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English Edition

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# PRESENTATION



As in recent issues of our Journal, in this tenth edition we highlight one theme, to which we dedicate five of nine total articles. This theme refers to the plight of the millions of migrants and refugees who find themselves in dire situations in many countries around the world. The article by Katharine Derderian and Liesbeth Schockaert of *Médecins sans Frontières* realistically portrays the terrible human tragedy of refugees and, from the point of view of human rights, discusses the concept of refugee, according to the criteria of the United Nations High Commissioner for Refugees (UNHCR), under whose guidance and with whose generous support we were able to organize this edition. The UNHCR criteria and the foundations of the protection system for refugees are explained in the article by Juan Carlos Murillo.

In addition to the articles mentioned above that address general problems, we published the following contributions, which focus on specific problems relating to the human rights of refugees and migrants:

**International Cooperation and Internal Displacement in Colombia**, by Manuela Trindade Viana, focuses on problems related to internal displacement in Colombia, a country that contains 25% of the world's internally displaced population (11.5 million).

**Access to antiretroviral treatment for migrant populations in the Global South**, by Joseph Amon and Katherine Todrys, of the *Human Rights Watch*, denounces the violation of laws that guarantee access to health resources for non-permanent populations of migrants and refugees.

**European Migration Control on African Territory**, by Pablo Ceriani Cernadas, analyses the inhuman immigration control policies adopted by European governments and EU organizations on the coast and in the waters of North African countries.

Our tenth edition is completed with the contributions by Anuj Bhuwania ("**Indian torture**" and the **Madras Torture Commission Report of 1855**), Daniela De Vito, Aisha Gill and Damien Short (**Rape Characterised as Genocide**), Christian Courtis (**Notes on the implementation by Latin American courts of the ILO Convention 169 on indigenous peoples**) and Benyam E. Mezmur (**Intercountry Adoption as a Measure of Last Resort in Africa**). Bhuwania argues that police torture in India is a legacy of colonialism, as illustrated by the "Madras Torture Commission Report of 1855". De Vito, Gill and Short discuss the theoretical consequences of defining rape as a

particular kind of genocide. Courtis presents emblematic cases of the application of the ILO 169 Convention on Indian and tribal populations in Latin America. Finally, Mezmur focuses on the problems associated with the policies for adoption of African children by families from other continents.

We hope that the articles presented in this edition will help to enrich the debate surrounding the growing number of problems associated with the displacement of vast human contingents, who were forced to leave their homes, not only due to wars, persecutions and political totalitarianism, but also due to various economic causes, whose detrimental consequences to the human rights of their victims are equally dramatic.

We would like to thank the following professors and partners for their help with the selection of articles for this edition: Carina du Toit, Carlos Ivan Pacheco Sánchez, Florian Hoffmann, Gaim Kibreab, Glenda Mezarobba, Guilherme da Cunha, Iniyana Ilango, Jeremy Sarkin, José Francisco Sieber Luz Filho, Juan Amaya Castro, Laura Pautassi, Malak Poppovic, Paula Miraglia, Rajat Khosla Renata Reis, Roberto Garretón and Upendra Baxi.

As mentioned on our website, beginning with this edition, we have adopted new rules for citations and bibliographical references in order to facilitate the reader's experience. Because this is a recent change, we count on our readers' understanding in the case of any mistakes caused by such change. In this matter, we would like to thank the following individuals who contributed to the formatting of the articles: Clara Parra, Elaini Silva, Mila Dezan, Rebecca Dumas and Thiago Amparo.

We conclude by stressing once again the importance of the guidance and support provided to us by the UNHCR for the publication of this edition, which originated as a doctrinal investigation and development of the "Mexican Action Plan for the Strengthening of International Protection of Refugees in Latin America", geared towards cooperation with academic institutions that are dedicated to the research, promotion and instruction of international law related to refugees.

In particular, we would like to thank the offices of UNHCR in Argentina and Brazil, and the Legal Regional Unit for the Americas.

**The editors**



#### ANUJ BHUWANIA

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#### ABSTRACT

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While it is often argued that police torture is institutionalised in India, the only authoritative government-backed study of the practice in the history of modern India is the Madras Torture Commission Report of 1855. In the context of the silence that surrounds present-day police violence in India, the rather curious phenomenon of an investigative Commission, instituted by a colonial state, over a hundred and fifty years ago, is particularly interesting. In this article, I attempt a textual analysis of this Report, and an investigation of its ideological and historical context. I argue that the Report primarily served to discursively “manage” the issue of torture, by erasing the complicity of the colonial state in its practice, and that the reforms it suggested resulted in the institutionalisation of a specifically colonial model in the restructuring of the Indian police, a structure that substantially survives to this day.

