend the Arc, Global Witness, the Gordon Parks Foundation and Open Society Foundations. He is the founder of The Alexander Soros Foundation, an organisation promoting civil rights, social justice and education by making grants to cutting-edge organisations in the US and abroad.

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PROFILES



“I DO NOT SEPARATE THE STRUGGLE FROM MY SPIRITUALITY”

Beata Tsosie Peña

**“FIGHTING FOR HUMAN RIGHTS
IN MY COUNTRY MEANS YOU KNOW YOU ARE
GOING TO DIE, THAT THEY MIGHT KILL YOU”**

Jennifer Domínguez

**“I FIGHT AGAINST RELIGIOUS RACISM
AND AGAINST ENVIRONMENTAL RACISM”**

Jôice Cleide Santiago dos Santos

“I DO NOT SEPARATE THE STRUGGLE FROM MY SPIRITUALITY”

Beata Tsosie Peña

• *By Maryuri Mora Grisales* •

Beata Tsosie Peña is an indigenous woman of mixed ancestry from Santa Clara Pueblo and El Rito, New Mexico. The calm with which she speaks contrasts with the harsh reality she faces in her community. As she herself says, since the 1940s, the United States government has occupied an important part of the Tewa people's sacred land, located near the Rio Grande river in Nuevo México, to conduct nuclear, biological, chemical and weapons research, and produce plutonium pits to maintain the nuclear weapons stockpile.

Los Álamos National Laboratory is a federal laboratory that belongs to the US Department of Energy (DOE) and is managed by the University of California. One of the largest multidisciplinary scientific institutions in the country, it produces parts for nuclear weapons. “We hear the explosions because they do open air tests and disposals of high explosives, which contaminate the air, soil and the water we use for agriculture”, she states. The nuclear activity in Los Álamos directly affects the communities living there, as they live on agriculture and depend on clean water, air and land for their survival. As she states, “we have lived here for thousands of years. Our role is to be the protectors of this place - of the land, the water, the animals and all of nature”. It is a sacred place.

The rituals and ceremonies of these communities also depend on the water. In the understanding of the indigenous peoples, contamination and the degradation of land for the sake of the arms race affects life as a whole. This is what Beata calls “environmental racism”: when the negative impacts of large-scale economic or war (in this specific case) activities affect the environment of particularly vulnerable groups living in certain geographical locations, such as the communities of poor and coloured people in the United States.

For Beata, these communities are experiencing new processes of colonisation. “We were colonised and we continue to be colonised over and over”. It is a form of attempted genocide of the indigenous people and the destruction of the history they share with other communities.

Faced with this reality, Beata joined *TEWA Women United (TWU)* – or “*wi don gi mu*” in Tewa – which means, “We are one in mind, heart, and spirit”. TWU is an inter-tribal collective that offers a safe space for the empowerment of indigenous women who are seeking justice for their communities and families.

Beata began working with a focus group on Los Álamos and is now the coordinator of one of the four programmes of TWU: the environmental health and justice programme. The objective of this programme is to increase local awareness on environmental issues; support the creation of networks of people affected by industrial pollution and, primarily, promotes commitment and community participation. The environmental justice programme builds strong local and international activism, which seeks to stop nuclear proliferation and defend, as they put it, “human rights and the rights of Mother Earth”.¹

“Our indigenous vision is to put an end to all kinds of violence against native women, girls and Mother Earth”, Beata affirms as she explains the relationship between environmental justice and reproductive justice. The relationship between care for the Earth and care and respect for women’s bodies is central for TWU. Therefore, one of their concerns is to educate community while seeking to strengthen their voice and leadership in the community, and to raise their awareness and empower them on food and seed sovereignty and sexual and reproductive health. This is part of the educational work that Beata carries out directly in her community.



Beata draws from the philosophy of “*women are the first environment*” – a famous quote by Katsi Cook (a Mohawk midwife and elder) that highlights the vital connection between the Earth and women’s potential as generators of life. Fighting for environmental justice with TWU consists mainly of educating youth and recognising the ancestral wisdom of women elders on the defence of native sovereignty, caring for ecosystems, intergenerational wisdom and a Tewa way of knowing and being.

TWU also joins forces with other groups in the region that are resisting the negative impacts of the activities of Los Álamos National Laboratory (LANL). Beata specifically mentions two of them: the first is *Las Mujeres Hablan (The Women Speak)*, which is a women led network in northern

New Mexico, a group of local activists and NGO's who are defending their land against the nuclear arms industry while working towards cultural preservation. And the other group is Communities for Clean Water (CCW): a coalition that works to guarantee that the water affected by toxic waste is safe for consumption, agriculture and the sacred ceremonies of the tribal communities near the Río Grande river basin. CCW is the only local coalition that is monitoring toxic waste and pushing for changes to public policy.

These joint efforts strengthen resistance to the constant threats the people located in "sacrifice zones" face in the United States. Sacrifice zones are places where highly polluting industries and the deposits of toxic waste are concentrated, which causes serious human and environmental impacts. It is no coincidence that these zones are inhabited by vulnerable communities marked by social and racial inequality.

The final goal of these coalitions is to raise the voice of these communities and promote collective action to stop the contamination of their sacred land. But as Beata states, this struggle is very difficult because the state really does not listen and because the work to defend clean water and environment comes up directly against strict national security policies and the economic interests of large corporations.

However, Beata's commitment is to life as a whole, as conceived in her tradition. This is why, when questioned on the role of religion in environmental justice work, she responded, "In my work, I do not separate the struggle from my spirituality" and because "spiritual and mental impacts caused by the abuses of the companies that produce arms exist". The contamination of the communities' water and sacred land is a direct attack on their possibility to survive, including their spirituality - that is, everything they believe in.

"We are truly holistic in our spirituality", she affirms. Separation does not exist. Violence against Earth is violence against people's bodies. "We can only do this work with the strength of our spirit-rooted loving energy, with my connection to Earth and to the mothers of the corn". This is why working with plants, health and the wisdom of women elders are so important, as they are a way of using energy to do good. Putting an end to the violent use of the internal energy of Mother Earth is one way of challenging the culture of violence, resisting the glorification of war, inherited from colonialism, and looking for ways to create a culture of peace, reconciliation and healing for Mother Earth.

NOTES

1 • See <http://tewawomenunited.org/programs/environmental-justice-program/>.



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“FIGHTING FOR HUMAN RIGHTS IN MY COUNTRY MEANS YOU KNOW YOU ARE GOING TO DIE, THAT THEY MIGHT KILL YOU”

Jennifer Domínguez

• *By Maryuri Mora Grisales* •

Jennifer is a young, 30-year old Mormon woman who has worked for the *Centro de Acción Legal Ambiental y Social en Guatemala* (Guatemalan Centre for Legal, Environmental and Social Action or CALAS according to its Spanish acronym) for 10 years. CALAS is a non-governmental organisation (NGO) that defends environmental human rights. It supports environmental human rights defenders that are criminalised by the state or forces linked to corporations from extractivist industries.

She is an educator specialised in human rights and is currently studying law and legal and social sciences. When she started to volunteer at the organisation in 2009, however, she did not have much experience or knowledge on the issue. Back then, she was invited to participate in the research for a report that only CALAS produces: the national report on the violation of the human rights of environmentalists in Guatemala. That is where she came into direct contact with human rights and began her work as an activist.

After two years of work and training as a general assistant, Jennifer became the coordinator of CALAS' department of political and citizen participation, the position she holds today. Her direct contact with the communities makes her more aware of the importance of fighting for human rights, especially in a country that went through 36 years of internal armed conflict and where over half of the population lives in poverty or extreme poverty. Guatemalan women are particularly affected by this situation, since, as Jennifer affirms, the discrimination against them is tripled: “because they are women, because they are poor and because they are indigenous”.

When Jennifer speaks about violence in Central America, her voice is strong and confident. One of her most shocking statements is: “Fighting for human rights in my country means you know you are going to die, that they might kill you”. Unfortunately, this is no exaggeration. Together with Honduras, Guatemala is one of the countries in the region with the highest number of assassinations of human rights defenders in recent years. According to the CIDH’s 2015 report on human rights in Guatemala, between 2000 and 2014, 174 human rights defenders were assassinated.

Defending life involves assuming risks. And it is about and based on this reality that she speaks. The details of the violence that Jennifer’s colleagues and friends have suffered due to their environmental work are horrifying. On 4 September 2008, for example, CALAS director Yuri Melini suffered an attempt on his life in which he was shot 16 times. And like him, many other people have been the target of violent attacks or were – and continue to be – threatened with death.

Since the year 2000, there has been an increase in conflicts related to mining, hydroelectric dam and monocropping projects that have negative impacts on ancestral territories and the resources found in them. CALAS carries out the important task of monitoring private and state sectors in Guatemala and defending concrete cases of human and environmental rights violations and has even succeeded in halting some mining operations. This explains why they are under constant threat. With a small team of five, the organisation is currently pursuing more than one hundred lawsuits.

CALAS works in a context where human rights defenders are highly criminalised. In September 2016, Yuri Melini’s 21-year old assistant Jeremi Barrios was killed by two gunshots to the head. His death was a heavy blow to the human rights movement in the country, the organisation and especially his friends and family. “Our organisation is very vulnerable. We know that something can happen to us at any moment. When they killed Jeremi, I realised that the work of young people is never recognised. As human rights defenders and organisations, we have to learn to value youths. We must not wait for people to die to recognise their work”.

Defending the environment in Central American countries involves fighting not only against foreign mining corporations, but also the state. In general, the state does not respect the community’s will, nor does it assume the role of defending the national common good by carefully monitoring, for example, the concession of mining permits and guaranteeing that its citizens’ rights are protected.

Many of the cases that end in serious conflicts, violence and the imprisonment of rights defenders are related to the *modus operandi* of foreign extractivist corporations that flout national legal barriers by simulating popular consultations or, even worse, unscrupulously deceiving the communities from whom they need to acquire land or who will be directly affected by their operations.



In 1995 Guatemala confirmed the constitutionality of the consultation of indigenous peoples. In article 6 of the Agreement on Identity and Rights of Indigenous Peoples, the state defends the need to “secure the approval of the indigenous communities prior to the implementation of any project for the exploitation of natural resources which might affect the subsistence and way of life of the communities [...]”. However, there are no real legal guarantees to ensure compliance. Moreover, communities exposed to devastating damage do not always recognise themselves as indigenous, which becomes an impediment to accessing the legal defence of their territory and requires them to seek other mechanisms of action.

This is where popular resistance takes on great importance and religion has assumed, in some way, a leading role in strengthening social movements that resist the destruction and appropriation of territories. According to Jennifer, the Catholic Church in Guatemala is increasingly open to the issue of human rights and the environment. This can be seen in the creation, by the Diocese of Santa Rosa de Lima (Municipality of Santa Rosa, Guatemala), of the *Comisión Diocesana en Defensa de la Naturaleza* (CODIDENA, or Diocesan Committee in Defence of Nature), which is coordinated by people from the community. “There are also evangelists who support our work. It is nice to see how the Mayan cosmovision and Western religion have come together in the case of Jalapa and Santa Rosa (in the southeast of Guatemala)” around the mining conflicts in the area.

In addition to becoming a reference on environmental and extractivist issues, CALAS is one of the few organisations that takes mining cases to the Supreme Court of Justice and the Constitutional Court. “No other organisation dares to pursue cases as openly as CALAS does, and this caused us to lose funding...in 2012, we were left practically without salaries. No one wanted to support us”. This critical situation almost led them to close after 18 years of intense work. Jennifer explains that this was also due to the international smear campaign that the government of the ex-president Álvaro Colom (2008-2012) helped promote outside the country. The Embassy of the Netherlands and the European Union were some of the important donors that withdrew their support.

But then, something that Jennifer interprets as a miracle or a divine blessing happened: the European Union started to support them again by funding a small project that “brought them back to life”. After that, several European churches began to offer financial support, including the Lutheran Church, the Catholic Church of Ireland, the Netherlands and Switzerland. “Little by little, help arrived from places we least expected”.

Jennifer is a Mormon, but a different kind of Mormon. “We, Mormons, distance ourselves from the media. We’re conservative. At church, no one talks about climate, human rights, politics, these things that are important. They only talk about love. Religion is important, but Jesus did not stay holed up between four walls. Religion is something that should push us to do things better, do things well done and fight for what we believe is just”.

This is what Jennifer does every day: fight for what she believes in during the numerous hours she dedicates to community work and defending human and environmental rights with vulnerable groups. She divides up her time – including Saturdays and Sundays – between caring for her one-year-old son, her university studies and her activism as a human rights defender. “Fighting is important. We must fight and not lose faith because of the good things we have”.



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“I FIGHT AGAINST RELIGIOUS RACISM AND AGAINST ENVIRONMENTAL RACISM”

Jôice Cleide Santiago dos Santos

• By Maryuri Mora Grisales •

Jôice Cleide Santiago was the only black woman and follower of Candomblé at the Fé no Clima (Faith in the Climate) conference that took place in Rio de Janeiro. She belonged to a religious minority at a gathering that was supposed to be inter-religious, but the majority of its participants ended up being Christian.

She is from Salvador, but currently lives in Lauro de Freitas, Bahia. Graduated in social services, she is also a harm reduction technician. She identifies herself as a follower of the Keto Nation (*Nação Keto*), daughter of Ilê Asé Opô Alafunbí, line of Candomblé: “I am *Iaô de Oyá* – in my religion, a child, a very young person. But with every day that I discover and live, this religion empowers me as a woman and makes me hope for a better future. I am the mother of Julyana *Omi* (Juliana of the waters), also a follower of Candomblé and the partner of an incredible guy, son of Xango. A family linked to spirituality”.

She currently works as an artisan with jewellery linked to the religion of African origin. “My current work is a way of fighting against stereotypes and strengthening the beauty and the magic of the African matrix, my people”. But it is through her experience with religion and her work that she has developed with Quilombola women that she analyses the relationship between environmental racism, religion and the situation of black women.

Last year (2016), Jôice worked directly with women from three Quilombola communities and with another 15 indirectly in the project Trade with Identity developed in Bahia by *Koinonia*

Presença Ecumênica e Serviço (*Koinonia* Ecumenical Presence and Service), a non-profit organisation run by people from different religious traditions and that works at the national and international level. *Koinonia's* main objective is to mobilise solidarity and offer services to historically and culturally vulnerable groups that are going through processes of social and political emancipation.



"If you think things in the city are bad, when you arrive in these [Quilombola] communities, it becomes clearer that that is where patriarchy and racism are", she states. Joice worked with Quilombola women in Camamu (a Brazilian municipality located in the Costa do Dendê, or Palm Oil Coast, on the southern coast of the state of Bahia). Her work consisted of providing training on the issues of racial identities, gender, solidarity and the feminist economy, public

policies and the INCRA (the *Instituto Nacional de Colonização e Reforma Agrária*, or National Institute for Colonisation and Agrarian Reform, which is responsible for managing public land and demarcating the territories of Quilombola communities and providing them land titles).

The word "quilombo" is of Bantu origin and means "warrior camp". The quilombos were made up of mainly black people who survived as slaves on ranches and who fled to these territories to live collectively. They are historical places of resistance and currently include the black and rural population defined by its relation to its ancestry, the land and its own religious and cultural practices.

Privatisation, deforestation and the precariousness of the territories occupied by the Quilombola communities threaten their means of subsistence and force entire communities to migrate and into misery and oblivion. She argues that her struggle is against not only religious intolerance, but also environmental racism – that is, against environmental and social injustice that always hits the most vulnerable the hardest.

Koinonia's work in the quilombos in the south of Bahia aims to strengthen rural black and traditional communities politically through training, exchanges of knowledge and political advocacy. For Joice, the importance of this work lies in "the revival of the culture and ancestry because Christianity is beginning to enter the quilombos in an extremely aggressive manner". Certain things – such as plantain and pumpkin, for example – are being prohibited by some ministers, as they believe they are associated directly with the rituals of African origin. In response to this, she angrily exclaims that "the problem is that our religion is a religion of black people. It is not just intolerance. It's racism!"

For Jôice, environmental racism works like this: “we, followers of Candomblé, need sacred spaces in order to give our offerings or our gifts to our deities. But in certain places, this is no longer possible because forests were cut down to develop the city with subways and roads. There are less and less green spaces in Salvador. This reduced our space, leaves us in places with no contact to nature. Our offerings in the street get broken or kicked. If you are a follower of Candomblé and go outside your area, you automatically suffer from racist attacks, from assault. It is as if you are only allowed to survive within your own territory. Outside this space, I am not well thought of if I am a follower of Candomblé. There are limits on our place, territory and religious practices”.

The *Koinonia* project with the women from the quilombos aims to strengthen the women’s financial capacity by helping them do business. In Camamu, for example, a lot of cocoa and *cupuaçu* is produced, but the work is done by men - assisted by their partners - yet many women never have access to money.

“When women plant things in their yard, such as coriander and tomatoes, they can then sell them at the market. These are small elements of empowerment, allowing these women to have to economic autonomy, even if it is only minimal. They become aware of the fact that they can grow things and that this can be a possible source of income; and even a possibility for survival that allows them to provide for their families without depending on their husbands”, she explains.

Jôice also works, together with *Koinonia* and the Alafumbi Ceremonial Land Association (*Associação do terreiro Alafumbi*), to empower black youths, mainly the black women from communities of traditional people in Salvador and Lauro de Freitas. All these initiatives are another form of resistance in combating religious and environmental racism. As she states “in the hope of *Orixá* allowing better days for all, especially for traditional community peoples. I have faith that *Ogum* strengthens our journey, *Ogum ti onan*.”



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IMAGES



THE IMPACT OF CLIMATE CHANGE ON HUMANS

Jashim Salam & Khaled Hasan

THE IMPACT OF CLIMATE CHANGE ON HUMANS

Images that seek to show the impact of climate change on our world are, more often than not, of a piece of lush rainforest bordering a field that has been cleared for intensive agriculture or of a polar bear floating on a piece of melting ice.

These images are shocking and demand urgent responses from the international community. However, they fail to communicate sufficiently the nexus between climate change and human rights and the impact climate is already having on our fellow human beings.

This collection of photos for the 25th edition of the Sur International Journal on Human Rights seeks address this imbalance.

Changing weather patterns and extreme meteorological events mean that an increasing number of communities around the globe are unable to enjoy the full protection of various human rights guarantees including the right to life, food, water and housing. Furthermore, it is the most impoverished and vulnerable communities and groups that bear the brunt of these challenges, communities that have contributed least to the production of greenhouse gases¹

Nowhere is this seen more clearly than in Bangladesh. Located at the northern tip of the Bay of Bengal, the inhabitants of this region must deal with multiple effects of climate change: rising sea levels, increased frequency of cyclones and river flooding, and higher temperatures.

The following photographs are testimony to the realities of living with climate change and the hardships this presents on a daily basis.

Khaled Hasan (Bangladesh) documents the fishing community that lives on Ashar Chor, a tiny piece of land in the Bay of Bengal. His photographs tell of the difficulties

that rising sea levels and unpredictable weather patterns present. One of his subjects describes how “the weather is changing so quickly, there are more storms, which means the fishing boats can’t go out to sea so we don’t have fish to dry and sell. Then we don’t know when the rains are coming, so we can’t dry our fish like we used to, so we lose out economically.” Rather than face such uncertainty, many choose to move to other parts of the country, in doing so joining the 200,000 other Bangladeshis that are forced to leave their homes each year; climate change “refugees” that find no protection under the 1951 Refugee Convention.²

Meanwhile near the border with Burma/Myanmar, **Jashim Salam (Bangladesh)** has recorded the residents of the Ramu region dealing with annual tidal surges that submerge up to 80 per cent of the city. Rising sea levels threaten to increase the frequency of these surges and the area that is submerged each time. While many are forced into temporary flood shelters, the majority have no choice but continue their day to day life with the water around them. While the subjects of the photographs demonstrate a spirit of resistance, Jashim explains that the flooding is a miserable experience, again forcing many to consider moving their homes and relocating their businesses. He speaks from personal experience – he is from the second largest city in Bangladesh, Chittagong, which faces similar tidal surges as often as twice a day. Jashim hopes that these stark images will shock people into taking action against climate change.

NOTES

1 • <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>.

2 • <http://www.aljazeera.com/indepth/features/2015/11/climate-refugees-151125093146088.html>.

JASHIM SALAM
Ramu | Bangladesh

A man crossing a flooded road to reach his submerged home.









JASHIM SALAM
Ramu | Bangladesh

A man returns home after staying for five days
in an emergency flood shelter.



JASHIM SALAM
Ramu | Bangladesh

A boy carries a goat on his way to an emergency shelter.

JASHIM SALAM
Ramu | Bangladesh

A rickshaw driver tries to cross a flooded road with the help of his daughter.





KHALED HASAN
Ashar Chor | Bangladesh

Baskets full of fish are washed in the small fresh water pools to get them ready to finally dry. Changing weather patterns mean the workers no longer know when they can dry the fish, putting their stock – and their livelihood – at risk.

KHALED HASAN
Ashar Chor | Bangladesh

Female fish driers are becoming increasingly common. As earning a living drying fish becomes harder due to changing weather patterns, it is usually the men that leave to find alternative work in other parts of the country.









KHALED HASAN
Ashar Chor | Bangladesh

This man tells how his “dream was to be a fish dealer but I ended up as a dry fish labourer, still I know if I work hard I can own a boat and fulfill my dream.” However, as the weather becomes increasingly harder to predict on Ashar Chor, it becomes more difficult for the labourers to make a living drying fish.

GRAPHIC NOVEL



LA LUCHA

THE STORY OF LUCHA CASTRO AND HUMAN RIGHTS IN MEXICO

Front Line Defenders

INTRODUCTION

La Lucha: The Story of Lucha Castro and Human Rights in Mexico is a nonfiction graphic novel and the first in a series of forthcoming books focused on depicting and narrating the lives and struggles of human rights defenders (HRDs) to defend the human rights of and achieve justice and accountability for communities worldwide. Front Line Defenders fundamentally believes that HRDs are vital actors in promoting open and just societies.

The graphic novel series was conceived of as a means of engaging new audiences to understand and appreciate not only the work, but also the challenges and risks HRDs face every day. *La Lucha* was created as the first book to point a spotlight on the high risk that HRDs, particularly women, face in Mexico. The chapters in *La Lucha* tell the stories of women and their families who are threatened, detained, hunted down, and killed for their insistence on justice in Mexico. The murder of Mexican women is not a story from the past, and *La Lucha* is not a history book. It is a horror story, and a story of incredible courage. Some have called femicide in Mexico a worsening “epidemic,” and like an outbreak of an infectious disease, the people stepping up to fight it are the ones most at risk.

Reaching audiences who normally would not read a human rights report is critical if HRDs are going to find support from their wider communities. This is particularly true in Mexico, where the HRDs in the book live and work, and where public support is a critical element

of overall protection in a society where violence against HRDs (and journalists) is rampant and often goes unpunished. After publishing the book in Spanish in Mexico (with *Editorial Resistencia*), Front Line Defenders worked with *El Centro de Derechos Humanos de las Mujeres* (The Centre for Women's Human Rights or CEDEHM in its Spanish acronym) in Chihuahua to build support among key supporters in the state. Following the gubernatorial elections in Chihuahua, which brought former Senator Javier Corral to office in October 2016, Front Line Defenders initiated discussions with the state institutions (education and governor's office) to introduce the book into the curriculum at secondary schools and universities in the state. As senator, Corral had hosted the launch of *La Lucha* at the Mexican Senate in November 2015. Following a series of meetings, Front Line Defenders has entered into an agreement with the education administration of the state to introduce the book in September 2017.

Front Line Defenders expects to publish the next two books in the series – one on HRDs confronting the mining industry and working to defend land rights and protect the environment; and the other on LGBTI rights defenders in countries where homosexuality is criminalised – over the next two years.

Adam Shapiro
Head of Campaigns & Visibility
Front Line Defenders

PREFACE

Seeing the way forward can be difficult when you receive death threat phone calls and the organisation you belong to, the Centre for the Human Rights of Women – *Centro de Derechos Humanos de las Mujeres* – is under constant attack. When the highest court in the Americas, the Inter-American Court of Human Rights decides to place you on its small and select list of beneficiaries of Provisional Measures, because your life is in danger; and when your close friends have been killed just for defending human rights.

Our voice is sometimes lost or silenced. The strength in our legs sometimes falters, and fear can paralyse us.

The risk I have placed my family under, the price I pay is very high. My three daughters, my son and my five grandchildren live far away from me. For security reasons I live apart from them, and not a day goes by without a longing seizing me, when I think that I will not be there when my grandchildren take their first steps, or when they say their first word or have birthday parties. To my grandchildren I am a stranger who visits each year to show them love for a few days and who they hardly remember. When the danger escalates, the phone starts ringing. “Mum what are you doing there, come here, we can take care of you” and I tell them, fire fighters love their profession, they do not want to get burned, but when there is a fire they go out to fight it. The same goes for doctors,

when there is a risk of contagious epidemic they face the disease. In Chihuahua there is an epidemic of human rights violations. That's why I'm there.

In my organisation, we started by defending human rights in gender-based crimes, that is to say femicide, trafficking, domestic violence and sexual violence. Then the invisible victims of the war on drugs came knocking on our doors; mothers, daughters, sisters of the tortured, the forcibly disappeared and human rights defenders under threat. In all modesty we became the Front Line of Chihuahua.

Human rights defenders have faced up to political and economic powers, however there is now a new player which has increased the risks, namely organised crime working hand in hand with the police and military to implement mega-projects, with no qualms about threatening, torturing or murdering activists.

In the place where I work, there are areas where organised crime has supplanted the state with the complicity of the authorities and where women and girls are the most vulnerable. I am talking about women from villages who are forced to coexist with criminal groups, and with the police and military. Women walk in terror under the menacing gaze of men who are ready to fire their weapons, raid any home or take

their children as the spoils of war. In the logic of this armed conflict, it has become difficult to distinguish members of organised crime from the police, to the point that it is impossible to discern the perpetrators of attacks.

I have held hands with hundreds of women in peaceful civil resistance to prevent evictions; I have offered my arms for a hug when suffering disrupts their lives. I have clasped my hands together so that women can climb up and reach their dreams of living a life free from violence and raised my voice so they can be heard.

On my way through law school as a young college student, the seeds were planted in my heart, and from these seeds grew the strength and rebellion that still drives me today to long for a more just world.

At some stage in my life I was a successful entrepreneur in the field of drilling wells. However while doing that job a desire for a different world sprang into my mind, along with a rebellious impulse to search for alternatives in my personal life. That is to say, every day the belief grew stronger in me that I could not be part of inhumane structures which offered me a more or less comfortable way of living, as long as I forgot about those who were suffering.

I refused to cooperate with a patriarchal and unjust system and I changed the direction of my life. My search for answers to the question “what should I do in this world”, took me

to the seminary in Chihuahua to study theology, and this new narrative had a profound effect on my life.

Of all the skins that I've covered my body with, the one that I feel best in is that of human rights defender, and I have two simple ways to check whether the way of life I have chosen is best for me. The first is whether what I do makes me happy and I have decided to accept that the day that ceases to be the case, I will be looking for another path. The other way is by looking at my diary and reflecting on how I spend my life. Another way to assess my path in life is to drink from the wisdom of women in history.

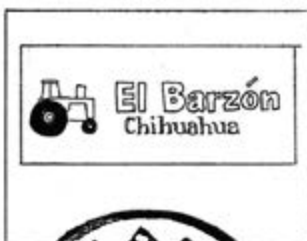
In my journey as a defender, I have learned to listen to the stories of women who suffer violations of their human rights, with compassion and a reverence that compels me to respect their lives. I am convinced that it is through acts of love and justice that we can proclaim the scandal of all the unjust acts imposed on women, represented by all forms of violence, many of them hidden. By empowering women we can encourage them to rebuild their lives.

Finally, I am still here, and I would like to repeat the words of my dear friend Bety Cariño who I once heard saying, in the last public event before she was killed, a Front Line Defenders event to which we were both invited, "we denounce human rights violations so that we do not forget, to preserve historical memory in the heads and hearts of the torturers, who burn down our houses, threaten us, rape, disappear and murder our children."

Lucha Castro
Chihuahua, Mexico

CENTER FOR HUMAN RIGHTS FOR WOMEN

IN DOWNTOWN CHIHUAHUA



AFTER A MUCH NEEDED DAY OF REST, I ACCOMPANY LUCHA TO WORK AT THE CENTER FOR HUMAN RIGHTS FOR WOMEN ON A CRISP AND SUNNY MONDAY MORNING. IN ADDITION TO BEING THE CENTER'S DIRECTOR, SHE AND GABINO ARE REGIONAL COORDINATORS FOR EL BARZON, A DECENTRALIZED ORGANIZATION OF FARMERS DEMANDING DEBT RELIEF. 2 BARZON ACTIVISTS FROM CHIHUAHUA WERE KILLED IN LATE 2012.







"CHIHUAHUA IS NUMBER ONE IN TERMS OF THREATS AND KILLINGS OF HUMAN RIGHTS ACTIVISTS, SO WE TRY TO BE VERY CAREFUL ABOUT SECURITY"



"I WORK, DAY BY DAY, AND I HAVE HOPE THAT THIS WORK WILL LEAD TO THE CONSTRUCTION OF A NEW SOCIETY"

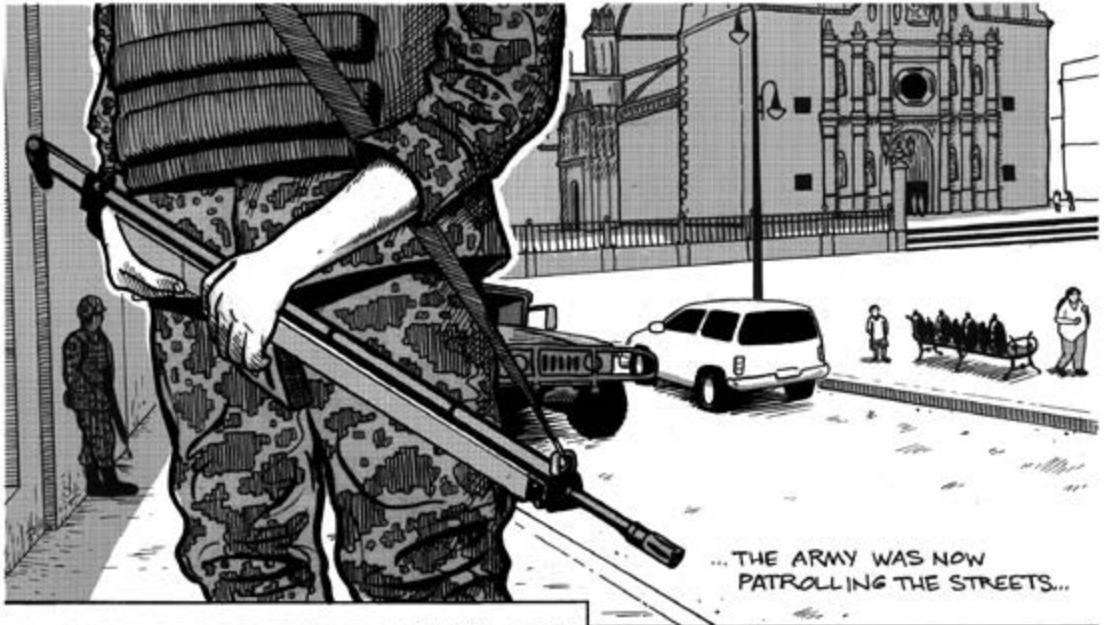


"I HAVE A LOT OF SADNESS AND FEAR ABOUT WHAT'S HAPPENING IN MEXICO, AND THE THREATS AND VIOLENCE AGAINST WOMEN... BUT THERE'S REASON ALSO TO HAVE HOPE AND FEEL POSITIVE"

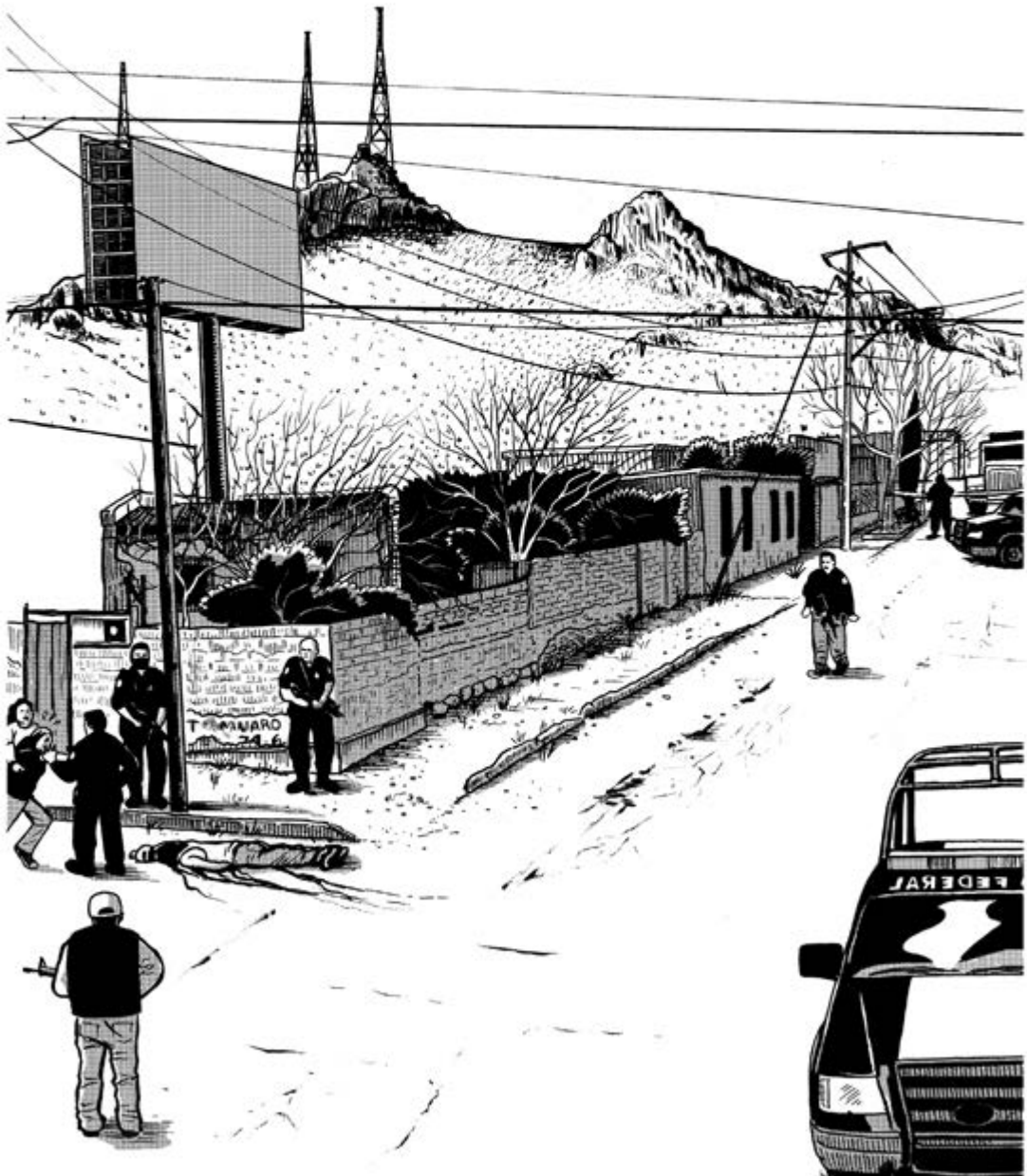


WHILE PART OF THE CENTER OPERATES AS A DROP-IN CLINIC FOR WOMEN, THERE'S ALSO AN AUDITORIUM THAT WAS OFTEN A HIVE OF ACTIVITY IN THE EVENINGS, SUCH AS THIS MEETING OF BRACEROS

BY THE NEXT MORNING, 2 MORE MEN HAD BEEN SHOT DEAD IN A NEARBY COLONIA, INCLUDING A POLICE CHIEF... THE GOVERNMENT'S RESPONSE TO THE VIOLENCE WAS NOT A POPULAR ONE...



SOON AFTERWARDS, THE STAFF
WOULD RETURN TO THEIR WORK...
WHILE SCENES LIKE THIS WERE
OCCURRING AT AN ALARMING RATE
JUST A FEW MINUTES AWAY...





ESSAYS



INTERNATIONAL HUMAN RIGHTS REGIMES

Alejandro Anaya Muñoz

AN UNPRECEDENTED EXERCISE OF INTERNATIONAL SUPERVISION

Mario Patrón

Santiago Aguirre Espinosa

Sofía de Robina

Stephanie Brewer

María Luisa Aguilar

CRIMES AGAINST HUMANITY IN A DEMOCRATIC CONTEXT

Marlon Alberto Weichert

ASSESSMENT OF THE IMPLEMENTATION OF UN TREATY BODY RECOMMENDATIONS

Vincent Ploton

INTERNATIONAL HUMAN RIGHTS REGIMES

Alejandro Anaya Muñoz

- *A matrix for analysis and classification* •

ABSTRACT

In this article Anaya presents the main features of the international human rights regime. The author critically analyses the origin and consequences of its implementation on the behavior of states. The text examines the definition of the concept of an international regime and its application in the area of human rights. The author then presents the specific human rights regimes before offering a critical dialogue with the Donnelly matrix and proposing a modified version that explores both its degrees of institutionality and its historical development from comparative perspective.

KEYWORDS

International regime | Human rights | International relations | Institutionality

In 1945, the Charter of the United Nations (UN) included the promotion of human rights as one of the nascent international organisation's main purposes. One year later, following the mandate established by Article 68 of the UN Charter,¹ the Economic and Social Council (ECOSOC) set up the UN Commission on Human Rights (UNCHR) and, a few years later, in 1948, the General Assembly adopted the Universal Declaration of Human Rights (UDHR).² This is how what the field of international relations (IR) calls an "international regime" was born. An international regime is a set of principles, norms, rules and decision-making procedures established by states to guide their behaviour in a particular thematic area.³ Since then, the international human rights regime has continued to be developed and consolidated as an important component of the global institutional architecture.

In IR,⁴ two fundamental questions on international regimes can be posed: what are their causes and what are their consequences? In other words, why did states establish them and what impact have they had on state conduct? The responses to these questions are particularly important in relation to human rights. Over the past seven decades, although an increasingly complex and active regime has been developed in this area, it does not seem to have the "teeth" it needs to significantly influence states' behaviour.⁵ In this framework, the question raised in this article is: what are the main characteristics of the international human rights regime and how has it developed over time? To answer it, this article critically revisits and refines the analytical framework proposed by Jack Donnelly thirty years ago, which we will use as the basis of our systematic approach to the analysis of the international human rights regime, namely to determine their level of institutionality.⁶

In the first section, the article defines the concept of international regime and discusses its application to the area of human rights. In section 2, the regime is broken down into a series of specific regimes that are currently in place. Then, in section 3, the article presents a critical analysis of the matrix originally proposed by Jack Donnelly and explains the need to adjust it. In section 4, it uses the modified version of Donnelly's matrix to conduct an exploratory analysis of the historical development of the universal, Inter-American, European and African human rights regimes' degree of institutionality. Finally, the article presents its conclusions and draws light to the significant variations observed in the regimes' levels of institutionality, both from a comparative and a historical perspective.

1 • The concept of international regime and its application to the area of human rights

The "international regime" concept is one of the most important ones in the IR field. It allows us to describe this key element of the international relations in the world today with greater precision. According to the already classical "consensus" definition offered by

Stephen Krasner, an international regime is a type of international institution formed by a set of principles, norms, rules and decision-making procedures adopted and established by states to regulate or guide their interactions in a particular thematic area.⁷

The international human rights regime (or regimes, as we will see shortly) is founded on the principles of dignity, the equal worth of and equal rights for “all members of the human family”, without distinction of any kind, such as “race, colour, sex, language or religion”, as well as the idea that human rights are inalienable, universal, interdependent and indivisible in nature.⁸ From a conceptual perspective, and even moreso from an empirical point of view, these norms and rules seem to blend together. Various articles of the UDHR establish a wide range of concrete rights held by individuals, which necessarily creates obligations for states. The International Covenant on Civil and Political Rights (ICCPR), for example, stipulates that the States Parties to the covenant commit “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” in the covenant and therefore, they are obliged to take the necessary steps to “adopt such laws or other measures as may be necessary to give effect to [them].”⁹ Thus, by creating rights and obligations, numerous international human rights instruments establish a wide range of norms.¹⁰ They also prohibit certain types of conduct (such as torture, forced disappearance or arbitrary or extrajudicial executions, for example) and establish different prescriptions for action (such as guaranteeing the existence of effective legal remedies or access to healthcare). In addition to defining the regime’s norms, international human rights instruments establish a series of rules. As has already been mentioned, these norms and rules seem to merge or overlap one another. To take this into account, for the sake of conceptual simplicity and greater clarity, we will use the concept of norms in broader terms to refer to both rights and obligations and prohibitions and prescriptions of certain actions (thus including the rules within a broader notion of international norms).

Finally, the founding charters of the different international organisations (such as the Charter of the UN or the Charter of the Organization of American States) and the international human rights instruments themselves (such as the American Convention on Human Rights, ACHR, or the ICCPR) establish a range of bodies and procedures¹¹ to promote the implementation of the regime’s norms. Ultimately, the bodies of international human rights regimes “make decisions”: through various concrete monitoring and protection mechanisms or procedures, they determine, in an authoritative way, to what extent states are complying with or violating the international norms they have committed to respect.¹²

The explicit use of the concept of “international regime” is useful for descriptive and analytical purposes. It is more precise than the vague notion of “system” (for example, the “Inter-American system” of human rights) that is commonly used in the legal literature or by “practitioners” or other actors directly involved in the promotion and defence of human rights.

2 • International human rights regimes

Until now, we have referred to the “international human rights regime” in the singular. However, in empirical terms, there is a much broader and more diverse reality. Even when their principles do not vary and the norms are in some cases similar, in practice, we can talk about the existence of several human rights regimes. The international instruments containing human rights norms are numerous and very diverse, as are the decision-making and implementing bodies. It is possible and, in fact, necessary to regroup the different norms and decision-making and implementing bodies according to certain criteria related to a particular aspect or affinity. For example, some sets of norms and bodies are explicitly related to broad, yet specific categories of rights (such as civil and political rights on one hand, and economic, social and cultural rights, on the other¹³) or to specific rights (such as the prohibition of torture and forced disappearance). Other sets of norms and bodies can be regrouped according to the specific group of subjects they seek to protect (such as women, children, migrant workers or persons with disabilities).

However, the most common way of disaggregating the complex international human rights regime, or grouping together its components, is according to the international (or intergovernmental) organisations from which they have originated or in which the concrete groups of existing norms and bodies are inserted. Here, we can talk about the UN or the universal regime; the Council of Europe (CoE) or European regime; the OAS or Inter-American regime; or the African Union (AU) or the African regime (see table 1).¹⁴ This classification criteria will be used in this article for two reasons. On one hand, it corresponds to common practice in other fields (such as law) and the world of “practitioners”. Secondly, it emphasises the key role international organisations play not only in the promotion and defence of human rights in the world, but also in the regulatory and institutional development of the international system – an issue that is particularly important for IR.¹⁵

...

Table 1 • International human rights regimes¹⁶

Regime	International organisation to which it is linked	Main international instruments	Main decision-making and implementing bodies
Regime universal	United Nations (UN)	<p>Charter of the UN</p> <p>Universal Declaration of Human Rights</p> <p>International Convention on the Elimination of All Forms of Racial Discrimination</p> <p>International Covenant on Economic, Social and Cultural Rights</p> <p>International Covenant on Civil and Political Rights</p> <p>Convention on the Elimination of All Forms of Discrimination against Women</p> <p>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</p> <p>Convention on the Rights of the Child</p> <p>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</p> <p>Convention on the Rights of Persons with Disabilities</p> <p>International Convention for the Protection of All Persons from Enforced Disappearance</p>	<p>Human Rights Council¹⁷</p> <p>Committee on the Elimination of Racial Discrimination</p> <p>Committee on Economic, Social and Cultural Rights</p> <p>Human Rights Committee</p> <p>Committee on the Elimination of Discrimination against Women</p> <p>Committee against Torture</p> <p>Committee on the Rights of the Child</p> <p>Committee on the Protection of the Rights of Migrant Workers</p> <p>Committee on the Rights of Persons with Disabilities</p> <p>Committee on Enforced Disappearance</p>

INTERNATIONAL HUMAN RIGHTS REGIMES

Regime	International organisation to which it is linked	Main international instruments	Main decision-making and implementing bodies
Inter-American regime	Organization of American States (OAS)	Charter of the OAS	Inter-American Commission on Human Rights
		<p>Charter of the OAS American Declaration of the Rights and Duties of Man</p> <p>American Convention on Human Rights</p> <p>Inter-American Convention to Prevent and Punish Torture</p> <p>Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador"</p> <p>Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, Convention of Belém do Pará</p> <p>Inter-American Convention on Forced Disappearance of Persons</p> <p>Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities</p>	Inter-American Court of Human Rights
European regime	Council of Europe	<p>Statute of the Council of Europe</p> <p>European Convention for the Protection of Human Rights and Fundamental Freedoms (and its 14 protocols)</p>	<p>Committee of Ministers</p> <p>European Court of Human Rights¹⁸</p>

Regime	International organisation to which it is linked	Main international instruments	Main decision-making and implementing bodies
European regime	Council of Europe	European Social Charter European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	Committee of Independent Experts and Governmental Committee European Committee for the Prevention of Torture
African regime	African Union	Constitutive Act of the African Union African Charter on Human and Peoples' Rights Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa African Charter on the Rights and Welfare of the Child	African Commission on Human and Peoples' Rights African Court on Human and Peoples' Rights

3 • The Donnelly matrix

In the mid-1980s, shortly after Stephen Krasner's concept of international regime became popular, Jack Donnelly used it to describe and analyse the set of international human rights norms and bodies that had emerged and been developing since the notion of human rights was included in the UN Charter. By doing so, not only was

Donnelly the first internationalist to apply the concept of international regime to the area of human rights, but also the first to propose a concrete analytical tool for describing and systematically classifying the existing international human rights regimes. He developed a matrix with two axes (see table 2). The vertical axis of his matrix is based on the level of legal enforceability of the regime's international norms: a) national standards (or absence of international norms); b) international guidelines; c) international standards with national exemptions, and d) international norms without exemptions.¹⁹ The horizontal axis of the matrix presents a scale that reflects the functions attributed to the bodies of the regime, or, in other words, the varying levels of power delegated to them by states: a) national decisions (or the absence of international bodies); b) promotion; c) information exchange; d) policy coordination; e) monitoring of conduct, and f) adoption and enforcement of decisions. The two dimensions combine to form a matrix made up of different cells that denote the degree of international institutionality (or of "legalisation"),²⁰ which go from the inexistence of an international regime (bottom left-hand square) to that of being highly institutionalised, in which the regime's norms are binding for all states and the international bodies have the capacity to make decisions and impose or force actors to comply with them (upper right-hand square). Using the horizontal axis as a basis (degrees of delegation), Donnelly proposed ideal types of international human rights regimes: declaratory, promotional, implementation and enforcement.

Table 2 • Donnelly matrix:
Levels of institutionality and typology of international human rights regimes

	National decisions	Promotion	Information exchange	Policy coordination	International monitoring	International decisions
International norms						
International standards (with exceptions)						
International guidelines						
National standards						
	Declaratory regime	Promotional regime	Promotional/Implementation Regime	Implementation regime	Implementation/Enforcement regime	Enforcement regime

Source: Jack Donnelly, 1986, p. 603.

In practice, international human rights regimes have different levels of institutionality and they have all evolved over time. Donnelly's matrix can be very useful for tracing and describing variations among regimes and over time. However, it does not appear to adequately reflect the functions assigned to the bodies of the international human rights regimes. The tasks of information exchange and policy coordination between states are not prominent in international human rights bodies, which are not based on the principle of reciprocity between states. In this article, we propose to adapt Donnelly's matrix, particularly by introducing changes to the categories of the horizontal axis. These alterations are based on a descriptive analysis that explains the main functions of the bodies of the international human rights regimes.

In general terms, the main tasks that have been assigned or delegated to these bodies are those of promoting, monitoring and protecting human rights. The UN Human Rights Council (HRC), for example, has the explicit task of "promoting universal respect for the protection of all human rights"; for which, among other things, it will "[p]romote human rights education and learning".²¹ As for the Inter-American Commission on Human Rights (IACHR), the OAS gave it the mandate to "promote the observance and defence of human rights".²²

The different bodies of the international human rights regime also carry out monitoring work: they systematically monitor states' efforts to implement the norms of the regime in question. For instance, the IACHR "[o]bserves the general situation of human rights in Member States and publishes...reports on the situation in a given Member State" or "[c]onducts *in loco* visits to countries to conduct an in-depth analysis of the general situation and/or to investigate a specific situation."²³

In general terms, the bodies monitor these efforts and, based on the results of their assessments, determine the extent to which states are complying with the regime's norms. The outcome of this exercise is generally the elaboration of a series of concrete recommendations that are not, however, binding for the states.

Some of the bodies of the international human rights regime also carry out functions related to the protection of human rights. This involves not only the adoption of preventative measures, but also the establishment of an institutional machinery to ensure "enforceability" – that is, for the pursuit of truth, justice and reparation.²⁴ The European, Inter-American and African human rights courts, the IACHR and the UN treaty bodies have the authority or the competence to receive and process complaints, denunciations or communications on concrete cases of human rights violations committed by specific states and to decide on the merits of the case.²⁵ Thus, in a jurisdictional scheme (in the case of the courts) or a quasi-jurisdictional one (the case of other fora), the international human rights bodies explore the case under examination to determine if the state has or has not violated human rights and adopt a series of "reparation measures". These measures must be implemented by the state responsible for the violation. Therefore,

international human rights bodies not only monitor, but also protect human rights by providing a framework for the pursuit of truth, justice and reparation. The decisions adopted in this framework, however, may or may not be binding. Only the actual judicial bodies – the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples’ Rights – can adopt sentences that are legally binding for states. The other bodies – such as the IACHR and the UN treaty bodies – only make recommendations, which are not binding.²⁶

In light of this, a modified matrix for analysing the level of institutionality of international human rights regimes is proposed in table 3 below. In particular, on the horizontal axis, which corresponds to the degree of delegation to the bodies of international regimes, the columns related to the functions of information exchange and policy coordination have been eliminated. As for the other functions, in addition to monitoring, we have added protection through non-binding decisions (or “weak” protection) and protection through binding decisions (or “strong” protection). These changes modify the typology of international regimes derived from the horizontal axis of the matrix, which now has the following categories: declaratory, promotional, monitoring, weak protection, strong protection and enforcement regimes (see table 3).

4 • Levels of institutionality of existing international human rights regimes

What “type” of international regime are the international human rights regimes that are in place today?²⁷ What is their level of institutionality? Have they evolved over time? In this section, we seek to answer these questions by applying the modified version of the Donnelly matrix to the universal, Inter-American, European and African regimes.

In 1948, there was a total absence of an international human rights regime (see table 3).²⁸ The establishment of the UNCHR and the adoption of the UDHR gave birth to the universal regime. It was, at first, an incipient declaratory and promotional regime based solely on international guidelines (the UDHR) and international bodies with limited powers to promote human rights (UR1 in table 3). Then, with the adoption of the American Declaration of the Rights and Duties of Man (ADRD), the Inter-American regime was created as a declaratory regime based solely on international guidelines, which still lacked an international body to delegate functions to (IAR1 in table 3).²⁹ A very short time later, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) came into effect in 1953 and the European Commission of Human Rights (EHR Commission) and especially the European Court of Human Rights (ECtHR) were established, thereby creating a strong protection regime in Western Europe. It was based on international norms (ECHR), and not international guidelines, and equipped with a body that has the power to make binding decisions. Back then, the regime’s limits were found in the binding nature of its norms, as the signing and

ratification of the ECHR was not obligatory for all CoE member states (ER1 in table 3). In sum, one decade after World War II, the universal and Inter-American regimes were still at an early stage of development, as they were merely declaratory and promotional regimes. The European regime, on the other hand, was clearly more advanced: set up as a strong protection regime, it has had a high level of institutionality since the beginning.