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#### KEYWORDS

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Torture – Police – Colonialism

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# “VERY WICKED CHILDREN”: “INDIAN TORTURE” AND THE MADRAS TORTURE COMMISSION REPORT OF 1855

Anuj Bhuwania

## 1. Introduction

Alec Mellor, in his landmark book on the history of torture, *La Torture*, first published in 1949 in the aftermath of the Second World War, tries to explain the reasons for the supposed *reappearance* of torture in the twentieth century. He suggests three fundamental causes for this resurgence: the rise of the totalitarian state culminating in the USSR; the importance of “intelligence” gathering and “special methods of interrogation” as a result of modern warfare; and finally, the influence of “Asianism” (PETERS, 1985, p. 106). Though the third “cause” does seem rather contrived in the context of the first two, this ethnocentric fetishization of “Asia” as the natural home of torture and other such “barbaric” practices, and its corollary – torture as alien to modern, enlightened Europe - is not an isolated instance. Montesquieu, in his “Persian Letters,” for example, used the idea of the “tyranny of the Turk” as a foil for that of Louis XIV. In fact, such an analysis is representative of a long and chequered history, of a discourse in which such a projection of “despotism” as uniquely “oriental” “helped Europeans define themselves in European terms by making clear what they were not, or rather were not *meant* to be” (METCALF, 1994, p. 7).

In a similar vein, as Talal Asad writes, it has often been observed “that European rule in colonial countries, although not itself democratic, brought about moral improvements in behaviour - i.e., the abandonment of practices that offend against the human” (ASAD, 1998, p. 293). However, the progress made in eradicating such inhuman practices as torture has admittedly been rather uneven. Thus, the accepted account of events is that, although the Europeans tried their best to suppress these cruel practices (that were previously taken for granted in the

*Notes to this text start on page 26.*

non-European world), they were not completely successful (ASAD, 1998, p. 293). Acknowledging this failure of its pedagogy, the West continues its sincere efforts in arenas like the United Nations, with Non-Governmental Organisations taking up cudgels on its behalf.

In 1973, one such organisation, Amnesty International, published an international survey of torture. In its section on India, it reported widespread use of torture by the Indian police (AMNESTY INTERNATIONAL, 1973). Following this, Upendra Baxi argued that torture is, in fact, institutionalised in India. As he puts it, "custodial violence or torture is an integral part of police operations in India" (BAXI, 1982, p. 123). He notes, however, the difficulty in assessing the magnitude of this phenomenon, because of the lack of any authoritative government-backed study of the practice. Ironically, he says, "when one looks back a little, one finds that the British governing elite was more explicitly concerned with use of torture by the native police, than the governing elite of independent India" (BAXI, 1982, p. 129). Baxi's statement probably derives from the fact that the only comprehensive study of this kind in the history of modern India is the Torture Commission Report of 1855. The Commission was set up by the then Madras Government, under orders from the Court of Directors of the East India Company. Baxi notes that the Commission's conclusions regarding the plight of the victims are still valid today. Police torture is as much a reality now as it was then (BAXI, 1982, p. 130).

In the context of the silence that surrounds present-day police violence in India, the rather curious phenomenon of an investigative Commission, instituted by a colonial state, over a hundred and fifty years ago, is particularly interesting. Why was the British governing elite so explicitly concerned with the use of torture by the native police?

I am not concerned here with examining the degree to which torture was prevalent in pre-colonial, colonial or post-colonial India. My aim is, rather, to examine the discourse of torture, and, in particular, the peculiarities that this discourse assumed in the colonial context of mid-nineteenth century India.

My argument is in two parts: first, I argue that the Report primarily served to discursively "manage" the issue of torture, by erasing the complicity of the colonial state in its practice. Second, I argue that the reforms it suggested resulted in the institutionalisation of a specifically colonial model in the restructuring of the Indian police.

The first section analyses the language of the Report. As an all-European body called upon to investigate the prevalence of torture in a South Indian province in the mid-nineteenth century, how did the Commission interpret its mandate? How did it construct the problem that it was supposed to look into? How did it look at issues of race? Or, more specifically, how did it go about fixing responsibility for the practice on Indians and Europeans? And, finally, what was its diagnosis of the malaise and the solutions it suggested?