The universal regime began to develop further in the late 1960s and especially in the early 1970s, when the UNCHR decided to get involved and monitor human rights violations in certain countries.³⁰ At first, this component of the universal regime was based on international standards without exceptions: in other words, the legal basis for the establishment and the operations of the UNCHR was the UN Charter and, therefore, in principle, it could carry out its monitoring tasks in all of the organisation's member states. In practice, however, the Commission's actions soon became strongly politicised, as it performed its monitoring work selectively while often applying double standards. These problems seriously affected its legitimacy, which eventually led to its elimination and the establishment of the HRC. Its levels of institutionality, then, were greater "in theory" than in practice, as the UNCHR adopted exceptions while implementing international norms and performing its monitoring tasks. This is why it is more accurate to situate this component and moment of the universal regime at the level of international standards with exceptions in the vertical axis of the classification matrix (UR2 in table 3).

With the entry into force of the International Convention on the Elimination of All Forms of Racial Discrimination in 1969 and especially the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976, the universal regime continued to develop and gain strength through the adoption of a wide range of specific human rights treaties and the creation of their respective implementing bodies (see table 1). Treaty bodies such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights (in charge of monitoring the implementation of the ICCPR and the ICESCR, respectively) began to receive and review regular reports from states in the late 1970s. However, it was only in the early 1990s that they began to elaborate truly critical "concluding observations reports", which, in practice, is an important monitoring task (UR3a in table 3). Moreover, some of the treaty bodies were given the task of receiving and examining reports on concrete human rights violations. The first rulings on this kind of report were made by the Human Rights Committee at the end of the 1970s (UR3b in table 3). The component of the universal regime based on treaty bodies, though, has been based on international standards with exceptions, as both the signing and ratification of the treaties and the recognition of the competence of the treaty bodies to receive reports of concrete cases is voluntary for UN member states. In any case, towards the end of the 1970s, with the implementation of the treaty bodies, a monitoring and weak protection regime emerged and was developed (UR3a and UR3b in table 3), thereby complementing the component of the regime based on the CHR. Thus, not only did the universal human rights regime grow in "size", but it also developed significantly by increasing its level of institutionality.

As mentioned earlier, the UN Commission on Human Rights was substituted by the Human Rights Council in 2006. The new global human rights body retained the monitoring powers of its predecessor, but diversified the mechanisms at its disposal by designing and implementing an innovative tool: its Universal Periodic Review (UPR). Through this new monitoring mechanism, the HRC conducts a public exercise (based on “constructive dialogue”) of evaluating the human rights situation in all UN member states. Thus, the establishment of the HRC and the implementation of the UPRs, in particular, helped develop the universal regime’s levels of institutionality further, as in practice, they were based on international standards without exceptions (UR4 in table 3). Table 3 shows how the international human rights regime of the UN has come a long way between the time of its inception in 1946 and today.

Table 3 • The modified matrix: levels of institutionality and typology of international human rights regimes

Duty/ Delegation	National decisions	Promotion	Monitoring	Protection (international, non-binding decisions)	Protection (international binding decisions)	Enforcement / Mandatory compliance with international decisions
International norms (with no exceptions)			UR4 (from 2006 on) IAR3 (from 1965-1967 on)	IAR3 (from 1965-1967 on)	ER2(from 1994-1998 on)	
International standards (with exceptions)			UR2 and UR3a (from the 1990s on) AfR1 (from 1986 on)	UR3b (from the 1970s on) AfR1 (from 1986 on)	ER1 (1953/1959 to 1994) IAR4 (from 1979 on) AfR2 (from 2004 on)	
International guidelines	IAR1 (1948)	UR1 (1946/1948 to the early 1970s)	IAR2 (from 1959 to 1965-1967)			
National standards	Absence of a regime (Prior to 1946)					
	Declaratory regime	Promotional regime	Monitoring regime	Weak protection regime	Strong protection regime	Enforcement regime

Source: Elaborated by the author.

The Inter-American regime began to evolve in 1959 with the establishment of the IACHR. Since then, with the investigations it carried out on the human rights

situation in the region, the regime evolved from a promotional to a monitoring regime, but one that was based solely on international guidelines (IAR2 in table 3). A short time later, a series of reforms to the OAS's regulatory and institutional framework enhanced the regime's institutionality. In 1965, the IACHR's statute was reformed to grant it a protection mandate, giving it the power to receive and examine individual complaints on concrete cases of (certain) human rights violations committed by any OAS member. Then, in 1967, the Buenos Aires Protocol altered the Charter of the OAS to officially include the IACHR in the list of the organisation's main bodies and officialise its mandate to monitor and protect human rights. This strengthened the Inter-American human rights regime significantly, as it acquired a protection mandate (weak, as it issues only non-binding recommendations) and began to be based on an international norm without exceptions (one that applies to all OAS members): the regional organisation's charter (IAR3 in table 3). The next step in the institutional development of the Inter-American human rights regime was the adoption in 1969 and the entry into force in 1978 of the American Convention on Human Rights (ACHR). The ACHR established the Inter-American Court of Human Rights, which became operational only one year later, in 1979. Thus, the creation of the Inter-American Court converted the Inter-American regime into a strong protection regime (that is, one with the capacity to make decisions that are binding for states). It is, however, based on international norms with exceptions, as the ratification of the ACHR and the recognition of the Inter-American Court's jurisdiction are voluntary for OAS member states (IAR4 in table 3).

The African human rights regime emerged from within the Organisation of African Unity (OAU, which is now the African Union, AU) in the 1980s. The African Charter on Human and Peoples' Rights (ACHPR) came into effect in 1986 and the African Commission on Human and Peoples' Rights was established one year later. The ACHPR Commission received a clear mandate to monitor human rights, as it was given the task of conducting investigations into situations of massive human rights violations and the elaboration of reports and recommendations based on the results. It was also to analyse regular reports from the states and receive complaints on concrete cases of human rights violations. Therefore, a monitoring and weak protection regime arose in Africa (the resolutions of the ACHPR Commission on concrete cases are not binding), which is based on international norms with exceptions (the ACHPR)(AfR1 in table 3). More recently, in 2004, the First Protocol to the ACHPR came into effect, which established the ACHPR Court and gave it the power to adopt binding decisions on concrete cases. This moved the African regime towards a strong protection regime, but one that is based on international norms with exceptions, as both the ratification of the ACHPR and the recognition of the ACHPR Court are optional for AU member states (AfR2 in table 3).

As suggested early, the international human rights regime with the densest and the highest level of institutionality is the European regime. Since 1994, a resolution of the Parliamentary Assembly of the Council of Europe explicitly stated that all CoE members

must be part of the ECHR.³¹ This strengthened the strong protection regime that has been in place in Europe for decades even further by basing it on international norms without exceptions (RE2 in table 3). This places the European regime in the uppermost right-hand corner of the matrix that it is possible to reach, which represents the highest level of institutionality that a regime can possibly attain in reality, as one should not expect international human rights bodies to acquire the power to impose their decisions by force (at least not in the foreseeable future).

5 • Conclusions

In this article, the international regime concept, which is characteristic of the field of IR, was used to analyse the dense international institutional architecture that has been developed around human rights. We demonstrated its utility and precision. More importantly, we took up again an analytical-descriptive tool proposed by Jack Donnelly over thirty years ago, which has been largely underutilised in the IR literature (and surely of other disciplines) on human rights. Based on an empirical analysis of the functions delegated to international human rights bodies, we adjusted the matrix, and the typology of international regimes that it generates, to enhance its precision and, therefore, its usefulness as an analytical-descriptive tool.

By applying the modified matrix to the main international human rights regimes in existence today, the article shows that there are clear variations in the regimes' levels of institutionality, both from one regime to another and over time. In regards to the latter, the matrix gives visibility to the significant evolution of the international human rights regimes throughout history and to their current level of institutionality.

This conclusion inevitably raises a question of an explanatory nature: has the increase in the levels of institutionality led to similar increases in the levels of compliance with the regime's norms? In other words, does a higher level of institutionality mean better prospects in relation to human rights in practice? Existing literature strongly suggests that it does not. As it is well known, despite the institutional development of international human rights regimes and their formal acceptance by the majority of states, the aggregate indicators on the respect (or rather, the violation) of human rights have changed little over time.³² The analysis presented in the previous sections illustrates that the international human rights regimes do not have the power to enforce compliance with its norms or the decisions of its bodies. In other words, it does not "have the teeth it needs". Is this the best response to the paradox of the lack of compliance mentioned a few lines earlier? Or are there other transnational mechanisms – such as pressure from activists, economic or trade conditionalities, or imposition by force by the powerful nations – or national ones – such as litigation and social mobilisation – that could improve the effectiveness of the regime? These are questions that clearly go beyond the scope of this article and therefore, will have to be answered by research projects in the future.

NOTES

- 1 • “Charter of the United Nations”, United Nations, October 24, 1945, accessed June 19, 2017, <http://www.un.org/en/charter-united-nations/index.html>. United Nations Conference on International Organization, San Francisco, California, United States.
- 2 • “Universal Declaration of Human Rights”, United Nations, December 10, 1948, accessed June 19, 2017, <http://www.un.org/es/universal-declaration-human-rights/>. Through General Assembly Resolution 217 A (III).
- 3 • Stephen Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables”, in *International Regimes*, ed. Stephen D. Krasner (Ithaca: Cornell University Press, 1983): 1-21.
- 4 • International Relations (capitalised) understood as the academic field that studies the phenomenon of international relations (not capitalised). Chris Brown, *Understanding International Relations* (London: MacMillan Press, 1997): 3.
- 5 • Emilie Hafner-Burton, *Making Human Rights a Reality* (Princeton: Princeton University Press, 2013).
- 6 • Jack Donnelly, “International Human Rights: A Regime Analysis”, *International Organization* 40, no. 3 (1986): 599-642. Hasenclever, Mayer and Rittberger note that international regimes have varying degrees of institutionalism, which they understand as “the view that (international) institutions matter”. The degree of institutionalism depends on how effective and resilient the international regimes are; in other words, the extent to which they achieve certain objectives or fulfil certain functions, and the degree to which they succeed in remaining in force and robust when faced with exogenous challenges, respectively. Andreas Hasenclever, Peter Mayer, and Volker Rittberger, *Theories of International Regimes* (Cambridge: Cambridge University Press, 1997): 2. The notion of “institutionality” used in this article – understood as the degree or extent to which international institutions are based on binding international norms and have bodies to which the power to make and enforce decisions has been delegated – is clearly different from the “institutionalism” concept proposed by Hasenclever and his co-authors.
- 7 • Krasner defines principles as “beliefs of fact, causation and rectitude”; norms as “standards of behaviour defined in terms of rights and obligations”; and rules as “specific prescriptions or proscriptions for action”; and decision-making procedures as “prevailing practices for making and implementing collective choice”. Krasner, 1983, 2; see also Hasenclever, Mayer and Rittberger, 1997, 8-22; cf. Donnelly, 1986, 599-605.
- 8 • “Universal Declaration of Human Rights,” 1948, preamble; “Vienna Declaration and Programme of Action,” World Conference on Human Rights, Vienna, Austria, preamble, art. 1.5, June 25, 1993, accessed June 19, 2017, http://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_Spanish.pdf.
- 9 • “International Covenant on Civil and Political Rights”, High Commissioner for Human Rights, Resolution 2200 A (XXI), art. 2, December 16, 1966, came into effect on March 23, 1976, accessed June 19, 2017, <http://www.ohchr.org/SP/ProfessionalInterest/Pages/CCPR.aspx>. Serrano and Vázquez affirm that the states’ “general obligations” in relation to human rights are the obligation to respect, protect, guarantee and promote human rights. Sandra Serrano and Luis Daniel Vázquez, *Los Derechos en Acción. Obligaciones y Principios de Derechos Humanos* (Mexico: FLACSO Mexico, 2013): 58-82.
- 10 • Mainly binding treaties and declarations. For the different types of international human rights instruments and the differences in the degree to which they are binding or in the level of binding force they imply. See Daniel O’Donnell, *Derecho Internacional de los Derechos Humanos: Normativa, Jurisprudencia y Doctrina de los Sistemas Universal e Interamericano*, 2nd edition (Mexico: OACNUDH y

TSJDF, 2012): 51-72.

11 • For the sake of analytical clarity and simplicity in relation to terms, the article will henceforth use only the term “body/bodies” to refer to the procedures (mainly the “special procedures” of the UN Human Rights Council, as well as the numerous special rapporteurships, working groups and similar entities). For a complete and up-to-date list, see “Special Procedures of the Human Rights Council”, OHCHR, September 27, 2016, accessed June 19, 2017 <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>.

12 • The said decisions are only binding for states in the case of the jurisdictional bodies, such as the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court on Human and Peoples’ Rights. For the other bodies of the international regime, their decisions are only recommendations. See Daniel O’Donnell, 2012.

13 • This classification, however, goes against the principle of indivisibility.

14 • Of the existing regimes, the universal, European, Inter-American and African human rights regimes have the highest level of institutionality. More recent attempts have been made to develop an architecture of human rights norms and bodies in other regional spaces, such as in the Middle East and Southeast Asia, or even in cultural “spaces”, such as the Islamic world. See “Terms of Reference of ASEAN Intergovernmental Commission on Human Rights,” ASEAN, July 20, 2009, accessed June 19, 2017, <http://hrlibrary.umn.edu/research/Philippines/Terms%20of%20Reference%20for%20the%20ASEAN%20Intergovernmental%20CHR.pdf>; “Statute of the OIC Independent Permanent Human Rights Commission,” Organization of the Islamic Cooperation, OIC/IPCHR/2010/Statute, June 30, 2011, accessed June 19, 2017, <https://goo.gl/tYmCsc>.

15 • Obviously, not all IR theorists would agree with this affirmation on the importance or the relevance of the institutionality of the international system and, more concretely, in the thematic area of human rights. For more on this debate, see

Hasenclever, Mayer and Rittberger, 1997, and Alejandro Anaya Muñoz, *Derechos Humanos en y Desde las Relaciones Internacionales* (Mexico: CIDE, 2014): 21-35.

16 • Anaya Muñoz, 2014, 66-67.

17 • Formerly, the Commission on Human Rights.

18 • Formerly the European Commission of Human Rights.

19 • In relation to international human rights law instruments, international guidelines are the declarations, principles, minimum rules, guidelines and other instruments that are not contractual in nature (“*soft law*”). These instruments differ from the treaties, covenants, conventions and protocols that do have a contractual nature (“*hard law*”). See O’Donnell, 2012, 56.

20 • Approximately 15 years after Donnelly developed the matrix, Kenneth Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal developed the concept of “legalisation” in detail, thereby offering a very useful tool for systematically exploring the formal features of international regimes in general. The “legalisation” of an international regime is measured on the basis of three dimensions: obligation, precision and delegation. Kenneth Abbott *et al.*, “The Concept of Legalization”, *International Organization* 54, no. 3 (2000): 401-19. The more an international regime’s norms are binding and precise and its bodies have greater powers to implement norms and make authoritative decisions, the greater its legalisation.

21 • “Resolution 60/251,” UN General Assembly, A/RES/60/251, April 3, 2006, §2, 5^a, accessed June 19, 2017, http://www2.ohchr.org/spanish/bodies/hrcouncil/docs/A.RES.60.251._Sp.pdf. Emphasis added.

22 • “Charter of the Organization of American States”, OAS, April 30, 1948, accessed June 19, 2017, http://www.oas.org/dil/esp/afrodescendientes_manual_formacion_lideres_anexos.pdf. It came into effect on December 13, 1951, Ninth International Conference of American States, Bogotá, Colombia, art. 106.

23 • “Mandate and Functions of the Commission”,

OAS, August 24, 2016, accessed June 19, 2017, <http://www.oas.org/en/iachr/mandate/functions.asp>.

24 • Serrano and Vázquez, 2013, 64-71.

25 • The treaty bodies are a series of committees of experts established for each of the ten main human rights treaties or optional protocols adopted at the UN. Anaya Muñoz, 2014, 74-78.

26 • Taken from Anaya Muñoz, 2014, 68-90.

27 • A different way of approaching this question is proposed by Hasenclever and his co-authors, who defend different approaches to conceptualising international regimes or different ontological perspectives on them: the behavioural, cognitive and formal approaches. The behavioural one understands international regimes as a series of *practices* related to a group of rules or specific conventions. The cognitive approach, for its part, puts emphasis on intersubjective *meanings* and common *understandings*. Finally, the formalistic approach insists on verifying the *formal existence* of explicit norms agreed upon by states. Hasenclever, Mayer and Rittberger, 1997, 14-7.

28 • The description of the historical evolution of the different international human rights regimes and their functions were taken from Anaya Muñoz, 2014, 68-90.

29 • It has been argued that over time, the UDHR and the ADRDM (or at least some of their articles)

have been converted into international custom and therefore, they have acquired the status of binding norms. For simplicity sake, and especially due to the difficulties involved in identifying the precise moment in time when these changes occurred, this transformation has not been explicitly reflected or incorporated into the analysis that follows.

30 • In the first two decades of its existence, in the middle of the Cold War, the Commission on HR explicitly decided not to get involved in the monitoring of the human rights situation in certain countries (and therefore to not assume critical positions in this respect). Anaya Muñoz, 2014, 68-70.

31 • “Resolution 1031 (1994)”, Parliamentary Assembly of the Council of Europe, April 14, 1994, accessed June 19, 2017, <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=16442&lang=EN>. In 1998, by adopting Protocol No. 11 to the ECHR, CoE members opted for eliminating the EHR Commission and strengthening the EHR Court by making it a permanent body.

32 • Beth Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics*, (Cambridge and New York: Cambridge University Press, 2000); Todd Landman, *Protecting Human Rights. A Comparative Study* (Washington, DC: Georgetown University Press, 2005); Hafner-Burton, 2013.



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AN UNPRECEDENTED EXERCISE OF INTERNATIONAL SUPERVISION

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- *The Ayotzinapa case and the experience of the Interdisciplinary Group of Independent Experts (GIEI) in Mexico* •

ABSTRACT

The disappearance of 43 students in Ayotzinapa in 2014 became a paradigmatic case of human rights violations. The Mexican state's indifference to the situation led the families of the disappeared to request international technical assistance, together with human rights organisations in the country. This article discusses the creation of the Interdisciplinary Group of Independent Experts (Grupo Interdisciplinario de Expertos Independientes or GIEI according to its Spanish acronym), the strategies it used, the obstacles it faced and the results of its investigative work. In addition to highlighting the state's failure to clarify the facts, the GIEI exposed the collusion between state and non-state actors involved in schemes of organised crime that are related to the case. Finally, this experience in international monitoring is considered innovative and relevant to other efforts to fight impunity in Mexico and the region due to the support provided to the victims and their families, among other reasons.

KEYWORDS

Disappeared | Impunity | International monitoring | Ayotzinapa

1 • Introduction

On the night of 26 September 2014 in Iguala, Guerrero, one of the most emblematic episodes of human rights violations in Mexico's recent history occurred. The grave violations were unleashed when a group of students aged 17 to 25 from the *Raúl Isidro Burgos* Rural Teachers College in Ayotzinapa¹ went to the city of Iguala, Guerrero² with the goal of "seizing" buses to participate in the 2 October commemorations that are celebrated every year in Mexico to keep the memory of the repression of students in 1968 alive. Even though it was normal in Guerrero for students to temporarily stop buses to use them for their activities, on 26 September, the authorities did not respond as they ordinarily would: the Iguala municipal police opened fire on the students to prevent them from leaving the city with the buses. Assisted by other police forces and by civilians, the police managed to block the road to stop five buses. 43 students were arrested and then disappeared.

The results of that cruel night in Iguala were brutal: 43 young students disappeared,³ 6 people were executed, among which 3 were students, including the case of a young man whose body appeared the next day in a deserted area showing clear signs of torture,⁴ and at least 40 people were injured.⁵ In total, more than 180 people were direct victims of human rights violations that night and approximately 700 people were indirect victims.

The Ayotzinapa case became a paradigmatic incident that exposes the indifference towards the disappearances and is also an emblematic case of collusion between state and non-state actors involved in organised crime, also known as macro-criminality. The high number of victims, Iguala's close proximity to the country's capital, the immediate documentation of the facts by human rights organisations, the deeply rooted tradition of social struggle in the state of Guerrero, and the organisational and moral strength of the fathers and mothers of the disappeared are some of the factors that explain the tremendous impact the events on 26 and 27 September have had on political awareness in the country and abroad.

In this article, we seek to illustrate the importance of one of the initiatives promoted by the families to achieve justice: the Interdisciplinary Group of Independent Experts (*Grupo Interdisciplinario de Expertos Independientes* or GIEI according to its Spanish acronym). To do so, we will first refer to how it emerged and then, we will describe the work it carried out in Mexico, as we believe that this experience can be relevant to other efforts to fight impunity in Mexico and the region. Finally, we will present conclusions and reflections on the experience that this process has left.

2 • The creation of the GIEI

The GIEI was appointed by the Inter-American Commission on Human Rights (IACHR) upon the request of the families and their representatives to provide international technical assistance for the search, investigation, victim support and the structural analysis of the case. Center Prodh⁶ was put in charge of coordinating the international legal strategy.

The process leading to the creation of the GIEI was not a simple one. From the night of 26 September 2014 on, authorities from all three levels of government were negligent of their duties in relation to the occurrences. The administration headed by Enrique Peña Nieto failed to act within hours of the incident and also in the days that followed immediately after, which is key in cases of forced disappearances.

In light of the incapacity of the local authorities and the indifference of federal authorities, and due to the urgency and seriousness of the facts, on 30 September 2014, the human rights organisations accompanying the families requested precautionary measures from the IACHR.

On 13 October 2014, the committee for follow-up on the precautionary measures was officially established.⁷ During the meeting, in the presence of the IACHR, the students, their families and their representatives decided to petition the Mexican state to request international technical assistance for the investigation on the whereabouts of the missing college students.

On 29 October the mothers and the fathers engaged in a tense dialogue directly with the president of the republic, which ended with the signing of several agreements. The agreements included the president's commitment to accept and support the technical assistance to be provided by the IACHR.⁸ The president also committed to fully cooperate with the Argentine Forensic Anthropology Team (EAAF, according to its acronym in Spanish), a highly recognised institution in the region.

The technical assistance agreement was the result of intense negotiations between the state and the victims' representatives, which were facilitated by the IACHR itself. The agreements established that the Group would have a six-month mandate that could be "extended for as long as necessary in order to achieve its objective" (Clause 10).

The Group was composed of renowned figures with extensive experience on the continent. The IACHR appointed the following people to do this work: Guatemalan lawyer Claudia Paz y Paz, the first female Attorney General of Guatemala; Ángela Buitrago, a Colombian lawyer who has worked as the prosecutor of high profile cases in Colombia; Carlos Martín Beristain, a doctor and psychologist from the Basque Country with a broad background in attention to victims and truth commissions; Francisco Cox, a Chilean lawyer specialised in criminal law; and Alejandro Valencia Villa, a Colombia lawyer and expert on humanitarian law and international human rights law.⁹ The Group officially began its work on 2 March 2015.

Since November 2014, the Attorney General's Office (PGR, according to its acronym in Spanish) had been widely disseminating a version of the story that Attorney General Jesús Murillo Karam had labelled the "historical truth" about the facts.¹⁰ According to this narrative, the 43 disappeared students went to Iguala for political motives, where they were detained by municipal police officers, who then handed them over to members of a criminal organisation. The gang members apparently confused them with

members of a rival group, killed them and burned their bodies on a pyre in a garbage dump located in Cocula, Guerrero. They then hid all of the remaining evidence and threw it into the nearby tributary named the San Juan River.

This version of the story – according to which all of the students together, in one group, were executed and then incinerated – had an unforgettable impact on the families.¹¹ It also had a social impact that was expressed in the form of outrage and protest.¹²

3 • The GIEI's work in Mexico

3.1. Phase one: from its arrival in Mexico to its first report

In the first stage of its work, GIEI earned its legitimacy as an international monitoring body by maintaining continuous dialogue with both the state and the victims and their representatives. During this initial period, the experts had the basic conditions they needed to conduct their work. For instance, they were given access to detention centres to interview some of the accused being held in custody. The GIEI decided to communicate publically the advances in and obstacles to its work; in its first six months, it published 6 press releases.¹³

On 6 September 2015, the GIEI presented its first report¹⁴ in which it managed to fully reconstruct the events of 26 September 2014. It reported finding a plurality of criminal acts and moments in which the attacks were perpetrated that the official version does not acknowledge. Similarly, the report demanded the identity of the students, clarified the reasons for them being in the city of Iguala that day and refuted the version that criminalised the victims.

The GIEI also paid special attention to the absence of effective inquiry in the 72 hours after the incident, as well as the lack of systematic use of intelligence based on scientific investigative methods to guide these efforts. But its most important contribution in terms of establishing the truth about what had happened was its invalidation of the official hypothesis on the case: an independent expert study concluded that the evidence does not scientifically prove that the 43 students were executed and incinerated on a human pyre.

The presentation of the GIEI's first report had a major impact on the public in both Mexico and abroad.¹⁵ Numerous voices from the international human rights field announced their support for the GIEI.¹⁶ But most importantly, the report had a considerable impact on the families of the missing youth.¹⁷

The federal government's first official statement appeared in a message posted on Twitter by President Enrique Peña Nieto only a few hours after the GIEI released its report to the public. In several messages, the president said many things, including: "The @gobmx would like to once again thank the GIEI for its work and the IACHR for its support in the investigation of these deplorable events."¹⁸

As for the Office of the Attorney General, it issued the following statement on behalf of the federal government:

[...] the Interdisciplinary Group of Independent Experts of the Inter-American Commission on Human Rights presented a report that is fundamental to the investigation. [...] Pursuant to the instructions of the President of the United Mexican States, the results and the conclusions of the in-field interviews and studies carried out by the experts will, starting today, be analysed and, in due time, the Attorney General will evaluate incorporating it into the previous investigation [...] Let there be no doubt that the Government of the Republic has used all of its means to ensure that there is no place for impunity in this case.¹⁹

The GIEI's first report was so powerful that it forced the president of Mexico to meet with the families again, one year after the first meeting. The families complained that the investigation process was biased and demanded the creation of a specialised unit to inquire into the whereabouts of the youth. They also presented eight points to be addressed in the next stage of the case, based on the experts' recommendations.²⁰ The state responded by publishing a series of unilateral actions that did not respond to the needs of the case, nor to the GIEI's recommendations.²¹

On 19 October 2015, during the 156th regular session of the IACHR, the GIEI presented its report to the plenary. This presentation led to meetings in which the conditions for the renewal of the GIEI's mandate were agreed upon.²²

3.2. Phase two: from the renewal of the mandate to the second report

Even though an agreement on the basic conditions for the continuation of the GIEI's work had been reached at the IACHR, which included the creation of a specialised unit to continue on with the inquiry, obstacles did not cease to emerge. For instance, the state did not allow the GIEI to interview some soldiers that had been exceptional witnesses of the events.²³ It also denied the GIEI access to the prisons to interview people who had been convicted.²⁴

To add to the tension in the air, a media and political campaign was launched in an attempt to undermine the legitimacy that the group had gained through its work. Initially, the campaign focused on discrediting attorneys Ángela María Buitrago and Claudia Paz y Paz by presenting them as being responsible for the supposed manipulation of legal cases in Colombia and Guatemala. Later, the said campaign included the other GIEI members by questioning the technical and moral authority of Carlos Martín Beristain, Alejandro Valencia Villa and Francisco Cox.

Although several civil society organisations²⁵ demanded the state to take a public stand to defend the importance of the GIEI's work to provide technical assistance,

the federal government did not officially declare its support. In light of its silence, the IACHR stood up in defence of the GIEI.²⁶

On 24 April 2016, the GIEI presented its report entitled “Ayotzinapa Report II. Forward Steps and New Conclusions on the Investigation, Search and Care for Victims”. In this second report, the GIEI reaffirmed the magnitude of the events and documented new scenarios in places that had not been investigated by the PGR. It also concluded that all law enforcement agencies that were present that evening participated actively or passively (by omission) and demonstrated that the collusion between criminal groups and state structures was not limited to the municipality; it included other levels in a scheme of macro criminality.

The GIEI documented the PGR’s reluctance to explore lines of investigation other than the one on the garbage dump in Cocula. The GIEI also detected serious irregularities in the collection and processing of evidence that was supposedly found in the San Juan River, as well as violations of due process in the investigation. The GIEI wrote that the PGR did not use satellite photographs nor laser technology, as it had recommended in its first press release.²⁷

In the section on the problems in the investigation of human rights violations in Mexico, the GIEI identified mechanisms that foster impunity. They include: the excessive formality and bureaucracy permeating the Mexican criminal justice system; the preponderance of testimonial evidence and confessions over scientific evidence and the use of intelligence; flaws in statement-taking and the lack of capacity to analyse evidence; the predominance of the organised crime approach over a human rights one; the emphasis on the number of people apprehended, instead of the quality of the investigation; the denial of information to the victims; the obstruction of justice; the lack of technology used in the search for the disappeared; deficiencies in burials and exhumations; the revictimisation and the criminalisation of the victims and, finally, the prevalence of a sovereignist attitude that hinders international cooperation.

The second GIEI report had, once again, enormous repercussions on Mexico and at the international level.²⁸ Many voiced their support for its work.²⁹ However, the culmination of the GIEI’s mandate – when the reason for which it had been created still existed, as the whereabouts of the students remained unknown – was controversial.³⁰

3.3. The Special Follow-up Mechanism ordered by the IACHR

On 15 April 2016, the IACHR announced that the GIEI would not continue with its work because the state had not provided the necessary conditions to do so³¹ and ordered a special follow-up mechanism to be created. Another difficult negotiating process began between the families and the state to define the characteristics of this mechanism. The families mainly argued that in light of an investigation where justice had been deviated and obstructed, only international monitoring could offer them guarantees.

It is clear that the growing rift between Mexico and the Inter-American human rights system played a determining role in the difficulties to concretise the mechanism. It led Mexico to adopt positions never seen before *vis-à-vis* the Commission, which were contrary to the strengthening of the system.

After a series of meetings were held with the families' representatives on 27, 28 and 29 July 2016, the IACHR defined how the special follow-up mechanism would be set up.³² It was to have the following characteristics: it would do follow-up on the precautionary measures and the GIEI's recommendations; it would be composed of at least two special technical advisors who would be allowed to visit Mexico as often and as long as needed and would have full access to files and other sources of information; and that the IACHR commissioner in charge of the mechanism would carry out four visits to Mexico to supervise the work between August 2016 and March 2017, plus the visits agreed upon for the following years. The Commission stressed that the activities of the mechanism could not be interpreted as restrictions on other powers granted by the American Convention on Human Rights.

4 • The main contributions of the GIEI

Even though the outcome of the technical assistance process is still uncertain, it is possible to do a preliminary assessment of the significance of the experience of the GIEI in Mexico. Taking stock of its contributions will mark the path to follow to achieve justice and truth for the victims and shows, at the same time, the vitality and importance of international human rights mechanisms.

The contributions of the GIEI can be seen at at least two levels: its direct impacts, linked to the clarifications of the facts; and its indirect impacts, related to the extent to and autonomy with which it carried out its mandate in Mexico.

4.1. Direct impacts

4.1.1. Greater visibility of the central role of the victims

One of the GIEI's most important contributions, which has received the least public attention, is the profound respect it has shown to the victims. In addition to documenting the families' suffering, the report emphasises their capacity to organise and demand justice. The GIEI highlights that, "The memory of their sons, the collective mobilisations and the hope that they will find them are elements that help the families to maintain a bond with the disappeared."³³

Opening up space for victims to actively participate in the process of pursuing justice and the truth was identified as crucial. The GIEI's insistence on putting the victims at the centre is also what led to the approval of conducting assessments of the psycho-social impacts on the families

and the students. The conducting of this study, which is uncommon in Mexico, has allowed for a deeper understanding of the impacts that the events and their aftermath on the people.

4.1.2. The reconstruction of a complex criminal event based on a variety of voices and evidence

To show that it is possible to reconstruct the events in a different way, the GIEI resorted to the testimonies of the victims and survivors, reconstructing the facts, scientific evidence and factual proof such as call records, and it succeeded in producing a comprehensive narrative. Thanks to the clarity of the reports, they can be analysed by not only specialists, but anyone interested in the issue and, especially, the families themselves.

Furthermore, the GIEI shows the importance of conducting a criminal investigation based on scientific methods in which several lines are developed to avoid confirmatory biases. This contrasts with the data presented by the PGR even after the two GIEI reports were released. What is more, by inadequately describing the facts and presenting incorrect information,³⁴ the PGR's ministerial report generates, yet again, an account of the events that is inaccessible and that loses sight of the human rights approach and the centrality of the victims.

4.1.3. Prioritisation of scientific and objective evidence

The GIEI published an independent opinion on the fire and which concludes that the official hypothesis was impossible. This conclusion was confirmed by the results of the multidisciplinary study conducted by the Argentine Forensic Anthropology Team (EAAF), which were presented on 9 February 2016.

Based on a rigorous technical analysis, the GIEI and the EAAF found inconsistencies between the scientific evidence and the testimonies and determined that the events at the Cocula garbage dump described in the "historical truth" – which the PGR claimed resolved the disappearance of the 43 students – could not have taken place. Therefore, both the GIEI and the EAAF helped to raise the importance of using scientific evidence in the process of establishing the facts.

4.1.4. Identification of the structures of macro-criminality underlying the facts

The GIEI identified the existence of criminal structures that colluded with state actors from all three levels of government, not only the municipal level. In other words, it showed that the disappearance of 43 students on one night could not have happened with the complicity of the municipal institutions only.

In its first report, the GIEI indicated that "the business that is carried out in the town of Iguala could explain the extremely violent reaction and the massive character of the attack, its duration in time and even the follow-up attack."³⁵ The GIEI documented how, by act or

omission, more security forces were involved, which also reveals the scope of transnational crime and its impact on the enjoyment of human rights.

4.1.5. Identification of a concrete and feasible path for establishing the whereabouts of the missing students

With regards to the future of the investigation, the GIEI designed a clear and concise roadmap based on 20 measures that, when adopted, will contribute to finding justice and the truth in the Ayotzinapa case. These measures are: unify the different criminal cases; avoid fragmenting the investigation process; prevent the Office of the Special Prosecutor for the Investigation of Organized Crime (SEIDO) from interfering in the inquiry, given that this body led the investigation towards a hypothesis that proved unsustainable; take other human rights violations and crimes committed into consideration; obtain the witness statements that remained pending; follow up on the telephone records of suspected perpetrators and students; compare the ballistic evidence collected from the crime scenes with the weapons of the different police forces; continue to cooperate with Innsbruck and the EAAF on genetic testing; request relevant military documentation that has not been delivered; investigate further the possibility of narcotics being transported across the border; fully identify the fifth bus and possible falsehoods in related declarations; investigate allegations of ill-treatment or torture; determine the responsibility for omission of the security forces present during the acts; arrest alleged perpetrators who are still at large; investigate the assets of alleged perpetrators; investigate a possible obstruction of the investigation; disseminate a narrative of the case based on reality and the GIEI's findings; continue the search for the missing students; maintain spaces for dialogue and communication with family members open; and, finally, guarantee the safety of the family members and their representatives.

4.2. Indirect impacts

4.2.1. Elaboration of structural recommendations

Thanks to its approach and in-depth study of the Ayotzinapa case, the Group of Experts was able to expose structural weaknesses related to the way investigations are carried out in cases of human rights violations and to the search and support for victims, the processing of cases, public policies, the institutional structure and legislation related to forced disappearances. Far from creating the conditions to ensure that the incidences will not be repeated, these elements perpetuate a situation that is conducive to human rights violations and impunity. This is why the GIEI's structural recommendations include: legal reforms, changes to the institutional model and to practices, and other public policy measures.

In relation to the General Law to Prevent and Punish Disappearances, for example, the GIEI proposed that after consultations with the victims and the families, a comprehensive law on forced disappearances must urgently be approved.

Among other recommendations, the experts analysed issues such as the need to improve the practices of investigating torture; the creation of specialised jurisdictions for cases of human rights violations; the separation of the forensic services from the attorney general's office to guarantee their autonomy; fully incorporating the standards of the Minnesota Protocol on the investigation of extrajudicial executions; the implementation of a state policy on the right to the truth that recognises the historical roots of the practice of disappearances in Mexico; the gradual withdrawal of armed forces from security tasks; and the strengthening of international cooperation efforts to design mechanisms capable of ending the structural impunity that prevails in Mexico.

4.2.2. Expanding the public debate on human rights in Mexico beyond its traditional limits

Intervening in the public sphere is undoubtedly one of the biggest tasks of the defence of human rights. In this area, the GIEI brought innovations to Mexico. GIEI became a public agent that successfully disputed credibility with the state thanks to its serious and technical work. It had a significant impact on public opinion and expanded the narrow limits within which human rights issues are traditionally debated in Mexico.

These contributions also reveal that considering the lack of credibility of Mexican law enforcement and administration of justice institutions, international monitoring can be a powerful tool for change.

4.2.3. The construction of a new model of international supervision to end impunity

The GIEI was the first experience of international monitoring carried out within a criminal investigation process of its kind. It can be replicated and contribute to the investigation of emblematic cases and regional settings³⁶ where processes of mass victimisation have occurred.

In Mexico, the GIEI has demonstrated international cooperation's potential to put an end to structural impunity that is sustained on pacts of corruption and silence; hence, its significance and the interest in seeking the best possible outcome.

For the Center Prodh, which coordinated the dialogue between the GIEI, the state and the families, some of the most important characteristics of the GIEI model that can help us to think of alternatives for the future of Mexico and other countries are:

- It was a mechanism that operated *in situ*. It practically remained in Mexico the whole time it was active, which guaranteed it the proximity to stakeholders it needed.
- It carried out its inquiry in *real time*, as the investigation it was supervising had not yet been finalised.
- It was activated without the need to *exhaust all domestic remedies*, within the

framework of the precautionary measures procedures, which prevented some additional violations of the victims' rights from occurring.

- It supervised a *complex criminal investigation* where its main interlocutors were the actual justice officials.
- It was a *collegial body*, which has important advantages over those comprised of only one person, when it comes to dealing with wearing situations.
- It was an *interdisciplinary* mechanism enriched by the complementarity of its members' profiles and specialisations.
- It had adequate *funding* from the state, which allowed it to do its work free from budgetary restrictions.
- It could go to *third parties for expert opinions*, which gave the investigation more sustenance and depth.
- It assembled a small *local support team* made up of serious and committed Mexican professionals, which helped contextualise the Group's work more quickly.
- It maintained, at all times, *a balance between its capacity to engage in high-level dialogue with the state and its proximity to the victims and their representatives*, which was always sustained with honesty and transparency.
- It became a social actor and strengthened its voice by using the media strategically and adopting language of justice more than one of diplomacy.

Based on this, the GIEI's experience leaves valuable lessons on the potential and constant evolution of international human rights mechanisms.

From another point of view, it is necessary to reflect on certain questions raised by the experience. For example, how do we enhance the attention to the people and institutions who remain in their places of origin after the intervention of international protection mechanisms, when these mechanisms affect powerful interests by exposing networks of corruption?

This dilemma becomes particularly important in relation to the victims. However, it also applies to the organisations involved in the process that, in strictly political terms, become the object of and heirs to the animosities that this kind of exercise can generate. This has happened, for example, in the case of the Center Prodh, which had to face adverse situations when it was identified in Mexico as one of the main proponents of the GIEI experience.³⁷ Fortunately, the GIEI was careful to not give visibility to the work of national human rights defenders. However, this is one issue for which too much discussion will never be enough.

5 • Conclusion: the struggle for justice and the truth continues

Sadly, the whereabouts of the 43 students who disappeared on 26 September 2014 are still unknown. The fathers and mothers continue on with their tireless struggle to discover the location of the young men.

Alongside the Ayotzinapa case, the crisis of human rights violations in Mexico continues. Even so, and without trying to sidestep this reality, the contributions of the GIEI are undeniable. Its recommendations outline the path to finding justice and truth on the disappearance of the college students. On the memory of the victims and the collective memory, the GIEI has left an unforgettable impression. Thanks to the GIEI, we now know more about the facts than when the federal government claimed to have arrived at the “historical truth”.

Furthermore, it has had tremendous impacts on the public agenda. It opened new spaces for discussion on human rights in Mexico and generated proposals to end the crisis of violations the country is experiencing and, more specifically, in relation to the disappearances.

The family members of the 43 missing persons, together with the loved ones of the 6 people who were executed and the more than 40 injured, continue to demand that justice – not impunity – and the truth – not lies – prevail. Both GIEI reports have given solid tools to the fathers and mothers to keep on fighting and showed them that reason and the scientific evidence are on their side.

However, in its last few days in Mexico, the GIEI itself stated that the task remained unfinished and reminded us that the obligation to establish the truth about the facts lies fundamentally with the state. While expressing his regret for the persistent lack of clarification and referring to the state’s responsibility in this, one of the group’s members, Francisco Cox, stated:

The truth is that I feel very sad about not being able to tell the families where their sons are, but there is also a certain satisfaction and peace of mind for having done everything that could be done [...] we are leaving behind a document that can be useful and can guide some legal changes to improve the efficiency of investigations in highly complex cases. [...] When one provides technical assistance, the one who requests the technical assistance should want to be technically assisted. The state told us, in fact, that it no longer needed our help.³⁸

The testimonies compiled by the GIEI in its second report confirm this sensation of ambivalence. On one hand, the fact that these voices have not been lost and were recuperated in this innovative exercise of international supervision is one of the most important aspects of the GIEI. On the other hand, the pain that the testimonies transmit point to everything that remains to be done.

In the words of one of the fathers,

For us, actually, the absence of our son has been very painful... this blow should not be wished on anyone. It hurts us minute by minute, second by second, and inflicts very deep wounds...when a family member dies, it is less: we take him, carry him, put him in

*the coffin, take him to be buried and we go see him whenever we want. But in the case of our son, not knowing anything - well, it is strong. The pain is strong.*³⁹

Despite this reality of the pain, in its passage through Mexico, the GIEI has made important contributions to the human rights agenda. It is a novel experience in international supervision, which can be useful to consider when thinking of innovative approaches to fighting impunity, which is endemic in many Latin American countries.

As the GIEI stated in its last report, “the Ayotzinapa case has put the country at a crossroads, from which it has yet to emerge, and to do so, the rule of law and the defence, guarantee and respect for human rights need to be strengthened.”⁴⁰ Ayotzinapa is an open wound that only justice and the truth can heal.

NOTES

1 • The “*escuelas normales rurales*” or rural teaching colleges were created immediately after the Mexican Revolution to train teachers to teach literacy to the poorest peasant and indigenous communities.

2 • The state of Guerrero is located in southern Mexico and the city of Iguala, in the north of the state. Over the past decade, Guerrero has held one of the lowest rankings in the country on the Human Development Index and one of the highest in relation to violence and crime. Its human rights record is the worst in the country.

3 • Their names are: 1) Felipe Arnulfo Rosa, 2) Benjamín Ascencio Bautista, 3) Israel Caballero Sánchez, 4) Abel García Hernández, 5) Emiliano Alen Gaspar de la Cruz, 6) Doriam Gonzáles Parral, 7) Jorge Luis Gonzáles Parral, 8) Magdaleno Rubén Lauro Villegas, 9) José Luis Luna Torres, 10) Mauricio Ortega Valerio, 11) Jesús Jovany Rodríguez Tlatempa, 12) Abelardo Vázquez Peniten, 13) AdanAbraján de la Cruz, 14) Christian Tomás Colón Garnica, 15) Luis Ángel Fransico Arzola,

16) Carlos Lorenzo Hernández Muñoz, 17) Israel Jacinto Lugardo, 18) Julio César López Patolzin, 19) José Ángel Navarrete González, 20) Marcial Pablo Baranda, 21) Miguel Ángel Mendoza Zacarías, 22) Alexander Mora Venancio, 23) Julio César Ramírez Nava, 24) Luis Ángel Abarca Carrillo, 25) Jorge Álvarez Nava, 26) José Ángel Campos Cantor, 27) Jorge Aníbal Cruz Mendoza, 28) Giovanni Galindes Guerrero, 29) Jhosivani Guerrero de la Cruz, 30) Cutberto Ortiz Ramos, 31) Everardo Rodríguez Bello, 32) Christian Alfonso Rodríguez Telumbre, 33) Martín Getsemaniy Sánchez García, 34) Jonás Trujillo González, 35) José Eduardo Bartolo Tlatempa, 36) Leonel Castro Abarca, 37) Miguel Ángel Hernández Martínez, 38) Carlos Iván Ramírez Villarreal, 39) Jorge Antonio Tizapa Legideño, 40) Antonio Santana Maestro, 41) Marco Antonio Gómez Molina, 42) César Manuel Gonzáles Hernández and 43) Saúl Bruno García.

4 • Their names are: students Daniel Solís Gallardo, Julio César Ramírez Nava and Julio César Mondragón

Fontes, whose body appeared with dreadful signs of torture. The others were: Blanca Montiel Sánchez; a young soccer player from the Avispones de Chilpancingo team, David Josué García Evangelista; and the team's bus driver, Víctor Manuel Lugo Ortiz.

5 • The list of wounded people include Aldo Gutiérrez Solano, who is still in a coma today, and Edgar Andrés Vargas, whose jaw was shattered by a bullet and who is still undergoing several surgeries.

6 • Miguel Agustín Pro Juárez Human Rights Center (Center Prodh).

7 • For more information, see "NOTA INFORMATIVA: Mesa de Implementación de Medidas Cautelares Solicitadas por la CIDH," TLACHINOLLAN, October 13, accessed June 6, 2017, <http://www.tlachinollan.org/nota-informativa-mesa-de-implementacion-de-medidas-cauteleras-solicitadas-por-la-cidh/#prettyPhoto>.

8 • The minutes of the meeting signed by the families and the president of the republic can be consulted at: "Reunion," Animal Político, n. d., accessed June 6, 2017, <https://es.scribd.com/document/244955468/Documento-Reunion-doc>.

9 • IACHR announced the GIEI's composition in a press release available at: "Interdisciplinary Group of Experts to Launch at IACHR Headquarters its Work on the Case of the Students of Ayotzinapa, Mexico", OAS, January 30, 2015, accessed June 6, 2017, http://www.oas.org/en/iachr/media_center/PReleases/2015/008.asp.

10 • For more on the press conference during which this term was coined, see: "Press Conference of the Attorney General of the Republic, Jesús Murillo Karam," PGR, November 7, 2014, accessed June 6, 2017, <http://www.pgr.gob.mx/prensa/2007/bol14/Nov/b21214.shtm>.

11 • In the first statements they gave after the release of this version, the families gathered at Center Prodh declared: "La VERDAD HISTÓRICA es la de los padres de LOS 43," YouTube video, 56:07, published by Mr. Politikon Zoon, January 28, 2015, <https://www.youtube.com/watch?v=0R7JlXPmMVM>.

12 • The protests held in response to this

announcement are among the largest in the recent history of Mexico. See: Astrid Rivera, Pedro Villa y Caña and Ana Anabitarte, "Claman Justicia en 33 Países." *El Universal*, November 21, 2014, accessed June 6, 2017, <http://archivo.eluniversal.com.mx/nacion-mexico/2014/impreso/claman-justicia-en-33-paises-220552.html>. Stella Calloni, Enrique Gutiérrez and Armando G. Tejada, "Multitudinarias Movilizaciones de Solidaridad en Ciudades del Mundo." *La Jornada*, November 21, 2014, accessed June 6, 2017, <http://www.jornada.unam.mx/2014/11/21/politica/010n1pol>. "#20NovMx Justicia para Ayotzinapa," *El País*, November 21, 2014, accessed June 6, 2017, http://internacional.elpais.com/internacional/2014/11/21/actualidad/1416529393_422883.html.

13 • The GIEI's press releases are available in: Interdisciplinary Group of Independent Experts, Ayotzinapa, 2017, accessed June 6, 2017, <http://prensagieiyotzi.wix.com/giei-ayotzinapa#!prensa/c1rv5/page/2>.

14 • To consult the first report of the GIEI, see: "Informe Ayotzinapa", Interdisciplinary Group of Independent Experts (GIEI), 2016, accessed June 6, 2017, <https://drive.google.com/file/d/0B1ChdondilaHNzFHaEs3azQ4Tm8/view?pref=2&pli=1>.

15 • Some of the repercussions in the media can be found in: Paulina Villegas, "Experts Reject Official Account of How 43 Mexican Students Were Killed." *The New York Times*, September 7, 2015, accessed June 6, 2017, <https://www.nytimes.com/2015/09/07/world/experts-reject-official-account-of-how-43-mexican-students-vanished.html>; Juan Paullier, "México: Así Reaccionó el Gobierno al Informe sobre los Estudiantes de Ayotzinapa." *BBC Mundo*, September 6, accessed June 6, 2017, http://www.bbc.com/mundo/noticias/2015/09/150906_mexico_estudiantes_informe_ayotzinapa_giei_reaccion_gobierno_jp.

16 • Some of the main declarations were published in: "En la Víspera del Segundo Aniversario del Caso Ayotzinapa, el Gobierno Mexicano Continúa

Aferrándose a la ya Desacreditada 'Verdad Histórica,'" WOLA, September 22, 2015, accessed June 6, 2017, <https://www.wola.org/es/2016/09/en-la-vispera-del-segundo-aniversario-de-ayotzinapa-el-gobierno-mexicano-continua-aferrandose-la-ya-desacreditada-verdad-historica/>; "Organizaciones de Derechos Humanos expresan apoyo para avanzar en la investigación de los 43 Desaparecidos en México," Amnistía Internacional et al., December 8, 2015, accessed June 6, 2017, <http://amnistia.org.mx/nuevo/2015/12/08/organizaciones-de-derechos-humanos-expresan-apoyo-para-avanzar-en-la-investigacion-de-los-43-desaparecidos-en-mexico/>.

17 • The complete video of the press conference, which is an important testimony of the impacts that the official version's lies had on the families, can be viewed at: "Familias Ayotzinapa se pronunciarán sobre las revelaciones del GIEI de la CIDH," YouTube video, 1:36:40, published by Miguel Agustín Pro Juárez Human Rights Center, September 6, 2015, <https://www.youtube.com/watch?v=UlmW0msPjuU>.

18 • See: Enrique Peña Nieto, Twitter message, September 6, 2015, 12:34, <https://twitter.com/search?q=from%3AEPN%20since%3A2015-09-05%20until%3A2015-09-07&src=typd&lang=es>.

19 • The message is available at: "Palabras de la Procuradora General de la República, Arely Gómez González," PGR, September 6, 2015, accessed June 6, 2017, <https://goo.gl/KaBgi>.

20 • The 8 points submitted to president can be found in: "Familias de Ayotzinapa Presentan 8 Exigencias Esenciales a Peña Nieto," Centro Prodh, September 24, 2015, accessed June 6, 2017, http://centroprodh.org.mx/index.php?option=com_content&view=article&id=1650:2015-09-24-18-58-03&catid=209:front-rokstories&lang=es.

21 • For more information on the unilateral points presented by the president's office, see: "Peña Presenta 6 Compromisos; Padres de los 43 Dicen que es Insuficiente," Milenio, September 24, 2015, accessed June 6, <https://www.nytimes.com/2015/09/07/world/experts-reject-official-account-of-how-43-mexican-students-vanished.html>.

22 • For more information on these conditions, see: "Firman Estado Mexicano y GIEI Compromisos para dar seguimiento al trabajo sobre el Caso Ayotzinapa," OAS, October 20, 2015, accessed June 6, 2017, <https://www.oas.org/es/cidh/actividades/giei/GIEI-boletin-2015-10-20.pdf>.

23 • The declarations of the Secretary of National Defence on this situation can be found in: "No Voy a Permitir que Interroguen a Mis Soldados' Por Caso Ayotzinapa: Cienfuegos," Aristegui Noticias, October 6, 2015, accessed June 6, 2017, <http://aristeguinoticias.com/0610/mexico/no-voy-a-permitir-que-interroguen-a-mis-soldados-por-caso-ayotzinapa-cienfuegos/>.

24 • Second GIEI Report, p. 572.