The second section tries to examine the curious question of *why* the Commission was set up at all. Why did the Report come to be written the



way it was, and *who* was it written for? In order to answer these questions, this section examines the ideological context of the Report. By the eighteenth and nineteenth centuries, the issue of torture and its abolition had become a crucial moral and humanitarian theme in Europe, and this is reflected in the almost triumphant moral tone of popular histories of the subject. This is followed by an analysis of the nature of nineteenth century colonial discourse with regard to India, which, I believe, is crucial to understanding why the colonial commission on torture came to the conclusions that it did. Specifically, the narrative device of the Report, putting the blame almost entirely on the native police and their supposed propensity to torture,” is placed in the context of the colonial ideological trends of the time.

The final section examines the legacy of the report in terms of the reforms it resulted in. The entire structure of the Madras Police was overhauled, broadly in accordance with the Commission’s recommendations. The Madras model later became the basis for police reforms throughout India. In fact, the same structure endures till today. The organising principle of this structure, as well as that of the Irish Constabulary, on which it was modelled, is next critically examined. In conclusion, I argue that the far-reaching changes thus introduced in the structure of the colonial police must be placed in the context of colonial Indian bureaucracy as a whole, especially if we are to understand what I believe is the specifically colonial character of the modern regime of power in India.

This paper is actuated by the belief that the “root of postcolonial misery” (in Partha Chatterjee’s words) lies in the “surrender to the old forms of the modern state,” as “autonomous forms of imagination of the community were, and continue to be, overwhelmed and swamped by the history of the postcolonial state” (CHATTERJEE, 1993, p. 11).

## 2. The Torture Commission Report, 1855.

*It is not the torture of the high European sort [...] Indian torture is ready, impromptu, ingenious, cheap, annoying, disgusting, revolting and petty in the extreme [...] It is the torture of very wicked children. (The Times, 3 sep. 1855 apud PEERS, 1991, p. 50).*

In 1854, the House of Commons was rocked by allegations of torture against the Honourable East India Company. During a debate, based on information from the Madras Presidency, it was said that torture was frequently employed by native officers to compel the ryots to pay the demands of Government (GUPTA, 1974, p. 310). Mr Danby Seymore, MP, accused the Company of using torture and coercion to get ten shillings from a man when he only had eight (RUTHVEN, 1978, p. 183). Soon the British press took over. *The Times* wrote of the “Indian Inquisition” and *Punch* carried a satirical piece on the issue (PEERS, 1991, p. 34). The Court of Directors immediately directed the Madras Government to set up “a ‘most searching inquiry’ and to furnish them a full report on the subject” (GUPTA, 1974, p. 311). Accordingly, on the 9<sup>th</sup> of September 1854, a three-member Commission<sup>1</sup>

was appointed to enquire into the "use of torture by the native servants of the state, for the purpose of realising the Government revenue" (COMMISSIONERS FOR THE INVESTIGATION OF ALLEGED CASES OF TORTURE AT MADRAS [MADRAS], 1855, p. 3). However, the scope of the enquiry was soon enlarged to include "the alleged use of torture in extracting confessions in police cases" (MADRAS, 1855, p. 3). The Commissioners were informed that:

*The instructions of Government were at first confined to the Revenue Department, because the imputation of the use of torture solely referred to the collection of the public revenue; but the Governor in Council is desirous of taking this opportunity of ascertaining the extent to which similar practices are resorted to in police matters, in which they have long been admitted to prevail, and the Commission will therefore be requested to extend their investigation to the Police Department, and, in fact, go fully into the whole subject in all its bearings. (MADRAS, 1855, p. 3).*

The Commission drew up a notification to make its existence generally known to the people. 150 copies of this notification in English, 10,000 in Tamil, 10,000 in Telugu, 10,000 in Canarese, 5,000 in Malayalam and 5,000 in Hindustani were despatched to all the districts of the Presidency to be generally distributed and to be affixed on all offices (MADRAS, 1855, p. 3). Also, the notification was advertised in all the newspapers of the Presidency and the complaints were to have reached the Commission by the 1<sup>st</sup> of February 1855. About 519 complainants appeared before the Commission, some from distances exceeding 300 miles. Also, 1,440 complaints were received by way of letters (MADRAS, 1855, p. 4). After having been in existence for about 7 months, the Commission submitted its Report on the 16<sup>th</sup> of April 1855.