25 • See, for example, the press release circulated by the following national and international organisations: Centro de Estudios de Derecho, Justicia y Sociedad (De Justicia), Centro de Estudios Legales y Sociales (CELS), Centro por la Justicia y el Derecho Internacional (CEJIL), Fundación para el Debido Proceso (DPLF), Grupo de Trabajo para Asuntos Latinoamericanos (LAWGEF), Oficina en Washington para Asuntos Latinoamericanos (WOLA), Open Society Justice Initiative, and Robert F. Kennedy Human Rights, which is available at: "OSC Internacionales Denuncian Campaña de Desprestigio Contra GIEI en Caso Ayotzinapa," Centro Prodh, February 5, 2016, accessed June 6, 2017, http://www.centroprodh.org.mx/index.php?option=com_content&view=article&id=1772%3A2016-02-05-17-17-35&catid=209%3Afront-rokstories&lang=es.

26 • To consult the press release, see: "CIDH Expresa Confianza y Respaldo a Expertas y Expertos Independientes Miembros del GIEI," OAS, January 28, 2016, accessed June 6, 2017, <http://www.oas.org/es/cidh/prensa/comunicados/2016/006.asp>.

27 • The GIEI proposed the use of LIDAR technology in its November 6, 2015 bulletin, which is available at: "Presenta el GIEI las Características de la Segunda Parte de su Mandato y los Desafíos

que ha Enfrentado para su Ejecución,” GIEI, November 6, 2015, accessed June 6, 2017, <http://prensagieiyotzi.wixsite.com/giei-ayotzinapa/single-post/2015/11/06/Presenta-el-GIEI-las-caracter%C3%ADsticas-de-la-segunda-parte-de-su-mandato-y-los-desaf%C3%ADos-que-ha-enfrentado-para-su-ejecuci%C3%B3n>.

28 • See, for example: Jan Martínez Ahrens, “La Comisión de Expertos Acusa al Gobierno de Obstruir el Caso Ayotzinapa.” *El País*, April 25, 2016, accessed June 6, 2017, http://internacional.elpais.com/internacional/2016/04/24/mexico/1461469508_584523.html; Kirk Semple y Elisabeth Malkin, “Inquiry Challenges Mexico’s Account of How 43 Students Vanished.” *The New York Times*, April 24, 2016, accessed June 6, 2017, <https://www.nytimes.com/2016/04/25/world/americas/inquiry-challenges-mexicos-account-of-how-43-students-vanished.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&r=0&ref=nyt-es>; David Agren, “Outside Experts Condemn Mexico’s Inquiry into 43 Missing Students.” *The Guardian*, April 25, 2016, accessed June 6, 2017, <https://www.theguardian.com/world/2016/apr/24/mexico-43-missing-students-investigation-iachr-report>.

29 • See, for example: “Mensaje del Vocero del Alto Comisionado de las Naciones Unidas para los Derechos Humanos: Rupert Colville,” OHCHR, April 2016, accessed June 6, 2017, http://www.hchr.org.mx/index.php?option=com_k2&view=item&id=810:giei-mensaje-del-vocero-del-alto-comisionado-de-las-naciones-unidas-para-los-derechos-humanos-rupert-colville&Itemid=266; José Miguel Vivanco, “Carta a la Procuradora General de la República sobre la Crisis de Derechos Humanos en México.” Human Rights Watch, April 28, 2015, accessed June 6, 2017, <https://www.hrw.org/es/news/2015/04/28/carta-la-procuradora-general-de-la-republica-sobre-la-crisis-de-derechos-humanos-en>.

30 • See, for example: “Entrega el GIEI Ruta de Seguimiento sobre su Trabajo en la Investigación del Caso Ayotzinapa,” GIEI, May 1, 2016, accessed June 6, 2017, <http://prensagieiyotzi.wixsite.com/>

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31 • The IACHR publicly announced its decision in a communiqué available at: “Informe sobre el 157º Período de Sesiones de la CIDH,” OAS, June 13, 2016, accessed June 6, 2017, <http://www.oas.org/es/cidh/prensa/comunicados/2016/049A.asp>.

32 • To consult the resolution, see: “Comisión Interamericana de Derechos Humanos – Resolución 42/16,” CIDH, accessed June 6, 2017, <https://www.oas.org/es/cidh/decisiones/pdf/2016/MC409-14-ES.pdf>.

33 • “Informe Ayotzinapa,” GIEI, 266.

34 • The full expert opinion is available to the public at: “Dictamen Sobre el Basurero de Cocula,” Argentine Forensic Anthropology Team, February 2016, accessed June 6, 2017,; <http://www.eaaf.org/files/dictamen-sobre-el-basurero-cocula-feb2016.pdf>.

35 • “Informe Ayotzinapa,” GIEI, 321.

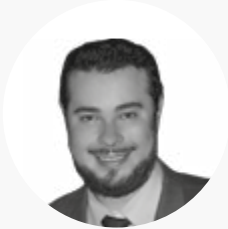
36 • For example, the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Guatemala recently organised a workshop on the *Lessons learned on international cooperation for the protection of human rights and the fight against impunity* in which the differences and similarities between the CICIG of Guatemala, the OHCHR in Colombia, the GIEI and the Mission to Support the Fight Against Corruption and Impunity in Honduras (MACCIH) were analysed, while, of course, taking into account the differences in mandates and contexts.

37 • See, for example: <http://www.eluniversal.com.mx/entrada-de-opinion/columna/roberto-rock/nacion/2016/04/1/ayotzinapa-el-cerco>.

38 • Cfr. “Nos vamos de México con mucha tristeza, dicen expertos del GIEI,” *Animal Político*, April 26, 2016. See: <http://www.animalpolitico.com/2016/04/nos-vamos-de-mexico-con-mucha-tristeza-dicen-expertos-del-giei/>.

39 • “Informe Ayotzinapa,” GIEI, 331.

40 • “Informe Ayotzinapa,” GIEI, Introducción.



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CRIMES AGAINST HUMANITY IN A DEMOCRATIC CONTEXT

Marlon Alberto Weichert

- *The systematic pattern of violence in Brazil* •

ABSTRACT

Although Brazil appears to enjoy democratic normality, the reality is that violence affects one segment of the population in a systematic and generalised way: young, black, poor people. The author presents data collected in annual research on violence in the country, providing evidence that this social group is the preferred victim (of homicides in general, of police violence and of mass imprisonment). The systematic nature of this violence, as well as the failure of the Brazilian state to reverse this it, are elements that make it possible to characterise this situation within the concept of crime against humanity as described in the Rome Statute and signed by Brazil in 2002.

KEYWORDS

Violence | Young, black and poor | Crimes against humanity | Brazil

1 • Introduction

The concept of a crime against humanity was developed primarily in the ambit of international criminal law after the Second World War in response to the grave violations of human rights perpetrated by the Nazi government in Germany. According to the rules of war crimes in place at that time, the persecution of segments of the civil population in their own country was not punishable. The concept of a crime against humanity was applied to prevent the persecution of national citizens from going unpunished.¹ The first international document to establish the concept was the Statute of the Nuremberg Trials.²

This definition was gradually refined, with adjustments, over the course of the second half of the twentieth century, until the 7th article of the Rome Statute in 1998, which created the International Criminal Court and which was ratified and promulgated by Brazil in 2002.³ It defined that:

Crimes against Humanity

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;*
- (b) Extermination;*
- (c) Enslavement;*
- (d) Deportation or forcible transfer of population;*
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) Torture;*
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;*
- (i) Enforced disappearance of persons;*
- (j) The crime of apartheid;*
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

Until recently the legal community linked the practice of crimes against humanity to the context of armed conflict and authoritarian regimes (dictatorships). However, a new front is now being explored in international criminal law, in terms of countries that, whilst appearing to be in a situation of democratic normality, show conditions of systematic or generalised violence against specific segments of the population.

In the ambit of the International Criminal Court, the Office of the Prosecutor has conducted preliminary examinations into the possible classification of crimes against humanity with regards to repressive violence in the Ukraine in public protests carried out against the government in 2014. Another example is the case of Honduras where the Office of the Prosecutor examined incidences of violence that occurred between 2010 and 2014, sparked in the wake of the *coup d'état*, but which continued even after democratic “normality” had been restored. The Prosecutor closed the case on the basis that there was not sufficient evidence that the serious acts were part of an attack against sectors of the population,⁴ but emphasised that the situation in Honduras was borderline, in other words it could almost be considered a crime against humanity.

In 2016, the international organisation Open Society Foundations (OSF), in partnership with five Mexican human rights institutions,⁵ published a report under the name “Undeniable Atrocities – Confronting Crimes against Humanity in Mexico”,⁶ the result of a four-year long piece of research in the country into the nature and extent of the persisting violence. They concluded that there are reasons to believe that, in line with analytical standards used by the Prosecutor’s Office at the International Criminal Court, both the state and non-state players had committed crimes against humanity. According to the report, in nine years (between December 2006 and 2015), 150 thousand people were intentionally killed in Mexico by the drug cartels and by the federal and state security forces, in addition to the perpetration of numerous cases of enforced disappearances and torture.⁷

In this article we used the recent interpretation of both the International Criminal Court and also of non-governmental human rights organisations regarding the above mentioned cases and reflected on the situation of violence in Brazil and the risk of it also being classified as the practice of crimes against humanity.

2 • Violence in Brazil

Between 2004 and 2007 approximately 206,000 people were victims of homicide in Brazil, the same figure as in 62 armed conflicts around the world⁸ and much higher than the Mexican example referred to by the OSF.

Brazil, “a country without conflicts about religion or ethnicity, colour or race, without territorial or frontier disputes, without civil war or violent political confrontation,

manages to slaughter more citizens than most of the armed conflicts in the world.”⁹ In fact, according to World Health Organisation data, in 2012 Brazil was responsible for around 13.5 per cent of all homicides committed in the world (although it represents 2.8 per cent of the world’s population) and around 38.85 per cent of those perpetrated in Latin American countries.¹⁰ The country is the 7th most violent in the world, after El Salvador, Trinidad and Tobago, Colombia, The Virgin Islands (USA), Guatemala and Venezuela, all of which are in South and Central America and is the “champion” of deaths by homicides among the twelve most populous countries.¹¹

Even more relevant, for the purposes of the concept of crimes against humanity is that violence in Brazil is selective. According to the Brazilian Forum for Public Security, in 2015 54 per cent of victims of violent death were young people.¹² The 2015 Map of Violence research confirmed this panorama and showed that in 2012, 285 per cent more young people (15 to 29 years old) were victims of homicide than people who were not young. In other words, “for every person who is not young and who dies, around four young people die.”¹³ It is also selective in terms of skin colour, as 73 per cent of fatal victims are “*preto*” or “*pardo*” people.¹⁴

In short, violence is heavily weighted against young black people, almost always poor, who are the victims of homicide in 41 percent of cases,¹⁵ with around 2.5 young black people for every young white person, according to the 2012 Map of Violence,¹⁶ while 51 per cent of the population in the country is black.¹⁷

In addition, the country has high incarceration rates with 607,000 people in prison in 2014, placing it as the fourth highest prison population on the planet, behind the United States,¹⁸ China¹⁹ and Russia.²⁰ In terms of the incarceration rate, it was in thirty-fourth place among 222 countries and territories, with 300 prisoners for every hundred thousand inhabitants.²¹ Among the twenty countries that have the highest populations of prisoners, it is fourth behind the United States,²² Russia²³ and Thailand.^{24 25}

It is not a coincidence that young, black poor people are the most affected. In fact 67 per cent of the prison population is made up of black people and 56 per cent are young people between 18 and 29 years of age, although this age group represents only 21.5 per cent of the whole population.²⁶ There are 2.5 young people in prison for every person who is not young.²⁷ Finally 68 per cent have not completed basic schooling and 15 per cent have never been to school, which points to their social background.²⁸

State violence is superimposed on this scenario. In 2015, 3,345 civilians were killed by the police, more than 9 people per day, 5.7 per cent of the total number of deaths.²⁹ Although qualitative analyses of the national scope are not available on the profile of victims of state violence, a recent study carried out in the municipality of São Paulo, showed that 64 per cent of deaths in police interventions were black people³⁰ (although black people represent only 37 per cent of the municipal population).³¹ Furthermore, 85 per cent of those killed are young people, under 30 years of age. In every 100,000 young

people who live in the city, 21 were killed by the police in 2014. The rate for those over 30 years old is 2 in every 100 thousand inhabitants.

Therefore, there is one social group – young, black, poor people – who suffer the three forms of violence: they are the preferred victims for homicides in general, homicides practised by public forces and also make up the majority of those imprisoned.

3 • Similarities with crimes against humanity

As seen above, the most severe violence in Brazil, either resulting from general criminality or from state intervention, targets practically the same segment of society – the young, black, poor population. The vulnerability of this youth has been highlighted by a number of social sectors as a silent “genocide”.³² The National Congress, by means of Parliamentary Commissions of Inquiry within the Chamber of Deputies and the Federal Senate pinpoint this.

The Parliamentary Commission of Inquiry in the Chamber of Deputies, assigned to ascertain the causes, reasons, consequences, social and economic costs of violence, death and disappearance of young, black poor people in Brazil, known as the “Parliamentary Commission of Inquiry on Violence against Young, Black, Poor people”, concluded in its report published in July 2015, that:

The statistics and arguments on the myth of institutional racial cordiality, previously presented, provide the context and indicators that poor, black people in this country, particularly its youth, have been victim of a particular, different type of genocide.

The crime as detailed in the 1956 Law, number 2889 which led to the consolidation of the provisions of the International Convention on the Prevention and Punishment of the Crime of Genocide, established in Paris on 11 December 1948 at the Third Session of the General Assembly of the United Nations (Decree no 30.822. of 1952) cannot legally be cited. Here follows sociological recognition, testifying to the outrage at the unfettered killing of young, black poor people in Brazil and the condemnation of this population in the absence of policies to foster their well-being. (...)

The genocide encountered by this Commission is the symbolic killing of an entire group in the midst of an absurd number of actual deaths.³³

Likewise, the Federal Senate’s Parliamentary Commission of Inquiry “Youth Murder” concluded in its Final Report, presented in June 2016, that:

We have verified through the work of the Commission that, although Brazil stands out for the total number of homicides

among young people and that violence has spread to all cities and all social groups, there is a preferred victim, the number of deaths in this group being startling and worrying.

From the outset the Commission encountered a cruel and undeniable reality: the Brazilian state is directly or indirectly provoking the genocide of the young black population.

Once the work was complete, all the public hearings had been carried out, when all the specialists had been heard and numerous documents collected, this bleak picture became clear and we could not find any national or regional public policy aimed at analysing and changing it.³⁴

In weighing up this grave scenario, it does not seem – in the light of international law, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and the Rome Statute – that the situation described falls strictly into the legal definition of genocide, as this demands that action is taken “with the intention to destroy, entirely or in part, one national, ethnic, racial or religious group”. Although it is recognised that there are systematic murders of poor people in the city peripheries, the subjective aspect of an “intention to destroy an ethnic or racial group” is an obstacle to defining this as an international crime.

There are, however, serious reasons for concern in terms of the Brazilian authorities’ repeated failure to recognise and act to avoid a systematic pattern of violent acts against this civil population from continuing to operate and from increasing. In this sense a risk is emerging of this situation becoming such that it could be defined as a crime against humanity.

As seen, article 7, of the Rome Statute defines the hypothesis of a crime against humanity as any act of *homicide* or of *persecution of a group or community that can be identified, for political, racial reasons or on the basis of other criteria universally recognised as unacceptable in international law committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*

Paragraph 2, of article 7, states that:

a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(...)

g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

According to the jurisprudence of the International Criminal Court, these definitions imply that the following requirements must be present in order to define a crime against humanity: (a) an attack directed against a civil population, (b) a state or organisational policy, (c) that the attack is widespread or systematic, (d) a connection between the individual act and the attack and (e) knowledge of the attack by the agent.³⁵

It is not within the scope of this article to carry out an extensive analysis of the definition cited here nor of its relevance to the actual situation of Brazilian state violence. However, it should be noted that the repetition of homicides and other violent acts faced by the poor, predominantly black youth,³⁶ in large Brazilian cities appears to be adopting a systematic pattern.³⁷ In effect, in the wording of the International Criminal Court, systematic refers to the “organised nature of acts of violence and the unlikelihood that they are random occurrences”. It goes on to say that a systematic attack can often be identified in the practise of a pattern of crimes, in the sense that the regular repetition of similar criminal conducts is not accidental.³⁸ In the case under examination the violent death of black and brown youths appears to have become systematic, especially when it is considered that the figure has now reached 23,000 dead, the majority direct victims of the state.

The term “attack” is not restricted to military operations. The International Criminal Court understands this term to refer to a situation in which the multiple commission of violent acts as described in article 7(1) of the Rome Statute involves, in other words, a campaign or operation carried out against the civil population. Victims of the attack may be groups that can be identified according to nationality, ethnicity or some other distinguishing feature,³⁹ which could include the category of youths who are killed in poor neighbourhoods or on the outskirts of Brazilian cities, which are largely inhabited by black and brown people.

Finally, there is an essential requirement that conduct is in accordance with, or complies with, a state or organisational policy, in committing the attack.⁴⁰ When the International Criminal Court applies this rule, it has been decided that the policy does not necessarily need to be expressed, precisely or clearly. It can be inferred by the occurrence of a series of events, *inter alia* (i) a generic history of circumstances and a wide political context within which the crimes are committed, (ii) coordinated military offensives, repeated in a temporal and geographical way and (iii) the scale of acts of violence perpetrated among others.⁴¹

Here it seems rash to state that the Brazilian state – or organisations tolerated by it – have an active policy to systematically persecute the civil population or black youths. There is no indication that high level public agents incite or disseminate this type of state intervention. However, it must be noted that the Assembly of States Parties in September 2002, defined the so-called “Elements of Crimes” of the Rome Statute and on the topic of the *policy to commit an attack*, highlighted

that this clause requires that the state or an organisation actively promote or encourage such attacks. However, in a footnote it states that in exceptional circumstances this policy may be implemented by omission. The simple omission by the absence of action would not be sufficient, but rather a deliberate failure to act, which would consciously prompt the said attack.⁴²

In the case of Brazil it is relevant to note that two Parliamentary Commissions of Inquiry in the National Congress point to the omission of the state in curbing violence against black youths, as well as the occurrence of the systematic execution of this population by agents of public security forces. The same point was made by The National Council for Human Rights, a collegiate body, created by law to function as a guardian of human rights at a national level.⁴³ Federal and state governments also receive frequent demands and complaints from civil society on these incidents and on the systematic practice of extermination and imprisonment of this population.

The state knows and recognises that violent persecution occurs – through murder and mass imprisonment, in inhuman conditions – of the young, black male population and despite having the legal right to act, fails to adopt specific measures. This persistent, repeated failure reveals a tolerance towards this violent persecution, or, in the language of the International Criminal Court, a deliberate failure to take action to change this scenario. It is quite clear that this failure, or tolerance, produces the effect of encouraging and feeding into the spiral of violence. A policy of non-action exists and is often disguised in the reinforcement of strategies that have proved to be either ineffective or to compound the situation. The death of a black youth, usually poor, seems to be less important to public authorities. Failure to act in the face of such a serious, known situation is a political option.

The continued failure by the authorities to foster changes in policies on crime, public security and justice, or in the way in which these are carried out, could be seen as representing a deliberate decision to maintain a policy of persecution of the young, poor/black civil population, according to the interpretation of the “Elements of Crimes” and the jurisprudence of the International Criminal Court.

Therefore, this persistent failure to act could qualify – little by little – as a policy to encourage the continuity of violent, systematic attacks on a civil population, approaching the definition in article 7 (1) and (2) of the Rome Statute and interpreted by the States Parties in the document “Elements of Crimes”.

NOTES

- 1 • William J. Fenrick, "Should Crimes Against Humanity Replace War Crimes?" *Columbia Journal of Transnational Law* 37, no. 3 (1999): 767-85.
- 2 • "The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations: (...) (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
- 3 • "Decreto nº 4.388, de 25 de Setembro de 2002," Brazil, Presidency of the Republic, September 25, 2002, accessed May 21, 2017, http://www.planalto.gov.br/ccivil_03/decreto/2002/D4388.htm.
- 4 • According to the Office of the Prosecutor's report: "Against a backdrop of high levels of violent crime and the prevalence of large numbers of criminal groups, the Office found scant information indicating links and common features between the alleged crimes, including in relation to their characteristics, nature, aims, targets, alleged perpetrators, times and locations, so as to demonstrate the existence of a 'course of conduct' within the meaning of article 7(2) (a) of the Statute. In this respect, the alleged crimes fail to evidence a certain pattern of behaviour indicating that they were committed as part of a campaign or operation carried out against the civilian population." See "Report on Preliminary Examination Activities (2015)," International Criminal Court, November 12, 2015, Accessed April 4, 2017, p. 278, <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>.
- 5 • Namely: The Mexican Commission for the Defence and Promotion of Human Rights, The Diocesan Centre for Human Rights Fray Juan de Larios, I(dh)eas Strategic Litigation in Human Rights, Fundación para la Justicia y el Estado Democrático de Derecho y Ciudadanos en Apoyo a los Derechos Humanos-CADHAC.
- 6 • "Undeniable Atrocities – Confronting Crimes against Humanity in Mexico," Open Society Foundations, August 8, 2016, accessed April 4, 2017, <https://www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-2nd-edition-20160808.pdf>.
- 7 • *Ibid*, p. 10.
- 8 • According to the 2014 Map of Violence – Homicides and Youth in Brazil there were 206,005 homicide victims in Brazil and 208,349 deaths in armed conflict. See Julio Jacobo Waiselfisz, "Map of Violence 2014 – Homicides and Youth in Brazil." Brazil, Secretary General of the Presidency of the Republic, 2014, accessed May 21, 2017, http://www.mapadaviolencia.org.br/pdf2014/Mapa2014_JovensBrasil_Preliminar.pdf.
- 9 • Julio Jacobo Waiselfisz, "Map of Violence 2012 – new patterns of violent murder in Brazil." Instituto Sangari, 2011, p. 237, May 21, 2017, http://www.mapadaviolencia.org.br/pdf2012/mapa2012_web.pdf.
- 10 • WHO data presented some differences in relation to those published by the Brazilian Forum for Public Security (FBSP) and the Map of Violence, on which this research was based. However, these are extremely valuable for comparative analyses with other countries. According to the WHO report there were around 474,000 murders in the world in 2012 and 165,617 in the countries of the Americas classified as low or average income. Brazil had 64,357 homicides. This figure is higher than the number published by the FBSP (50,241). See "Global Status Report on Violence Prevention 2014," World Health Organization, 2014, p. 231, accessed May 21, 2017, <http://apps.who.int/iris/handle/10665/145086>.
- 11 • Waiselfisz, 2014 *Map of Violence*, p. 94.

- 12 • Brazilian Forum for Public Security (FBSP), *Anuário Brasileiro de Segurança Pública 2016* (Sao Paulo: Brazilian Forum for Public Security, 2016): 6.
- 13 • Julio Jacobo Waiselfisz, "2015 Map of Violence – Death by fire arms." Brazil, Secretary General of the Presidency of the Republic, 2015, p. 65, accessed May 21, 2017, <http://www.mapadaviolencia.org.br/pdf2015/mapaViolencia2015.pdf>.
- 14 • Brazilian Forum for Public Security, 2016, 6. Editor's note: Black ("preto") and brown ("pardo") are used by the Brazilian Institute of Geography and Statistics as official categories of race and colour in the Brazilian national census.
- 15 • 2012 data. "Queremos Ver os Jovens Vivos!" ("We want to see young people alive") Amnesty International Brazil, 2015, accessed June 19, 2015, <https://anistia.org.br/entre-em-acao/peticao/chegadehomicidios/>.
- 16 • 2010 data. Julio Jacobo Waiselfisz, "2012 Map of Violence – The Colour of Homicide in Brazil." CEBELA, FLACSO, Secretary for Policies for the Promotion of Racial Equality for the Presidency of the Republic 2012 accessed May 21, 2017, http://www.mapadaviolencia.org.br/pdf2012/mapa2012_cor.pdf. The category Black used in this report represents a combination of the categories "black" and "brown", both used by the IBGE – Brazilian Institute of Geography and Statistics. See p. 8.
- 17 • "National Research on Penitentiary Information – INFOPEN – June 2014" Brazil, Ministry of Justice, 2015, p. 50, accessed May 21, 2017, <http://www.justica.gov.br/noticias/mj-divulgara-novo-relatorio-do-infopen-nesta-terca-feira/relatorio-dependencia-web.pdf>. Remembering that the category 'black' combines black and brown. Ibid, footnote 38.
- 18 • With 2.2 million prisoners.
- 19 • With 1.6 million prisoners.
- 20 • With 670,000 prisoners.
- 21 • International Centre for Prison Studies, *World Population List (10th edition)* (London: International Centre for Prison Studies, 2013).
- 22 • Rate of 698 per 100 thousand inhabitants.
- 23 • Rate of 468 per 100 thousand inhabitants.
- 24 • Rate of 457 per 100 thousand inhabitants.
- 25 • INFOPEN, 11-12.
- 26 • INFOPEN, 50; 48.
- 27 • "Map of Incarceration: The Youth of Brazil," Brazil, General Secretary of the Presidency of the Republic, 2014, p. 84, accessed May 21, 2017, <http://juventude.gov.br/articles/participatorio/0009/3230/mapa-encarceramento-jovens.pdf>.
- 28 • INFOPEN, 58.
- 29 • IBrazilian Forum on Public Security, 6.
- 30 • The rate of the black population killed by the police 11:100 thousand, while in the white population the rate is 4:100 thousand.
- 31 • See data from research in Jacqueline Sinhoretto, Maria Carolina Schlittler and Giane Silvestre, "Juventude e Violência Policial no Município de São Paulo," *Revista Brasileira de Segurança Pública* 10, no. 1 (February-March, 2016): 10-35.
- 32 • In the light of the situation of homicides among black youths, the non-governmental organisation, Amnesty International, through its Brazilian branch, launched a campaign "Young Black People Alive". See "We want to see young people alive!", Amnesty International, November 8, 2014, accessed September 25, 2016, <https://anistia.org.br/entre-em-acao/peticao/chegadehomicidios/>.
- 33 • "Final Report of the Parliamentary Commission for the Homicide Inquiry of Young, Black, Poor People," Chamber of Deputies, July 2015, accessed September 25, 2016, <https://goo.gl/rS3Wkd>.
- 34 • "Final Parliamentary Commission for Youth Murder Inquiry," Federal Senate, June 8, 2016, p. 145-6, accessed September 25, 2016, <http://www12.senado.leg.br/noticias/arquivos/2016/06/08/veja-a-integra-do-relatorio-da-cpi-do-assassinato-de-jovens>.
- 35 • See the decision "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya," International Criminal Court, March 31, 2010, paragraph. 79, p. 32, accessed May 21, 2017, <https://www.icc-cpi.int/pages/record.aspx?uri=854287>. All translations and references to this or other TPI decisions were done freely by

the underwriter.

36 • According to the IPEA – Institute of Applied Economic Research, in 2009, among the poorest 10% of the Brazilian population, black people constituted 72 per cent. See Instituto de Pesquisa Econômica Aplicada *et al.*, *Retrato das Desigualdades de Gênero e Raça* (4ª ed.) (Brasília: Ipea, 2011): p. 35.

37 • Note that in defining crime against humanity, attack may be either widespread or systematic. These elements are disjunctive. As affirmed by the TPI, “the underlying logic of this concept is ‘to separate isolated, random acts from the notion of crimes against humanity.’” International Criminal Court, “Situation in the Republic of Kenya,” paragraph. 94, p. 40-1.

38 • See the decision of the International Criminal Court, “Situation in the Republic of Kenya,” paragraph. 96, p. 42.

39 • See the decision of the International Criminal Court, Situation in the Republic of Kenya, paragraph. 80-1, p. 33.

40 • See the decision of the International Criminal Court, Situation in the Republic of Kenya, paragraph. 83, p. 34.

41 • See the decision of the International Criminal Court, Situation in the Republic of Kenya, paragraph. 87, p. 37. The report contains 11 different possible definitions of the policy.

42 • See “Elements of Crimes,” International Criminal Court, Article 7, footnote 6, February 1, 2001, accessed May 21, 2017, http://www.iccnw.org/documents/ElementsofCrimes_English.pdf: “Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.”

43 • See, for example, the recommendation issued by the National Council of Human Rights, considered at the 3rd Ordinary Meeting on 12 and 13 March 2015.



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THE IMPLEMENTATION OF UN TREATY BODY RECOMMENDATIONS¹

Vincent Ploton

- *An overview of latest developments and how to improve* •
- *a key mechanism in human rights protection*

ABSTRACT

The United Nations (UN) Committee against torture (CAT) recently adopted an innovative system to follow up, assess and grade the implementation of its recommendations to States. The new follow-up procedure largely draws on the precedent established by the UN Human Rights Committee, although it is also more comprehensive. It offers a range of new opportunities for human rights defenders and practitioners both to increase the visibility on the implementation of CAT recommendations, as well as encouraging States parties to do more to comply with those recommendations. The CAT and the Human Rights Committee now stand at the forefront of an emerging trend of improved assessment of the implementation of UN human rights bodies' recommendations. Despite the formidable potential which the evaluation and grading system provides, much remains to be done to make the most of them. They need to be better promoted and disseminated to a broad range of actors. They should also be harmonised and made more accessible.

KEYWORDS

UN treaty bodies | Torture and other ill treatment | Convention against torture | UN Committee against torture | Human Rights Committee | ICCPR | Human rights indicators | Implementation of international human rights treaties

1 • Setting the stage: a large gap between discourse and facts on implementation

United Nations (UN) human rights treaty monitoring bodies regularly pledge to improve the way they follow up on their recommendations (or “Concluding Observations” as per UN terminology) to States.² Civil society actors also regularly call and encourage treaty bodies to improve the way they support and track the implementation of these recommendations.³

The rhetoric on the need to improve the follow-up, evaluation and impact of the recommendations of UN human rights bodies is widespread and largely accepted. Yet what is required to transform discourse into facts is literally a paradigm shift. The UN human rights machinery and its governmental and non-governmental allies and counterparts need to radically rebalance their efforts and focus more on implementation and assessment and less on formulation of resolutions and recommendations.

Recommendations from Treaty Bodies (TBs) receive primary attention from both the drafters and their lobbyists at the stage of formulation, rather than on their actual implementation. The level of competition between human rights experts, diplomats, non-governmental organisations (NGOs), national human rights institutions (NHRIs) and lobbyists is quite high in terms of the formulation of recommendations, and these different actors compete to ensure that their issues of concern will be properly reflected in the recommendations. Yet similar efforts are very seldom taken to verify the level of implementation of these resolutions on the ground. The paradigm shift required to rebalance formulation with implementation and evaluation could involve UN TBs formulating less recommendations and instead dedicating more resources to assessing the evaluation of previous recommendations, and disseminating the results of their evaluation. The elaborate follow-up and grading systems adopted in recent years by several UN TBs, and the related score cards or grades reflecting the TBs’ assessment of the level of implementation of recommendations, provides a unique and remarkable exception in the current context of overwhelming absence of visibility on implementation of UN resolutions and recommendations.

The system was mainly pioneered by the UN Human Rights Committee (HR Ctte), which focuses on the level of compliance with some of its recommendations 12 to 18 months following the review of States parties. This innovative and effective system has been replicated and even improved by the Committee against torture (CAT) (see section 4 below). The TB system also provides valuable opportunities to “bring recommendations home” as part of follow-up visits in reviewed countries, as detailed in two specific case studies below.

2 • The Human Rights Committee's pioneering approach

2.1. Follow up to recommendations (or concluding observations)

In 2013, the UN HR Ctte, the body that monitors the implementation of the Covenant on Civil and Political Rights (ICCPR), was the first UN TB to adopt an elaborate system to follow-up and track the level of implementation on some of its recommendations (maximum four) to States.⁴

The procedure codified a practice which the Committee initiated in 2012.⁵ It is based on a simple scale of grades ranging from A to E, reflecting the best level of implementation for a recommendation (grade A) to the worst level (grade E). The grades are adopted by the Committee on the basis of information provided by the State party and other actors, notably civil society or NHRIs. Contributions to the Committee's follow-up reviews are expected 12 months after the review of periodic reports, based on the two to four recommendations which the Committee identified as requiring priority attention.⁶ These two to four recommendations need to be implemented by the State party within the 12 months after the review of periodic reports, as opposed to other recommendations for which a longer timeframe is provided (around four years generally⁷). The 12 months' timeframe, which is relatively short to implement important and often difficult recommendations, is nonetheless suitable to encourage States parties to focus their efforts and prioritise them in the year following reviews in Geneva. Such prioritisation schemes are not unique to the UN Human Rights Ctte, and four other treaty monitoring bodies have adopted similar procedures to prioritise the implementation of some recommendations.⁸

A Special Rapporteur for follow-up on concluding observations and a Deputy are elected amongst HR Ctte members. They are in charge of preparing draft evaluation reports and grades on the basis of information provided by the State party on follow-up, 12 months after the review. The draft evaluation report and the grades reflecting the level of implementation are discussed and adopted in plenary during public sessions of the Committee. The Committee's follow-up reports and grades are available on its website.⁹ Additionally, the Committee's Secretariat regularly updates and publishes a global overview on the status of States parties under the follow-up.¹⁰ The Centre for Civil and Political Rights, a Geneva based NGO which played a leading role in the adoption of the procedure,¹¹ publishes overviews of the Committee grades on its website after each Committee session.¹² The Centre has also supported the preparation and submission of civil society follow up reports in over 30 countries worldwide.¹³ An FAQ (CCPR Centre 2016) on the HR Ctte's follow-up and grading system is also available on the Centre's website.¹⁴

The detailed criteria or grades¹⁵ used by the HR Ctte are as follows:

Reply/action satisfactory	
A	Reply largely satisfactory
Reply/action partially satisfactory	
B1	Substantive action taken, but additional information required
B2	Initial action taken, but additional information required
Reply/action not satisfactory	
C1	Reply received but actions taken do not implement the recommendation
C2	Reply received but not relevant to the recommendation
No cooperation with the Committee	
D1	No reply to one or more of the follow-up recommendations or part of a follow-up recommendation
D2	No reply received after reminder(s)
The measures taken are contrary to the recommendations of the Committee	
E	The reply indicates that the measures taken go against the recommendations of the Committee

Thanks to the HR Ctte's innovative approach, more than 65 countries from all world regions have been assessed on their level of compliance with the Committee's priority recommendations. Examples of grades A, which reflect the full implementation of the recommendation, can be found in countries such as Mongolia (on the reform of the criminal justice system¹⁶) or Angola (on the universal registration of child birth¹⁷). Likewise, a grade E has also been adopted by the Committee when Indonesia undertook a range of executions of individuals sentenced to the death penalty for drug crimes, in contradiction with the HR Ctte's recommendation,¹⁸ or when Colombia enacted a reform of the military justice system which was deemed contrary to the HR Ctte's recommendation to have civil courts investigate violations committed by the armed forces.¹⁹

The grades adopted by the HR Ctte since 2013 constitute a growing body of evidence on the impact of the recommendations at the national level. The HR Ctte follow-up reports and the grades, although hardly accessible, give a unique visibility on the efforts of governments and other actors to comply with the Committee's recommendations. They also provides a growing body of statistical data and empirical evidence which are of direct and primary relevance for the "scholarly neglect[ed]" study of the domestic impact of UN treaty body recommendations.²⁰ As such, the system has a potential to improve substantially the way we can study and understand the implementation of HR Ctte recommendations and their impact.

2.2. Follow up to individual complaints

The grading system is also used by the HR Ctte to follow up on state compliance with its views related to individual complaints (or "Communications" as per UN terminology). In States which have ratified the First Optional Protocol to the ICCPR, individual complaints may be brought

to the HR Ctte’s attention. The views subsequently adopted by the HR Ctte are transmitted to States and, as with recommendations to States parties, the HR Ctte uses the same set of grades to reflect the level of enactment of its views on individual complaints by States parties.

Committee’s assessment

- (a) Effective remedy, including adequate compensation: C1
- (b) Release (or adequate opportunity to challenge all grounds on which his detention is based): A
- (c) Full reconsideration of the reasons for removal to Iraq and the effects thereof on his family life, prior to any attempt to return the author to his country of origin: C1
- (d) Publication of the Views: A
- (e) Non-repetition: C1

Example of the Committee grades adopted on the case Al Gertani VS Bosnia and Herzegovina during the 113th session of the HR Ctte (March-April 2015). CCPR/C/113/3. P. 6.

The HR Ctte follow-up reports on individual communications are available on the webpages of the sessions²¹ during which they were adopted. In addition to the complainant and the defendant, third parties such as NGOs can submit contributions to the HR Ctte on measures taken by States parties to comply with HR Ctte views. On follow-up to views the Rapporteur may request meetings with representatives from States parties.

Although the majority of HR Ctte views on individual complaints are not adequately followed or enacted by States parties, positive examples of implementation can be found in several cases. For instance, the HR Ctte found in 2015 that Australia had fully complied with three out of four of its views with regards to the case “Horvath”²² and adopted grade A for these three views (CCPR/C/113/3):

- Adequate compensation had been provided to the victim
- A suitable legislative review was undertaken
- Non repetition of the violation had been guaranteed

Other examples of initial or substantial action taken with regards to HR Ctte views can be found in various countries from the Global South (e.g. in *Maharjan VS Nepal*²³).

As stated by Joseph,²⁴ the grading system on individual complaints “serves to place sustained pressure on recalcitrant States.” As with the implementation of Committee recommendations, the use of grades for all individual complaints addressed by TBs would considerably improve the visibility on the level of implementation of the HR Ctte views at the national level. Yet the grades on follow-up to HR Ctte views suffer from the same lack

of attention and dissemination as the grades on recommendations to States parties. It is not possible for individuals, without a sound knowledge of the procedure and the Committee, to access the information about the grading system, and the adopted grades themselves.

3 • Opportunities and challenges around the HR Ctte's current procedure

Despite the above-mentioned opportunities provided by the HR Ctte's follow-up system on both recommendations and views, it still remains poorly known and underused by human rights actors and activists. Although the follow-up reviews of countries like the United States of America (US)²⁵ or Hong Kong²⁶ (China) have received substantial attention, many human rights actors still either do not know, or do not use the follow up system (or both). Civil society actors and NHRIs, for example, can provide information and they can even suggest grades on their own assessment of the level of implementation of the Committee's recommendations. As evidenced in the Committee's follow-up reports, these contributions are vital sources of information for the Committee's follow up work. Much remains to be done in outreach, capacity strengthening and research to use the Committee's follow up procedure to its full potential.

3.1. Absence of outreach strategy

The most stringent limitation currently affecting the HR Ctte follow up procedure relates to its lack of suitable visibility, and the limited efforts to disseminate the grades adopted by the Committee. Currently, the UN Office of the High Commissioner for Human Rights (OHCHR), which acts as the Secretariat of the Human Rights Committee, does not undertake any outreach activity specifically related to the grades adopted by Treaty Bodies. The adoption of the follow-up reports are not mentioned alongside country reviews and other ordinary tasks of the Ctte in regular OHCHR mailings and advertisements (e.g. see end of session news²⁷). In fact, the grades only appear in the details of the follow-up reports, which themselves can only be found by those who are more familiar with the Ctte's working methods (see below example).

Evaluation – paragraph 9:

[D1]: The State party does not provide any information on banning persons convicted of human rights violations from exercising public functions.

[B1]: Recalling the principles set out in paragraph 4 of general comment No. 31, the State party should be asked to provide additional information in its next periodic report on the manner and circumstances of the application by the Supreme Court of progressive prescription and on measures taken to ensure that it does not give rise to impunity for human rights violations (para. 9).

Example of the Committee grades adopted on Chile during the 104th session of the HR Ctte (March 2012). CCPR/C/104/2. P.3.

Neither the Committee nor the OHCHR make a statement when the follow up reports are issued, nor are they circulated proactively to relevant stakeholders. The reports are made available on the webpages of each Committee session once they are adopted (currently, this means on average two to six months after the end of each session, e.g. see the webpage of the 116th session²⁸).

The justifications for this current lack of visibility can be partially put down to different factors, including lack of will and competing priorities for key actors in the system, notably the Secretariat, as well as a limited outreach capacity in the Secretariat.

Enhancing the visibility of the HR Ctte's follow-up and grading system would not only contribute to boosting the level of implementation of the recommendations. Given that treaty bodies have been chronically under-resourced, it could also entail additional spin offs such as increasing public and financial support to their work.²⁹

3.2. Opportunities to disseminate the grades within the UN system and in courts

The grades adopted by the HR Ctte provide an authoritative evaluation of the implementation of a major international human rights law standard by a quasi-judicial body. Within the UN alone, both the grades on recommendations and on complaints are currently not reflected but could be:

- In the OHCHR's Universal Human Rights Index³⁰
- In the list of documents corresponding to each country reporting cycle on the treaty bodies webpage
- In the compilation of UN information used in preparation for Universal Periodic Review (UPR) reviews
- As background information on States applying for Human Rights Council or Security Council membership
- In the reports of UN Special Procedures as relevant (e.g. Special Rapporteur on torture, Special Rapporteur on freedom of expression, Special Rapporteur on extrajudicial executions, etc)
- In thematic and country-specific reports of the Human Rights Council
- In reports of fellow treaty bodies (e.g. Committee against torture, Committee on the elimination of discrimination against women, etc)
- In UN country teams national human rights plans

Additionally, the grades adopted on the follow-up to individual complaints provide a relevant indication about States' capacity and/or willingness to comply with the views from the body charged with the interpretation of the ICCPR. As such, the grades on complaints could be reflected in the proceedings of regional and national courts, as one of the elements of the treaty body's jurisprudence.

4 • Similar procedures adopted by fellow UN treaty bodies

The grading system pioneered by the Human Rights Ctte has so far partially been replicated by the UN Committee on the Rights of Persons with Disabilities (CRPD)³¹ and the Committee on Enforced Disappearances (CED³²). The Committee on the Elimination of Discrimination against Women (CEDAW) uses a simpler assessment system³³ based on the following four categories:

- Implemented
- Partially implemented
- Not implemented
- Lack of sufficient information to make an assessment

All of the current treaty body grading systems are based on some of the recommendations to States, not all. The adoption by these three treaty bodies of elaborate procedures to foster the implementation of recommendations and/or views is certainly welcome. Yet they bear a similar potential for development and similar challenges to those listed above on the HR Ctte. Namely, these procedures, which are still relatively new, will need to better trickle down to the grass roots and to human rights defenders and practitioners. Several actors, including NGOs and some treaty bodies themselves regularly encourage (e.g. Poznan statement³⁴ § 27, 2016 meeting of treaty body chairs³⁵) those treaty bodies which do not yet have follow-up procedures to adopt one, and/or to harmonize the different existing procedures. Most recently, the Committee on Economic, Social and Cultural Rights adopted a follow-up procedure³⁶ which establishes yet a new set of treaty body assessment grades on the implementation of recommendations: “sufficient progress”, “insufficient progress”, “lack of sufficient information to make an assessment” or “no response”.

4.1. The Committee against torture’s new procedure

The follow-up and grading procedure³⁷ recently adopted by the CAT not only builds on the positive and effective elements of the preceding HR Ctte procedure. It also integrates innovative elements which address some of the above mentioned existing challenges encountered with the HR Ctte procedure. It is focused on Concluding Observations and, according to the main architect of this new procedure Jens Modvig,³⁸ there are no plans for such a grading system to be adopted for follow-up to individual complaints to the CAT.

To counter some of the challenge noted above about the Human Rights Ctte, the CAT procedure integrates three different sets of grades:

- A first set of grades (ranging from 0 to 3) relates to the quality of the follow-up information submitted by the State (§ 19)
- A second set of grades (ranging from A to E) relates to the level of implementation

- of the recommendations. That system is almost entirely similar to the HR Ctte's. (§20)
- A third set of grades relates to an innovative development, as the CAT now recommends that States adopt implementation plans (§11) for the recommendations that are not flagged as requiring priority attention. These grades range from A to C reflecting the quality of State's implementation plans. (§21)

Therefore, the CAT's new procedure will tackle the need to differentiate between the actions taken by States to comply with recommendations, and the way they report back to the Committee. But even more importantly, the CAT's new procedure is also tackling the issue of recommendations which are not flagged as requiring priority attention within the 12 months after the reviews in Geneva. By encouraging States to come up with implementation plans for these recommendations, the CAT has found a creative and effective way to foster the implementation of its recommendations. Without creating a new obligation on States (the procedure "encourages" States to follow that route), this new development is likely to contribute at least to give more visibility on steps taken at the national level following reviews to comply with recommendations.

Finally, the new CAT procedure also drew inspiration from the HR Ctte procedure on two useful points:

- 1 - Any remaining issues under the follow-up procedure are to be automatically integrated in the subsequent review cycles, through the questions asked by the Committee to the States in preparation for the subsequent reviews (§ 29-31). Interestingly, the CAT procedure is more elaborate than the HR Ctte's on this point.
- 2 - Like the HR Ctte, the CAT also foresees to seek a dialogue with States on the follow-up phases, including through face-to-face encounters between the CAT Rapporteur on follow-up and State representatives (§26-28).

5 • Opportunities and potential risks for human rights defenders and practitioners

As detailed in the above sections, the follow up procedures adopted by the HR Ctte, CAT and other treaty bodies offer, broadly speaking, two opportunities for human rights defenders:

- Formal opportunities: such as the submission of reports as part of the Committee's follow-up procedures, which may or may not include suggested assessments and grades on the level of implementation of recommendations.
- Informal opportunities are countless and can be divided into three consecutive phases:
 - Before the adoption of Committee assessments or grades: invitation of Committee experts at the national level to disseminate concluding observations

and advocacy towards high level officials; national events and workshops to discuss and disseminate recommendations; preparation of national implementation plans for the recommendations, etc.

- Upon adoption of Committee assessment or grades: if the sessions are public and livestreamed online, such as with the HR Ctte, public discussions around the sessions can be organised at the national level, possibly in cooperation with UN country teams.
- Following the adoption of grades: disseminate the grades broadly, including to relevant stakeholders such as the national media, members of the three branches, NGOs, NHRIs, law enforcement agencies, professional unions, etc.

The TB follow-up procedures offer considerably more opportunities than risks for human rights defenders. One notable exception concerns threats and reprisals. The UN has considerably improved its institutional response to reprisals and threats against individuals cooperating with its human rights bodies, for instance with the adoption by TBs of the San José Guidelines in 2015.³⁹ Yet it should remain an individual decision of human rights defenders as to whether contributing to the follow-up procedures, and particularly suggesting grades and commentaries on the level of implementation of recommendations, could put them at risk of reprisal.

6 • Using the follow-up and grading system as part of high level follow-up visits with HR Ctte members

One of the strengths of the HR Ctte's procedure on follow-up to recommendations is that it has been used by Committee members as part of several follow-up visits to States parties after the reviews in Geneva. These non-official field visits, almost all of which have been organised by the Centre for Civil and Political Rights (CCPR Centre) (e.g. in Angola,⁴⁰ Cambodia,⁴¹ Indonesia,⁴² Mauritania⁴³ or Namibia⁴⁴), have made a significant difference. The visits have continued the constructive dialogue initiated with States during the reviews including meetings with key national decision makers, reaching out to relevant stakeholders, and contributing to the dissemination of recommendations. These visits also play a key role in explaining the treaty bodies' follow-up and assessment procedure, and encourage both governmental and non-governmental actors to take advantage of the important opportunities provided by the system. As TBs have acknowledged (e.g. Poznan statement §28), field visits at the national level following reviews of States parties in Geneva have proved to be an effective way to maintain this dialogue. Following one such visit to Nepal, one HR Ctte member said: "It was eye opening for me to be able to discuss with government stakeholders, and meet with a much broader range of relevant actors than those we normally get to interact with in Geneva."⁴⁵

6.1. Case study of a follow-up visit to Mozambique

The author was involved in a CCPR Centre-organised high-level follow up visit to Mozambique in December 2014, which was headed by the former HR Ctte Chair Ms. Zonke Majodina (South Africa). The visit followed the first ever review of Mozambique by that Committee in October 2013. The HR Ctte had issued urgent recommendations⁴⁶ on arbitrary arrest and detention, conditions of detention and the need to increase the number of judges. During the follow-up visit, the delegation was able to meet with a range of high-level government and international officials, including the Minister of Justice who had been the head of the government delegation during the review by the HR Ctte in Geneva. Quite clearly, the CCPR Centre delegation would not have been able to have access to these individuals if it had not been headed by a former Chair of the HR Ctte whom in this case, was a national of a neighbouring and relatively friendly country. The meeting with the head of the government delegation in Maputo was instrumental for the CCPR Centre delegation to gauge progress made on the implementation of the urgent recommendations. Although the author's government interlocutors in Mozambique were at best vaguely familiar with the follow-up and grading procedure of the Committee, there was nonetheless more interest than defiance. Meetings with government interlocutors also elicited that Mozambique had elaborate plans to follow up on the Universal Periodic Review recommendations. Nonetheless, there were no such plans for follow-up to treaty body recommendations.

The main goals of the high-level follow-up visit were to remind government officials about the recommendations of the HR Ctte, gauge progress achieved towards their realisation, and encourage both state and non-state actors to submit follow-up reports to the HR Ctte. The visit to Maputo was instrumental in achieving these objectives. Following the visit, continued and sustained follow-up initiatives were undertaken by the CCPR Centre (through bilateral contacts with state officials) and the HR Ctte (through formal and informal contacts with the Permanent Mission of Mozambique in Geneva) to convince the government to submit their follow-up report,⁴⁷ which they finally did in November 2015. In parallel, the coalition of civil society organisations which the CCPR Centre had engaged with prior, during and after the first review of Mozambique by the HR Ctte were able to submit their own assessment⁴⁸ on the level of implementation of the Ctte's recommendations. At the time of writing, the Committee were planning to review both government and NGO follow-up inputs at the 188th session (October-November 2016) which is when they will adopt the grades reflecting the level of implementation of the recommendations.

6.2. Case study of a follow-up visit to Mauritania

The author was also involved in a CCPR Centre-organised high-level follow up visit to Mauritania in August 2014. HR Ctte expert Lezhari Bouzid from Algeria, who had been the country Rapporteur for the review of Mauritania in October 2013, led the delegation which was organised and funded by the CCPR Centre. On this occasion, Lezhari Bouzid and the author were able to meet with a range of government representatives

including the Ministers of Justice and Interior, National Commissioner on Human Rights, OHCHR and other UN offices, diplomatic missions, the NHRI and NGOs. The delegation was also able to meet with representatives from the Inter-Ministerial delegation on human rights, which held the formal responsibility to report and follow up on treaty body recommendations under the auspices of the National Commissioner for Human Rights. The series of meetings and workshops with national counterparts proved to be instrumental in raising awareness and disseminating the recommendations adopted by the Committee less than a year before in Geneva. However, the visit also enabled the CCPR Centre delegation to gain a good overview of the steps that had been taken (or not taken) towards complying with the four urgent recommendations which related to:

- 1 - The publication of international human rights treaties nationally
- 2 - The criminalisation of torture
- 3 - Abolition of slavery
- 4 - Conditions of detention and prison overcrowding

Almost all of the delegation interlocutors had either never heard of the HR Ctte's follow-up and assessment system, or they knew little about it. However, in most cases, the delegation's interlocutors were quite curious, and most were willing to contribute to the process to the extent they could. During the visit, the National Commissioner for Human Rights pledged to submit the follow-up report⁴⁹ due one year after the review on time, which they did in November 2014. This, together with the submission of a report by a coalition of Mauritanian NGOs⁵⁰ supported by the CCPR Centre, enabled the Committee to undertake a formal assessment of the level of implementation of their four priority recommendations. During the 113th session of the HR Ctte, held in March 2015, the following grades⁵¹ were adopted:

- 1 - B2 on publication of international human rights treaties nationally, recognising initial action taken in that regard
- 2 - A range of two C grades and three B grades on the criminalisation of torture, recognising steps taken with regards to some aspects of the provision, and more remaining on others
- 3 - A C1 and two B1 grades on the abolition of slavery, notably thanks to the adoption of a road map on the eradication of slavery as recommended by the HR Ctte
- 4 - Two B2 grades on prison conditions and overcrowding, here again acknowledging some steps taken following the review

What is particularly interesting and telling in the Mauritania example is that the government maintained a high level of compliance with the HR Ctte following the publication of the grades, and submitted a new report in May 2015,⁵² which subsequently enabled the HR Ctte to review the first set of grades they had adopted, and adopt a new set of updated grades⁵³ in March 2016. This evidences what the delegation and the author perceived during the follow-up visit to Mauritania, i.e. that

government counterparts were interested in the grading system and willing to contribute to it, with the obvious hope that the Committee would acknowledge the efforts taken towards complying with the recommendations. The implementation of urgent HR Ctte recommendations in Mauritania and their evaluation, which was still ongoing at the time of writing, constitute an interesting process given that both governmental and non-governmental actors contributed to the process in good faith. This enabled the HR Ctte to adopt grades which acknowledged steps taken, while requesting more to be done towards full compliance.