The very first issue that the Report dwelt upon was the question of the novelty of the practice of torture. Relying on "old authorities," it noted the "historical fact" that "torture was a recognised method of obtaining both revenue and confessions" since pre-British times (MADRAS, 1855, p. 5). Specifically with regard to the practice of torture for eliciting confessions, even the Government Order of the 19<sup>th</sup> of September 1854, extending the Commission's enquiry to police matters, said:

*So deep rooted, however, has the evil been found, and so powerful the force of habit, arising from the unrestrained licence exercised in such acts of cruelty and oppression under the former rulers of this country, that it has not been practicable, notwithstanding the vigorous measures adopted, wholly to eradicate it, from the almost innate propensity of the generality of native officers in power to resort to such practices on the one hand, and the submission of the people on the other; and accordingly the abuse still prevails in the Police Department, although undoubtedly not to the same extent as formerly. (MADRAS, 1855, p. 5).*

The Commission, accepting this "native propensity," then frames the issue before

it thus: has the “change of government effected any radical change in the habits of the native lower officials?” (MADRAS, 1855, p. 5). The question it examines is:

*[...] whether there has arisen anything in the civil administration of the last few years, which has exercised a special influence, or had any preventive operation upon the continuance of the practice, or any particular tendency towards its extinguishtments. (MADRAS, 1855, p. 5).*

The Report then goes on to discuss the various British interventions till then regarding torture in criminal cases. It was noted that between 1806 and 1852 as many as 10 circular orders were promulgated by the *Faujdari Adalat* (the Supreme Criminal Court) on the subject of extorting confessions (MADRAS, 1855, p. 8). In April 1826, the Court of Directors of the Company despatched a letter to the Madras Government regarding various reports of torture from the Presidency (MADRAS, 1855, p. 5). Interestingly, the Court in its despatch discusses various judicial pronouncements on torture in Madras, a recurring theme of which is the leniency of the European magistrates towards native police officers, in cases of misconduct (MADRAS, 1855, p. 5-8). These allegations were brushed aside by the powerful Governor of Madras Presidency, Sir Thomas Munro with the comment that:

*It is no doubt too certain that many irregularities are used in obtaining confessions, and that in some instances, atrocious acts are committed; but when we consider the great number of prisoners apprehended, and the habits of the people themselves, always accustomed to compulsion where there is suspicion, how difficult it is to eradicate such habits, and how small the proportion of cases in which violence has been used is to the whole mass, the number of these acts is hardly greater than was to be expected, and is every day diminishing. (MADRAS, 1855, p. 8).*

In 1832, the Parliamentary Select Committee on East India Affairs examined the issue of torture in British-administered India. Alexander Campbell, who had been the Registrar of the Sudder Diwani and Faujdari Adalat (the Supreme Civil and Criminal Court, respectively) was asked by the Committee:

*Are you aware whether the practice of torture by the native officers, for the purpose of extorting confessions or obtaining evidence, has been frequently resorted to? [He replied] Under the native governments which preceded us at Madras the universal object of every police officer was to obtain a confession from the prisoner with a view to his conviction of any offence; and notwithstanding every endeavour of our European tribunals to put an end to this system, frequent instances have come before all our criminal tribunals of its use. (RAO, 2001, p. 4,127).*

Next, the Report considers the reports of the contemporary British authorities working in the “interior,” who had been asked to report on the allegations of torture. The Report surmised that the opinion among this section, with very

few exceptions, was that torture did take place, though in varying degrees in various districts. Most of the testimonies were based upon hearsay. In order to explain away the general absence of the actual witnessing of the operation by their countrymen, the Commissioners' noted "the certainty that no native would knowingly venture to have recourse to any such practice in the presence of a European" (MADRAS, 1855, p. 11). The Report, interestingly, next examined the various eyewitness accounts of torture and concluded that "such a body of evidence from credible, and nearly all European, eyewitnesses, is to our minds conclusive" (MADRAS, 1855, p. 15).