7 • Conclusion

As highlighted in the above sections, the innovative follow-up and grading systems developed by treaty bodies constitute an important breakthrough in the overwhelmingly accepted desire to improve the implementation of UN human rights recommendations. Key elements of a robust follow-up and grading system include, *inter alia*: the need for a transparent, thorough and clear methodology; buy-in and acceptance from a wide range of relevant stakeholders; expert and independent assessment; widespread dissemination and differentiation between substance and form. Much remains to be done to strengthen, streamline, highlight and replicate the existing procedures within treaty bodies themselves. The ongoing process of TB strengthening provides a suitable avenue to do so. As it has been previously argued⁵⁴ strong support from the High Commissioner for Human Rights is required for the ongoing process of TB strengthening to be effective, and to notably deliver good results on implementation of recommendations.

NOTES

1 • Some sections of this article have been published as part of the Geneva Academic Platform on treaty body review 2020. The submission is available at: Vincent Ploton, "The Development of Grading Systems on the Implementation of UN Treaty Body Recommendations and the Potential for Replication to other UN Human Rights Bodies." ISHR, March 2017, accessed May 21, 2017, <https://goo.gl/4LpUQx>.

2 • See for example, "The Poznan Statement on the Reforms of the UN Human Rights Treaty Body System," International Seminar of Experts on the Reforms of the United Nations Human Rights Treaty Body System, Sept. 28-29, 2010, §25-31, accessed May 21, 2017, <http://www2.ohchr.org/english/bodies/HRTD/docs/PoznanStatement.pdf>; or "Implementation of Human Rights Instruments," UN Doc A/71/270, 2016, accessed May 21, 2017, http://tbinternet.ohchr.org/Treaties/CHAIRPERSONS/Shared%20Documents/1_Global/A_71_270_25154_E.docx.

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4 • "Note by the Human Rights Committee on the procedure for follow-up to concluding observations," UN Doc CCPR/C/108/2, United Nations, October 21, 2013, accessed May 21, 2017, <https://goo.gl/bhTXL5>.

5 • The first HR Cttee follow up report which mentioned grades on recommendations was adopted during the 104th session in March 2012 (UN Doc CCPR/C/104/2). The grades mentioned in the report were slightly distinct from the grades codified in the 2013 procedure. For instance, they did not include a grade E. Additional simplifications were brought to the grades during the 119th session in March 2017, see

"Human Rights Committee discusses progress reports on Follow-Up to Views and on Follow-Up to Concluding Observations," The Office of the United Nations High Commissioner for Human Rights (OHCHR), March 20, 2017, accessed May 21, 2017, <https://goo.gl/KuIrUY>.

6 • CCPR/C/108/2, § 6&7.

7 • Longer lapses for the subsequent State periodic report are provided by the Committee in countries where implementation of the ICCPR is seen as less problematic. Shorter lapses are given to States which seemingly encounter more problems in implementing the ICCPR.

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9 • "The Treaty Body Database," The Office of the United Nations High Commissioner for Human Rights (OHCHR), accessed May 21, 2017, <http://goo.gl/vXPK5H>.

10 • "Follow-up to concluding observations - International Covenant on Civil and Political Rights," The Office of the United Nations High Commissioner for Human Rights (OHCHR), accessed May 21, 2017, http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/FollowUp.aspx?Treaty=CCPR&Lang=en.

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12 • E.g. see "Latest Assessment on the Implementation of HR Committee Recommendations," Centre for Civil and Political Rights, 2017, accessed May 21, 2017, <http://conta.cc/2mjTfCm>.

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CONVERSATIONS



JUAN E. MÉNDEZ:
**“WE HAVE LOST A SENSE OF PURPOSE
ABOUT ELIMINATING TORTURE”**

Interview with Juan E. Méndez

“WE HAVE LOST A SENSE OF PURPOSE ABOUT ELIMINATING TORTURE”

• *Interview with Juan E. Méndez* •

By Vivian Calderoni and Oliver Hudson

Born in Argentina in 1944, Juan Méndez is well-known for his extensive experience in the defence of human rights in Argentina and around the world. He was held as a political prisoner for a year and a half during the military dictatorship in Argentina before going into exile in the United States of America in the late 1970s, where he lives today. He is a professor of human rights law at the American University – Washington College of Law.

Based on his experience and hard work to defend rights throughout his legal career, Juan Méndez was nominated in 2010 by civil society organisations – including Conectas Human Rights – for the position of Special Rapporteur of the United Nations Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment. He served two terms as Special Rapporteur, the last one ending in 2016.

As Rapporteur, Méndez conducted visits to several countries to monitor and report cases of rights violations, especially those involving people deprived of liberty, and to encourage states to take measures to prevent torture. The approach of putting the victims of torture at the centre so they can demand not only reparation, but also their right to participate in the entire process was given considerable emphasis during his mandate.

Brazil was one of the last countries that Méndez visited as a rapporteur. This visit, in 2015, which Méndez describes as successful, was held almost simultaneously with that of the Subcommittee on the Prevention of Torture (SPT). On this occasion, he visited São Paulo, Brasília and three states in Brazil's north-eastern region: Sergipe, Maranhão and Alagoas (as

agreed upon with the SPT, which travelled to other states). "We did not have any problem visiting any of the places we asked to see", he affirmed in relation to the collaboration from and access to the prisons. However, his report on Brazil was critical in relation to the prison system. He denounced mistreatment – especially of persons belonging to racial, sexual, gender and other vulnerable groups – by police and prison officials and he made an important call for the country to strengthen its capacity to produce clear and relevant data on the incidence of cases of systematic rights violations.

In his interview with Sur, in addition to telling us about his experience as a special rapporteur, Méndez spoke of the limits and possibilities of his mandate and the current situation regarding torture, especially in the Latin American context. According to him, "we have lost a sense of purpose about eliminating torture unless it happens to people like us. So, getting to a complete eradication of torture has proven elusive".

• • •

Conectas Human Rights • You have dedicated your life to the defence of human rights. Can you start by explaining what led you to the field of human rights and more specifically to the issue of torture?

Juan E. Méndez • I became a lawyer in Argentina in 1970, when there was great turmoil. I decided to dedicate a lot of my time to what we now call human rights matters – defending political prisoners, but also defending workers' rights, etc. Unfortunately, the turmoil became much worse during the early and mid-1970s with the very repressive elected government of Isabel Perón after the death of General Perón. I got trapped in that repression. I was arrested in 1975 and held under the "state of siege" without trial. I had chosen to leave the country rather than remain in custody, which was permitted by a clause in the Constitution if you were being held under the state of siege, but the military suspended that "right of option" clause when they took over in March of 1976. They suspended this right to choose to leave the country into exile, so I stayed another year in prison. In the meantime, they filled the jails with many political prisoners. Eventually, I was allowed to leave the country - literally escorted to a plane – and sent into exile. I had to live abroad for several years. During this time I was very concerned about my fellow inmates that I had left behind and also my many colleagues who disappeared because they defended political prisoners. Many other friends also disappeared. As soon as I got to the United States, I started trying to join the campaigns to highlight what was going on in Argentina. Not long after, I expanded my work to focus on Latin America more generally. Then, eventually I got very lucky – I was able to join human rights organisations in the United States and do this kind of work for a living.

Conectas • So it was your personal experience that led to your involvement in human rights?

J.M. • It was my personal experience, but also the experience of others. What happened to me happened because I was already very interested in campaigning for the rights of others.

Conectas • Could you talk about the process of being appointed a special rapporteur.

J.M. • The United Nations special rapporteurships are now called special procedures. They are also called “charter-based” as opposed to the treaty-based organs and mechanisms. The Special Rapporteurship on Torture is one of the oldest procedures, having been created in 1985. The only two more long-standing ones are the Working Group on Disappearances, which was the first one to be created, and the Special Rapporteur on Extrajudicial Executions. All three of them are still in place but there are now many more.

The Human Rights Council is the organ of the United Nations that creates and terminates special procedures, which are either country-specific or thematic, like torture. The Human Rights Council not only decides to begin a mandate, extend or terminate it, but also appoints persons to exercise the mandate: in the case of special rapporteurs, individual experts; in the case of working groups, five individual experts, each one of them from one of the voting blocs in the United Nations.

These selections are done in a fairly transparent and open way. The Human Rights Council announces that there is a vacancy and encourages nominations. You can be nominated by a state, by a non-governmental organisation (NGO), or you can even self-nominate. An advisory group to the president of the Council – formed of ambassadors who represent the five voting blocs – goes over all of the applications and nominations and decides – sometimes after interviewing – on a shortlist of three that is then proposed to the president. The president elects from that list and announces to the Council that such a person has been proposed or appointed as special rapporteur for the next three years. If there is no objection, then the appointment by the president stands. If there is an objection, there could be a vote, but generally, that doesn’t happen. Rather there would be a debate – about whether the choice of the president is the right one or not, but there is no vote. Either the president insists or they go back to square one and begin the process all over again. Not very often, but sometimes that means that the appointment is delayed by a few weeks or months and so the previous mandate is extended for whatever length of time is necessary.

Conectas • Were you nominated by Argentina or by an NGO?

J.M. • I was nominated by Conectas, Humanas and CELS. I am very honoured that I was nominated by those three organisations. The Argentine permanent mission in Geneva supported my nomination with enthusiasm.

Conectas • In order to give our readers a sense of the agenda of a special rapporteur, could you tell us what countries you visited during your mandate?

J.M. • I visited a total of 12 states. The 12 were Tunisia, Kyrgyzstan, Tajikistan, Georgia, Morocco and Western Sahara, Uruguay, Ghana, Mexico, Brazil, Mauritania, Sri Lanka and Gambia. We are somewhat restricted in how many we can visit. Firstly, because there is no

budget for more than two visits a year. The other problem is that because these are volunteer positions, we have to find the time to do a mission – they are very labour intensive and require a lot of time. The third reason is that you depend on being invited. I also did follow-up visits to some of the countries I visited. For example, I was allowed to do follow-up visits to Tunisia, Tajikistan, and to Ghana. Uruguay was in fact a follow-up visit because it had been visited by my predecessor a little earlier. I was unable to do follow-up visits to some countries, either because the visit had happened too late in my mandate – like Brazil, Mauritania and Sri Lanka – or because I was not allowed or not invited to do follow-up. This was the case for Morocco and Western Sahara, and Mexico. In the case of Mexico, we did a follow-up report, but it was based on research done without the benefit of a visit – by questionnaires, responses and bibliographic and journalistic research.

Conectas • Could you talk a little bit more about your experience in Brazil as a special rapporteur?

J.M. • I think the visit to Brazil was very successful. It was done in coordination with the Subcommittee on the Prevention of Torture that was going to visit in the same year. Because Brazil is such a large country, we decided to divide up the places we would visit. I visited Brasília, São Paulo and three states in the Northeast: Sergipe, Maranhão and Alagoas. We tried to visit a cross-section of detention centres, including a detention centre for girls in Brasília and another one for boys in São Paulo, and then we visited the women's prison in São Paulo and men's prisons in several different places, as well as at least one mental health hospital. I was given very broad and generous access. In all places, we had the cooperation of not only the federal government, but also the state government. We interviewed high level officials, as well as many NGOs and former victims of torture who were brought to our attention by the NGOs. They were very cooperative in the sense of actually travelling to where we could meet them. We focused on prison conditions first and foremost, but also on the prevalence of torture in interrogation and also what measures, if any, were being put into place to address questions of torture, including the *audiencia de custodia* [custodial audience], which had just started operating at the time of our visit.

Conectas • What are you most proud of achieving during your time as Special Rapporteur?

J.M. • I think my country visits were generally very fruitful. In countries like Mexico and Brazil, what we said was widely publicised. We were able to highlight the problems of torture and mistreatment and prison conditions in several countries and were heard by very high authorities in those countries on what needed to be done. Obviously, this was not the same in, for example, Gambia where the press was, at the time, heavily censored. Gambia was also the only country that really did not cooperate with us. They changed the terms of reference when we were already in country, and so our fact-finding was less successful there than in many of the other countries visited. Nonetheless, we did write a report on the basis of what we had learned, mostly through people who were already exiled because we spent some time in Senegal interviewing people who had fled from Gambia. The key is to write a good report that is solidly based on evidence and does

not make outlandish claims. If this report is picked up by civil society and the media in the country you are visiting, this can have an important impact in the fight against torture in each country. With the recent end of the dictatorship in The Gambia, the recommendations in my report now have a chance to be implemented.

I am also happy about having been able to write thematic reports, particularly because we decided on the topics or the themes that we were going to cover in consultation with people in different human rights organisations and other organisations that deal with torture in different forms. We published thematic reports on topics that were so important that the reports later have had a life of their own - for example, solitary confinement, the question of torture in health care settings, gender and torture, detention of children, and the need for a universal protocol for interviewing in criminal investigations.

Conectas • Would you highlight any good practice in the fight against torture that you came into contact with during your mandate?

J.M. • The case of Brazil, with the “*audiencia de custodia*” [custodial audience] is one example. In Mexico the Supreme Court has elaborated what they call a *Protocolo de Actuación* [Action Protocol] in cases of torture. It is a non-binding directive to lower courts on how to proceed if they get a complaint or if they come across prima facie evidence and decide ex officio to investigate whether torture has happened or not. Unfortunately, these are partial victories - initiatives going in the right direction, but not fully successful in ending torture.

The only country of all those that I visited, which was clearly making a clean break with torture, was Georgia. And it is kind of an anomaly in that sense, but a good one, because only a year and a half before I visited, there had been a change of government. The previous government was supposed to win the elections, but lost because within a month or so of the elections, a big scandal broke out about torture in the prisons of Georgia. The opposition campaigned saying that they would terminate that and won a surprise victory. The incoming government kept its promises and they did some extraordinary things. For example, in a few months, it had reduced the prison population to less than half of what it had been. And with that, as you can imagine, they have corrected a lot of problems of overcrowding. But not only that, they actually prosecuted something like 50 or so prison officials accused of torture and that has had an enormously positive effect on the practices that we saw in Georgia at the time. Now, I haven't been back and I hope that that progress is sustainable. I haven't heard that it is not. It is important to keep governments on their toes, making sure that practices like that don't return.

Conectas • Did you receive any criticisms from either states or civil society during your mandate and how did you respond?

J.M. • I reported to the Human Rights Council (HRC) once a year and once a year to the General Assembly. Some states occasionally complained, particularly at the HRC – either

about the report that we published after a visit, about a specific case where we processed a complaint and eventually found that the government had violated human rights, on our methodology for making such findings, and sometimes refuting our motivation. And sometimes we were criticised on the thematic reports as well – for example, on the gender report that included the rights of women and girls, but also of LGBTI persons. Several states intervened to say that I had ventured into areas where the international community had no agreement. They didn't quite say what that lack of agreement was, but you could tell that they were objecting to treating torture under a gender dimension not only about the equality of men and women, but also about the condition of discrimination against LGBTI persons.

I responded that the thematic reports are not supposed to be about something everyone agrees upon. They are precisely designed to generate discussions on what we should agree upon in the future. And also that my report had only taken two principles that are clearly agreed upon: one being the prohibition of torture and mistreatment, and the other one being the prohibition of discrimination. I had only put them together and highlighted how, in some countries, women and girls and LGBTI persons suffer more severely and more specifically from some forms of torture and mistreatment.

Conectas • What impact do you hope that your mandate has left on the fight against torture?

J.M. • Sir Nigel Rodley, who unfortunately passed away in January 2017, my immediate predecessor, Manfred Nowak, and the other two jurists, Kooijmans and van Boven who all occupied the position before me all left a very good trajectory of promotion of actions against torture, expanding the limits of the mandate and encouraging states to take more preventative action against torture.

I hope that my six years continue that direction. Perhaps the more significant aspect of this was my emphasis on putting the victims of torture at the centre of the approach and to insist, for example, that victims not only have the right to reparation and to rehabilitation as necessary, which are, of course, very important rights, but also to participate in the design of those programmes and to participate in the obligation to investigate, prosecute and possibly punish cases of torture. I also highlighted that solitary confinement is a form of mental torture, psychological torture. Although many organisations were already campaigning on this very significant issue I think I contributed to making it an international concern, rather than something that can be resolved in each country, within the domestic jurisdiction alone.

Conectas • What have been the advances and setbacks in the fight against torture in Latin America in the democratic period, and do they have global influence?

J.M. • The transition from dictatorships to democracy in all of our countries has renewed attention to the illegitimacy of the practices of those dictatorships, which have always included torture. So the fact that the public is much more self-conscious that these dictatorships were illegitimate for a variety of reasons, but among them, that they used torture against a political

enemy in a very systematic way, is obviously a big advantage. The fact that torture is not practised against political enemies in most of Latin America is a tribute to that transition and to the moral condemnation of torture that resulted from the transition.

Unfortunately, however, democracies have been disappointing at completely eradicating torture because they have not really reformed their police forces, their correctional institutions or their criminal justice practices more generally. Therefore, torture remains because there has not been enough attention to torture when it happens to poor people, members of marginalised communities and vulnerable people.

In addition, the democratic period has been characterised by the public's concern with criminality and insecurity. In that context, our societies begin to have a permissive attitude that, while torture may be bad, may be ugly, it keeps us safe and therefore, we'd rather look the other way and not criticise our police bodies when we know they torture. This is, of course, a generalisation. I am not saying that all people believe that or think that way, but it does seem to me that the prevailing mood of fear of crime – or fear of terrorism in other countries – conditions us to lose a sense of purpose about eliminating torture in our midst unless it happens to people like us. So, getting to a complete eradication of torture has proven elusive, to say the least, in Latin America.

Conectas • With this in mind, how should we react to Trump's recent comments that torture "absolutely works" and what impact do you think comments such as these have on the practice of torture in the US and in the wider world?

J.M. • I think this phenomenon of public relativism regarding the condemnation of torture is more universal. After 9/11 the preoccupation with terrorism, and in some countries with organised crime, has also caused the public to be less condemnatory than they used to be about some forms of torture. And even more worrisome is the popular culture that created this idea that how are you going to fight crime unless you break some rules? What we need to do is to continue to fight for hearts and minds - to show not only the moral and legal implications of mistreating people, but also address head on this argument that "torture works". We can show this rationally and demonstrate not only that it doesn't work because it gets a lot of false information but also because it results in unsafe convictions and judicial decisions that then need to be overturned. But more significantly it corrupts our institutions. It corrupts the judiciary, it corrupts the prosecutors' office, and it corrupts the police bodies and the investigative offices as well. We need to put a lot of pressure on our judicial systems to make judges, prosecutors and public defenders live up to their obligations to investigate, prosecute and punish torture, to examine any evidence of torture, to exclude evidence obtained under torture and to prevent people from being sent back to countries where they might be tortured.

Conectas • We are experiencing a moment of great change in the human rights movement. You have worked nationally and internationally in the defence of human rights, including

for organisations from both the South and the North. Is this North-South debate still relevant and if so, does it have specific resonance in the fight against torture?

J.M. • It is relevant in the sense that there has been much better coordination and complementary work between the organisations that dedicate their efforts to monitoring and denouncing violations. I think there is a lot better sense of equality between these organisations. I also feel that many organisations from the Global South are acquiring an international personality and they are becoming better known beyond their borders. But of course, this is a trajectory and not yet a final destination. More needs to happen for the international human rights movement to be truly a universal movement and one in which the distinction between North and South is less significant than it is now.

Conectas • Finally, we are very keen to know what your future plans are!

J.M. • I will continue to be a full-time professor of international law and, in particular, international human rights law as I was during my six years as special rapporteur. I have also been appointed to be a member of the selection committee to appoint judges in the special jurisdiction for peace and members of the truth commission under the Colombian peace process and that is going to take up a lot of my time in the next six to eight months.

• • •

Interview conducted in March 2017

by Vivian Calderoni and Oliver Hudson (Conectas Human Rights).



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EXPERIENCES



OXFAM'S CODE FOR CORPORATE CAMPAIGNING

Irit Tamir

OXFAM'S CODE FOR CORPORATE CAMPAIGNING

Irit Tamir

- *Reflecting on what drove the Behind the Brands campaign and why it was so successful* •

ABSTRACT

Oxfam's Behind the Brands campaign was launched in 2013 and sought to influence the sourcing policies of the world's ten biggest food and beverage companies. Over the three years of Behind the Brands, the campaign achieved a series of significant successes, particularly around land rights, women's empowerment and climate change, both in mobilising a significant number of supporters and achieving a series of significant policy wins. This article highlights some of the principles and tools the campaign used in achieving those policy wins.

KEYWORDS

Corporate campaign | Supply chain | Consumer brands

Oxfam's Behind the Brands campaign was launched in 2013 and sought to influence the sourcing policies of the world's ten biggest food and beverage companies, the Big 10.¹ The targets of the campaign were food and beverage companies with highly recognisable global brands, but the indirect targets of the campaign were food commodity traders. In 2012 Oxfam published *Cereal Secrets*, which looked at the top four commodity traders at the time, Archer Daniel Midland, Bunge, Cargill and Louis Dreyfus (known as the ABCDs due to their initials) and their dominance in certain commodities along with their impact on global agricultural issues, including the lives of smallholder farmers. One aspect of this report focused on how invisible the traders are in policy debates, their lack of transparency as companies and absence of any brand which would provide them with a public profile. On the other hand, the food and beverage companies, whose brand success is driven by its emotional connection to the public – are directly accountable to consumers concerned about social and environmental impacts of agriculture.

In order to tap into the brand connection felt by consumers, Oxfam launched the Behind the Brands campaign with the dual goal of building a movement of global supporters and achieving specific improvements in the sustainability policies of the Big 10. Behind the Brands adopted a theory of change which assumed that less visible supply chain actors, like the commodity traders, could be pressured by big consumer brands which are vulnerable to public pressure.



By calling on these big brands to take on progressive policies and to implement them upstream in their supply chains Oxfam assumed that systemic change could happen

across supply chains. The campaign approach brought together several components to create pressure on the companies to make commitments:

- Deep engagement with each company and at times together;
- A scorecard which analysed and ranked the top 10 companies on how their businesses support (or undermine) key stakeholders (farmers, workers, women) and how they mitigate (or aggravate) key company impacts upon natural resources (land and water) and the climate.
- Research and evidence on specific instances of bad company practice and policies;
- Communications and engagement work, largely online through shareable social media content and an online platform including the scorecard;²
- Campaigning with others both online and offline;
- An influencing strategy that engaged a range of secondary targets including multi-stakeholder bodies, investors, industry insiders and civil society allies.

While Oxfam looked at seven themes in the scorecard relating to agricultural sourcing, the public campaign highlighted three issues over the three years; women, land and climate change. Oxfam first highlighted the issue of women in cocoa supply chains of the large chocolate companies. Women cocoa farmers are central to the sustainability of the cocoa supply chain and cocoa-growing communities. Too often unrecognised and under-valued, women's labour makes significant contributions to the amount of cocoa produced, which is under increasing demand. Empowering women cocoa farmers not only has a positive impact on the lives of women, men and communities, but also has a business advantage. When women have control over their own income or family earnings, they reinvest in their families, children and communities, increasing the well-being and the sustainability of cocoa-growing communities.³

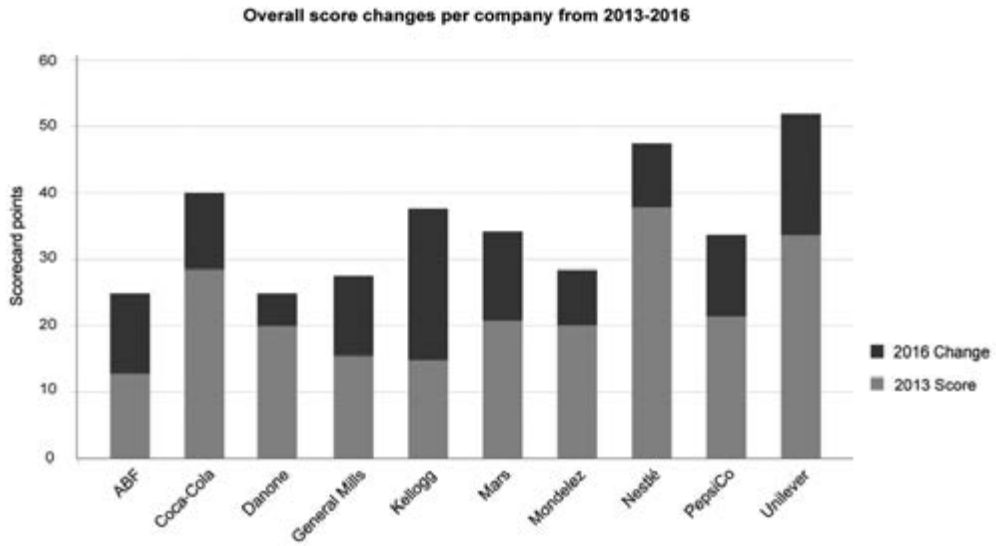
On land, Oxfam highlighted risks and impacts on communities related to land rights in the sugar supply chains of some of the food and beverage companies. Oxfam showcased three cases where communities living off the land had been denied their land rights in favour of sugar mills that were also suppliers to some of the Big 10 companies. Land governance is weak in many countries, and often favours corporate interests over the rights of local farmers and communities. Governments have a pivotal role to play in protecting rights through legislation and enforcement but the campaign sought to show companies purchasing commodities that they could also ensure that land rights are respected with their suppliers.⁴

Finally, Oxfam produced data that showed that the agricultural emissions of the Big 10 were equivalent to the emissions of the 25th most polluting country. In highlighting this new data and connecting it to the stories of men and women farmers already dealing with climate change, Oxfam challenged companies to take responsibility for the agricultural emissions within their supply chain and be an advocate for progressive climate change policy.⁵

Over the three years⁶ of Behind the Brands, the campaign achieved a series of significant successes, particularly around land rights, women's empowerment and climate change, both in mobilising a significant number of supporters and achieving a series of significant policy wins:⁷

- Between March and May 2013, Mars, Mondelez, and Nestle (representing 40 per cent of the global cocoa purchase) committed to signing the United Nations Women's Empowerment Principles and to gender action plans for their cocoa supply chains in key cocoa sourcing countries.
- By March 2014, Coca-Cola, PepsiCo and Nestle, three of the world's largest purchasers of sugar, committed to taking a "zero tolerance" approach to land grabs. All ten companies have made reference to the principle of free, prior, and informed consent (FPIC), which is critical to ensure communities' land rights, and six of them have committed to the principle (ABF, Coca-Cola, Kellogg's, Nestlé, PepsiCo, Unilever).
- In August 2014, General Mills and Kellogg agreed to implement industry-leading measures to cut greenhouse gas emissions from its supply chains and press for meaningful political action to address climate change.
- Overall, all companies improved their policies over the life of the first three years of the campaign with nine of the ten companies improving their score by at least 10 per cent.⁸





The campaign used a combination of tactics and approaches to gain corporate commitments. It sought to walk a moderate line: hard hitting enough to convey urgency so supporters will act while at the same time not so aggressive as to create strained relationships with companies that could not be repaired. The Oxfam formula for the Behind the Brands campaign was multi-faceted.

Oxfam combined evidenced-based advocacy using deep company engagement, combined with digital mobilisation, media, offline and online stunts, advertising, investor and shareholder activism, case studies, and collaboration with allies and influencers. The evidence-based advocacy on Behind the Brands always included a justification of why specific companies were targeted along with a business case that highlighted best practice.

In addition, Oxfam took a “critical friend” approach on Behind the Brands. Many corporate campaigns personalise a company through the chief executive officer or other decision-maker; they may call for boycotts or generally paint the company as inherently bad. Oxfam, on the other hand, did not call for boycotts because the impact is generally felt by the communities for whom Oxfam was advocating (e.g., farmers and workers). Rather, Behind the Brands has taken the approach that the private sector can be a positive actor for development. In garnering several commitments on the campaign, Oxfam also took into account the fact that it would work with a company on implementing those commitments not only as a watchdog to ensure that they follow through but also as an advisor on how best to do it. Aggressive campaigns can mean a real hangover after the celebration of a win. After all, at the end of the day relationships between Oxfam and the company sit with individuals and when there are hard feelings between those individuals it makes it challenging to work together, even on shared outcomes and interests.

So, what's the Behind the Brands code for corporate-campaigning?

DO:

- Be respectful.
- Create a realistic ask: Campaign for something that the company can actually deliver;
- Justify your campaign with evidence.
- Follow the lead of your supporters, allies, and community you claim to represent: Openly communicate and carefully listen to your constituency.
- Give the company the chance to do the right thing: don't campaign for campaign's sake, give the company a chance to right the wrong before going public.

DON'T:

- Ambush the company: Provide a right of response and opportunity to review materials you will be making public. Be transparent with what you want and what you are going to do without jeopardising your strategy.
- Target individuals: This should be a last resort tactic. Similarly treat company brands with respect. Calling for change does not need to be a smear campaign. Only make accusations where you have evidence and legitimate cause.

Of course there are also challenges with this private sector influencing approach:

- It requires Oxfam to continuously strike a nuanced balance in tone and strategy, which can be a time-intensive approach, reduce nimbleness, and create intra-team tensions (this is also true for non-private sector campaigns).
- It requires continuous balancing of not becoming "too soft" with companies vs. not alienating companies' willingness to engage through unconstructive public tone.
- It can be a challenge to be sufficiently nimble while at the same time being sensitive to sign-off and risk management. It is especially difficult to accommodate the different time lines of public campaigning and private sector engagement work.
- Working closely with companies can come with a number of risks including forming insider relationships over time or empathising with the complex realities of companies, which can lead to lower ambitions in terms of our "asks" and what may actually be achievable. There is also the risk of raising expectations with companies that Oxfam is willing to support around long-term engagement and working together on solutions, which can be difficult to resource.

Behind the Brands gave Oxfam relatively quick wins with its targets, built a movement with several hundred thousand supporters, and provided a foundation for building out programmatic work that will track the implementation of the commitments made by the companies throughout the campaign. At the same time, Oxfam's approach in Behind the Brands is one which required a huge amount of resources, particularly in staff time. It also meant for complicated ways of working as the team was global in nature and conducting company engagement in multiple markets which needed to

be tightly coordinated. Nevertheless, the approach used could be modified for much smaller campaigns, including one that focused on fewer companies and markets.

NOTES

- 1 • The ten companies were Associated British Foods (ABF), The Coca-Cola Company, Danone, General Mills, Kellogg, Mars, Mondelez, Nestle, PepsiCo, and Unilever.
- 2 • See, "Behind the Brands," Oxfam, 2017, accessed June 7, 2017, <https://www.behindthebrands.org/>.
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- 7 • "Celebrating three years of Behind the Brands," Youtube video, 1:36, posted by oxfaminternational, April 19, 2016, <https://www.youtube.com/watch?v=Z1P2oGG569A>.
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INSTITUTIONAL OUTLOOK



DOCTORS WITHOUT BORDERS: COHERENT PRINCIPLES

Renata Reis

Susana de Deus

DOCTORS WITHOUT BORDERS: COHERENT PRINCIPLES

Renata Reis & Susana de Deus

- *The decision to suspend funds received* •
from the European Union

ABSTRACT

This text explains the reasons, including the internal debate, for Doctors without Borders' recent decision to suspend funds received from the European Union for the development of its humanitarian work, doing justice to the values that guide the organisation: Independence, medical ethics, neutrality and impartiality. The refusal to continue receiving economic assistance is a critical position in the face of recent migratory policies adopted by the European Union, signalling the negative impact that these policies are having on thousands of vulnerable people, who are, after all, the principal focus of MSF's humanitarian work.

KEYWORDS

Doctors without Borders | Financial Assistance | European Union | Principles | Humanitarian Aid

1 • Introduction

Doctors without Borders (MSF) is an international humanitarian organisation that provides consistently neutral and impartial medical support in diverse crises. The people we see are not distinguished by any criteria other than their health needs. Independence is another fundamental principle of our work. We uphold a strict principle of not basing our work on any political, economic and/or military interest.

The independence of our work is strongly linked to the origin of the funds that sustain it. MSF's reliance on the support of millions of people in many different countries means we can provide medical care where it is most needed, free of any political or economic influence. Even so, until recently a very small part of our budget came from institutional funding, such as the European Union (EU) and from some international health-related agencies, such as, for example UNITAID.

This short article covers MSF's recent decision to suspend funds received from EU and all its member states, in response to unacceptable European policy with regards to the refugee and migrant population – notably the signature and implementation of an agreement between the EU and Turkey in March 2016. We believe that it is at the most pressing and difficult times, when our organisations come under pressure to take pragmatic decisions, that we are challenged to test our principles. These are in no way easy decisions to take. As we will see, this decision reinforces the coherence of the principles that underpin our medical work.

2 • The European response to MSF's decision

In its 46 year-long history MSF has built up extensive experience in assisting refugees, asylum seekers, migrants and people who have been displaced from their home countries. MSF has sought to provide relief to people who have left everything behind in search of some security in order to start anew and who experience deterioration in their living conditions. These include: monitoring the Cambodian population fleeing the Khmer Rouge in Thailand, Rwandans in camps in Zaire, Somali refugees in Kenya, Palestinians in countries such as Lebanon, those displaced in Colombia, Mexican migrants and many other population movements triggered by conflicts, disasters and crises of many different types. Similarities between such different populations include their vulnerability, the enormous uncertainties they face, and the anguish of abandoning the world they knew and their emotional ties and roots.

In moments of extreme fragility, like the one being experienced by people who are now moving around the world for a variety of reasons, the receiving and transit countries and international regulations should provide assistance, protection and preserve human dignity over and above any national or transnational values. Sadly, that which seemed obvious and to be entrenched in so many international documents is being unacceptably “rewritten”

by the EU, causing terrible consequences for those people who most need protection, establishing a dangerous precedent that could set the tone in the building of policies for refugees, asylum seekers and migrants around the world. Another point worth highlighting is the fact that the EU is among the top principal donors and influencers of policies for humanitarian cooperation. A move such as this, therefore, has the power to have a terrible impact on the lives of millions of displaced people around the world.

As was widely publicised one year ago, the 28 EU member countries and Turkey signed a controversial treaty to stem the flow of migrants into Europe via the Aegean Sea. The agreement set out to send foreign nationals, including Syrians, arriving on the Greek coast, back to Turkey, effective from that time. Once the flow was stemmed the EU promised to receive the same number of Syrian refugees, originating from Turkey, as had been deported. In exchange for closing the Aegean route, Turkey was to receive 6 billion euros (24 billion Brazilian reais) by the end of 2018, to help the almost 3 million Syrian refugees in the country. In addition the EU promised to speed up the negotiation to exempt Turkish nationals from the visa requirement and to proceed with Turkey's admission to the EU.¹ The premise of the agreement itself is alarming: the fact that those seeking refuge – founded on the protection of fundamental guarantees, such as the right to life – were treated as a bargaining tool, involving swaps and financial resources. This represents an unprecedented shift – the inclusion of conditional factors in the offer of shelter – with a nefarious impact on people in transit and on future negotiations. This is unacceptable in moral and humanitarian terms.

MSF had already been publically calling for the EU and its member states to introduce and develop policies to protect vulnerable people – dignified conditions for receiving, schemes for reuniting families, humanitarian visas, simplified visa requirements, among other measures – instead of focusing on dissuasion and expulsion. In our day-to-day work we have been witnessing the physical and psychological consequences of policies of dissuasion. Almost four thousand men, women and children perished in the Mediterranean Sea in 2016, evidence of an abominable situation in which these policies are failing. The EU-Turkey agreement formalised a trend of not receiving and of rejecting undesirable populations in Europe, that was already apparent.

In the face of this scenario, the organisation initiated internal discussions on whether to continue to receive funds from the EU and other countries in the region. How could we distance ourselves and not be party to policies which are so harmful to the people we take care of on a daily basis? After all, MSF started in Europe and although it is increasingly multicultural and plural, it has five operational centres in the continent, so clearly, decisions related to the EU raise much debate.

Internal debate underpins MSF governance. The organisation would not have become what it is today without this characteristic. The decision was not taken without strong points of view being expressed by members of the association, in favour and against suspending these funds. Those in favour of EU funding, listed a series of arguments: they

highlighted the danger of the MSF distancing itself from EU platforms, which could lead to increased difficulty in communication with these platforms; the organisation's lack of memory regarding history, given that decades ago the EU was fundamental in releasing emergency funds that were important for the organisation to reach more people and attract an increasing number of private grants. By attracting private grants it was able to reduce institutional funding from the EU.

Like most organisations in the beginning, institutional/governmental grants were important in the MSF budget, reaching 50 per cent in 1996. However, from very early on, this fact was already worrying for the organisation.² So, in 1995, when MSF held the first of its two "policy summits", in Chantilly, France, the final document already included concern about the need to diversify funding in order to preserve its independence:

*"The concern for independence is also financial. MSF endeavours to ensure a maximum of private resources, to diversify its institutional donors, and, sometimes, to refuse financing that may affect its independence."*³

There was also questioning over how the people we work for – the most vulnerable and those who are excluded from health services and other basic needs – may receive news of this decision. The balance of opinions tipped towards a conviction about the protection of humanitarian principles.

Those who defended maintaining European funding were also worried about how this decision would be seen by donors and the general public. The public may consider this action an act of arrogance, because saying no to EU funding would be the same as saying no to the EU contributors and could therefore indicate that we do not need financial support. While those who defended not receiving funds trusted that the decision would be coherent with the complexity of the times we live in and with the trend of people fleeing from wars, economic crises and growing xenophobia. The organisation assessed there would be those among its donors who would want to imperiously defend these people and not by defending policies that turned them away from their borders, as was being done. The relations that MSF has in a number of European and international ambits of debate are healthy and we did not see ourselves being excluded from them because of the refusal of European funds. Financial independence would be preserved, intensifying communication about the assistance that we provide these people on a daily basis, therefore it was believed that funds would be guaranteed through private donors (individuals).

In June 2016, once the time for reflection within the organisation was over, MSF decided to announce that it would be suspending funds received from either the EU or from member states.

We emphasise that this decision stands alongside other decisions taken in the past, such as the refusal of donations from countries involved in military intervention. In 2004

MSF suspended funds received from American government agencies. This still stands and the objective is to guarantee the neutral and impartial provision of medical aid in the context of conflicts in which the United States are involved and where MSF is working.

3 • The suspension in practice

The impact of MSF's policy decision to suspend funds received from the EU and its member countries was carefully weighed up and considered. If necessary MSF could call on its reserve funds, normally used in emergencies, to guarantee that this decision did not affect patients and projects in progress. At the same time we worked to build awareness among donors so they would not give up on the work of MSF.

At this time the organisation's funding was already not dependent, as previously mentioned, on institutional grants. Even before the decision about the EU, 92 per cent of our funding came from the generosity of 5.7 million individual donors around the globe. While on the one hand our financial independence allowed us to be radical in the defence of our principles, on the other, more than ever, we needed individual supporters to be mobilised and connected to our work. It had become intolerable to receive funds from the same institution that was expelling people who we were providing with medical assistance. We could not receive resources from the EU whilst at the same time treating patients with frostbite from living in tents in the Greek winter in 2016, as the result of a disastrous and inhuman agreement.

At the time of the decision some projects were receiving European grants and these continued until the end of their contracts. The majority ended in 2016 and no new contracts have been signed since April 2016.

A decision that drastically bears witness to a respect for principles may not please everybody, but it responds to and reaffirms our commitment to those who motivate us and this is our only reason to exist: the population lacking medical attention and whose lives are in danger.

In this publication, aimed at discussing the institutional challenges to which organisations are exposed in their daily hardships, we are sharing our experience about the decision that was discussed by the dozens of countries where we are active and also our uncertainty about how this decision would be seen by the world. In the end, we confirmed that the strength of the organisation is in the work we do together with the populations supported and also in the constant reinforcement and struggle to keep our bases solid - in our case the principles of independence, medical ethics, neutrality and impartiality.

NOTES

1 • “Managing the Refugee Crisis – The Facility for Refugees in Turkey,” European Commission, 2016, accessed May 28, 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160420/factsheet_financing_of_the_facility_for_refugees_in_turkey_en.pdf.

2 • Jonathan Whittall, “MSF Suspension of EU Funds.” MSF Analysis, 2016, accessed May 28, 2017, <http://msf-analysis.org/msf-suspension-eu-funds>.

3 • “Who Are the Medecins Sans Frontieres,” MSF, 1995, accessed May 28, 2017, http://association.msf.org/sites/default/files/rst_library_item/Principles%20Chantilly%20EN.pdf.



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VOICES



HUMAN RIGHTS UNDER SIEGE

Philip Alston

HUMAN RIGHTS UNDER SIEGE¹

Philip Alston

- *How to respond to the populist threat facing human rights* •

ABSTRACT

There is little debate that the human rights movement is experiencing unprecedented challenges. Here Philip Alston addresses how the movement needs to respond in order to survive. Firstly, he notes the importance of maintaining perspective, reminding us that the defence of human rights has never been easy. He also argues that we must recognise that this is a long-term effort and will not disappear after Trump leaves office and that, crucially, the movement needs to develop introspection and openness in order to adapt. He then sets out the five key issues that he believes the movement must address in the coming years: the populist threat to democracy; the role of civil society; inequality and exclusion; the undermining of international law and the fragility of international institutions. Finally, Alston suggests a number of strategies that human rights organisations need to adopt in order to respond to this new reality. He ends by saying all this must be done with a sense of great urgency. The time to act is now.

KEYWORDS

Populism | Human rights movement | Strategies | Trump

The human rights movement, as we know it, is no longer.

The challenges that the human rights movement now faces are fundamentally different from much of what has gone before. This does not mean, “the endtimes of human rights”.² But it does mean that human rights proponents need to urgently rethink many of their assumptions, re-evaluate their strategies, and broaden their outreach, while not giving up on the basic principles.

These challenges are seen nowhere clearer than in the election of Donald Trump who has consistently advocated measures that would abrogate civil liberties for American citizens and non-citizens alike. Almost every senior appointment he has made has been a person from the far right of the political spectrum with a total lack of expertise for the relevant portfolio. And while the finer details of President Trump’s human rights policies remain to be worked out, there is an essential antipathy and even hostility to the subject. Beyond Trump, an increasingly diverse array of governments have all expressed a desire to pushback against key pillars of the international human rights regime. And while there have always been coalitions of would-be wreckers, in the past they have been met with at least some pushback from the United States of America (US) and other leading Western and Latin American governments. The prospect of effective pushback in the future is now evaporating before our eyes.

To respond to this, we need to remember three key points. First, we need to maintain perspective, despite the magnitude of the challenges. Defending human rights has never been a consensus project and has almost always been the product of struggle. Second, this is the start of a long-term effort; it won’t be over in four years. And finally, the human rights movement needs to develop a spirit of introspection and openness. Historically, it has not responded well to criticism.

Looking forward, there are a great many issues that will demand our attention in the years ahead, but five will be key. The first is the populist threat to democracy. Much of the problem is linked to post-9/11 era security concerns, which has translated into an actual or constructed fear and hatred of foreigners or minorities. These concerns have been exploited by governments of many different stripes to justify huge trade-offs, for example that security can only be achieved by restricting freedom of movement, privacy, non-discrimination norms, or even personal integrity guarantees.

The second major issue is the role of civil society and how, rather than “shrinking civil space” the reality is that the space has already closed in a great many countries. In my capacity as United Nations (UN) Special Rapporteur on extreme poverty and human rights I have seen this first hand in my country visits to Mauritania and to China, while other countries are excellent students in this domain. Egypt recently passed a law limiting the activity of non-governmental organisations (NGOs) to social and development work, and banning all NGOs from cooperating in any way with any international body without governmental approval.

The third issue is the linkage between inequality and exclusion. Populism is driven in part by fear and resentment. To the extent that economic policies are thus critical, it is noteworthy that mainstream human rights advocacy addresses economic and social rights issues in a tokenistic manner at best, and the issue of inequality almost not at all.³ Similarly, the focus of most human rights advocacy is on marginal and oppressed individuals and minority groups. However, the majority in society feel that they have no stake in this kind of human rights movement, and that human rights groups really are just working for “asylum seekers”, “felons”, and “terrorists”. A renewed focus on social rights and on diminishing inequality must be part of a new human rights agenda. Taking into account the concerns, indeed the human rights, of those who feel badly done by as a result of what we loosely call globalisation-driven economic change is key to ensuring the movement’s success.

The fourth issue is the undermining of the international rule of law, specifically, the systematic undermining of the rules governing the international use of force by Western countries. The US and its ever-supportive, never-questioning allies such as the United Kingdom and Australia and their assiduous efforts to rationalise targeted killings and other dubious acts are now reaping the rewards that they so richly deserve. These countries are no longer in a position to turn around and say that some of the tactics used by other countries are in violation of international rules. There has also been a shocking breakdown in respect for the principles of international humanitarian law. Systematic targeted attacks on medical facilities, on operations by *Médecins Sans Frontières* and other humanitarian groups are commonplace and barely remarked upon. In a 2016 opinion poll undertaken by the International Committee of the Red Cross, a mere 30 per cent of American respondents considered it to be unacceptable to torture a captured enemy combatant “to obtain important military information”. In the same poll, taken in 1999, the figure had been 65 per cent. In Nigeria, 70 per cent supported such torture and in Israel 50 per cent did.⁴

The fifth and final issue concerns the fragility of international institutions. The International Criminal Court is under sustained attack with various African states announcing their planned withdrawals. And the announcement by the Office of the Prosecutor that she is actively investigating the activities of the US Central Intelligence Agency (CIA) and other forces in Afghanistan and related countries will hardly endear the court to the Trump Administration. Meanwhile, the Human Rights Council has been operating in a way that is surprisingly balanced in the last few years. However, the new populism is certain to change this dynamic and China and Russia have both made it clear that they stand ready to introduce or to re-introduce major “reforms” of the Council, a prospect which is hardly grounds for cheer. Similarly, the United Kingdom and many other states have waning affection for the European Court of Human Rights, while Russia and Turkey are virtually unresponsive members. Across the Atlantic, the Inter-American Commission on Human Rights announced, in mid-2016, that it was going to have to lay off 40 per cent of its staff, a fate that was narrowly headed off at the very last

moment by new contributions. But there is no certainty that this rescue operation will be sustainable in the future and it is noteworthy that the US has traditionally played an outsized role in funding the Commission's work. And finally in institutional terms, the slashing of developmental assistance budgets, which is an ongoing process, is likely to be accelerated in the years ahead threatening these institutions even further.

So, what sort of strategies does the human rights community need to start considering in response to the fundamentally new circumstances that we are now confronting?

1 • Local/international synergies. We need to reflect on how better to ensure effective synergies between international and local human rights movements. The large NGOs have still not achieved the right balance. The activities of international NGOs must have less of an extractive character (extracting information and leaving) and instead focus more on building or complementing national capacity. There will be times when only international groups can function effectively; but there will also be situations in which exclusively international advocacy will be ineffective and perhaps counter-productive.

2 • The economics of rights. Economic and social rights must be an important and authentic part of the overall agenda. A surprisingly small proportion of self-described human rights NGOs do anything much on economic and social rights.⁵ It is argued that if people enjoy political freedoms they can stand up for their social rights. But the enjoyment of civil rights does not always bring social rights. We need to start insisting that the catalogue of human rights includes – equally – both categories of rights. Human rights groups should reflect on ways in which they can constructively contribute to both sides of the agenda. They remain fundamentally misunderstood by the great majority of governments and even by most human rights activists. The rights are conflated or confused with development, or poverty alleviation. But economic and social rights proponents should not be focusing their attention initially on, for example, ensuring that everyone actually enjoys immediate access to all types of health care. Instead, we need to start by constructing an appropriate human rights framework. This involves the same three elements as does a campaign against torture: recognition, institution building, and accountability.⁶

3 • Broadening the base. The human rights community must start expanding its horizons in terms of thinking about which other actors it can work with. We need to begin more of a big-picture conversation with the larger corporations about whether an authoritarian, anti-rights, and anti-welfare future is really in their interests. They, but also we, need to start thinking about where, how and when they can legitimately and constructively stand up to policies that cross certain lines and how they can use their influence and power to make the case for more human rights friendly approaches. And it is not just corporations. We need to start thinking more creatively about other potential allies with whom the human rights movement can cooperate.

4 • Persuasion. We need to acknowledge the need to devote more time and effort to being persuasive and convincing, rather than simply announcing our principles as though they were self-evidently correct and applicable. We need to take a step back from the absolutism that sometimes manifests itself. We pride ourselves, sometimes rightly and unavoidably, on being uncompromising and fear that if we make any concessions along the way we are selling out on the basics of human rights. However, in the words of Jose Zalaquett we must have “the courage to forgo easy righteousness, to learn how to live with real-life restrictions, but to seek nevertheless to advance one’s most cherished values day by day to the extent possible. Relentlessly. Responsibly.”⁷

5 • The role of scholars. What role do scholars have in all of this? As teachers, as researchers, as publicists, we have obligations to our students and to our readers. It has become fashionable, especially at elite universities in the West, to disparage human rights by accentuating the undoubted shortcomings of international human rights norms and institutions. At a range of law schools that I have visited I have encountered students who have become deeply disillusioned or cynical because they have been taught that the human rights enterprise is largely an illusion, that it is not something that they really should be putting their time into and that it has no future. It is our responsibility to suggest alternative strategies, not simply to ensure that students are aware that there are shortcomings.

6 • What each of us can do? A crucial element in responding to the populists and autocrats is for each one of us to reflect carefully on what contributions we can make. All of us can stand up for human rights, but each in our own way. The simple point is that each one of us is in a position to make a difference if we want to do so. Despondency or defeat is not the answer, because there is always something we can do. It might be a rather minor gesture in the overall scheme of things, but it makes a difference. It might be merely a financial contribution. Now is the time to be contributing to human rights groups and advocates in ways that we have not done in the past. It is absolutely essential for us to strengthen the frontline organisations that are going to be best placed to stand up and defend human rights against the threats posed by the new populism.

We cannot wait, we need to start acting; we need to do whatever we can to strengthen respect for international human rights. We need to commit to the principles in our own lives, in our own areas. We are going to need to operate in a much more creative fashion both internationally and locally. There is going to be a complex relationship between these two levels but there are always places where we can make a difference. These are extraordinarily dangerous times, unprecedentedly so in my lifetime. Even during most of the Cold War there was a degree of certainty but today we have lost much of that and almost anything seems possible. The response is really up to us.

NOTES

1 • This is an edited version of an article that first appeared in *The Journal of Human Rights Practice*, which in turn was based on a public lecture given at the London School of Economics on 8 December 2016.

2 • Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013).

3 • For a report on the relationship between extreme poverty and extreme inequality, see *United Nations, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston*, UN Doc. A/HRC/29/31 (26 May 2015), available from http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_31_en.doc.

4 • "People on War: Perspectives from 16 Countries,"

International Committee of the Red Cross (ICRC), 2016, accessed May 21, 2017, <https://www.icrc.org/en/document/people-on-war>.

5 • United Nations, *Report of the Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, on the Marginality of Economic and Social Rights*, UN Doc. A/HRC/32/31 (28 April 2016), available from http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A_HRC_32_31_AEV.docx.

6 • This framework is developed in some detail in *ibid.*

7 • José Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," (The Mathew O. Tobriner Memorial Lecture), *Hastings Law Journal* 43, no. 6 (1992): 1425.



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