The report then dealt with the evidence collected by the Commission from the various complainants. As already noted, there were totally 1,959 complaints. It concluded,

*[...] making every allowance for the tendency of the natives to exaggerate, even when their story is founded on fact; being painfully conscious of their untruthfulness, knowing by experience how litigious and revengeful they are, we still think that most of their depositions, as a whole, bear marks of veracity, and that their stories are in the main true. (MADRAS, 1855, p. 16).*

The report lastly goes through the records of the previous seven years of cases of torture, which had been investigated by the Courts or the magistracy. The Commissioners note the rarity of successful convictions in these cases on account of a lack of adequate evidence and the extreme leniency of punishment even in these rare cases. However, to set the record straight, they quote with approval Mr Daniel, the agent of the Government at Kurnool, who says, "I have no hesitation in saying, that neither ryots nor any other class of persons entertain any idea that acts of violence in the collection of revenue are tacitly tolerated by the Government or its European officers[...]" (MADRAS, 1855, p. 287-92).

### ***2.1 The Commission's findings***

#### ***On the basis of this evidence, the Commission concluded***

*that personal violence practised by the native revenue and police officials generally prevails throughout this presidency, both in the collection of revenue and in police cases; but we are bound at the same time to state our opinion that the practice has of late years been steadily decreasing both in severity and extent. (MADRAS, 1855, p. 31).*

The Report found the term "torture" as defined by Dr Johnson - "pain by which guilt is punished or confession extorted" (MADRAS, 1855, p. 31)<sup>2</sup> - to be applicable to the practices prevalent in the Presidency.

The Report then tried to explain the comparatively fewer complaints about the use of torture to extract confessions compared to revenue cases. Its reasoning makes interesting reading. It expresses the belief (based on testimonies about "the habits of the people") that

*torture is ordinarily applied only when there are very good grounds for believing that the really guilty party is the sufferer. [It continues] Indeed it seems to be the universal opinion among the natives themselves, that in criminal cases the practice is not only necessary but right. It excites no abhorrence, no astonishment, no repugnance, in their minds. (MADRAS, 1855, p. 34).*

The Report further elucidates under the heading, “Habits of the people”, that

*we have instances of torture being freely practiced in every relation of domestic life. Servants are thus treated by their masters and fellow servants; children by their parents and schoolmasters, for the most trifling offences; the very plays of the populace (and the point of a rude people’s drama is its satire) excite the laughter of many a rural audience by the exhibition of revenue squeezed out of a defaulter coin by coin, through the appliance of familiar “provocatives,” under the superintendence of a caricatured tehsildar;<sup>3</sup> it seems a “time-honoured” institution, and we cannot be astonished if the practice is still widely prevalent among the ignorant uneducated class of native public servants. (MADRAS, 1855, p. 34).*

The Report, however, immediately clarified that the intensity of the practice had declined with European intervention. It relied on the orders passed by the Faujdari Adalat regulating confessions and said they “cannot but have produced their effect” (MADRAS, 1855, p. 34).

It also noted as a disincentive to the practice the fact that an uncorroborated confession was highly unlikely to result in conviction.<sup>4</sup> The Report then reveals the basis of its faith in European intervention. It says, “[t]here is not a native public servant, from the highest to the lowest, who does not well know that these practices are held in abhorrence by his European superiors” (MADRAS, 1855, p. 34).

The Commissioners then express their anguish at the difficulty that the torture victims face in obtaining redress. But the very first statement in the Report on this subject is to clarify that the Government or its European officers are completely free from blame in this regard and grants them the fullest credit for their efforts (MADRAS, 1855, p. 35). The Report reiterates the awareness among the native officials of their European superiors’ disapproval of the practice. Moving from the native officials to the rest of the native population, they further go on the defensive:

*we have seen nothing to impress us with the belief that the people at large entertain an idea that their maltreatment is countenanced or tolerated by the European officers of Government. On the contrary, all they seem to desire is, that the Europeans in their respective districts should themselves take up and investigate complaints brought before them. [Summing up their viewpoint on the matter, the Commission notes] The whole cry of the people, which has come before us, is to save them from the cruelties of their fellow natives, not from the effects of unkindness or indifference on the part of the European officers of Government. (MADRAS, 1855, p. 35).*

The Report then seeks to explain the contradiction between the natives seeing the European officials as their saviours and the rarity of complaints from them about the native officials. The Report does consider the high rate of acquittals in prosecutions for torture and the mildness of punishments awarded in such cases as factors (MADRAS, 1855, p. 35). However, it continues to harp on the character of the natives as the primary reason for this and does not seem to consider the European authorities who adjudicated upon these cases and, in effect, condoned the practice of torture, as responsible. This is in spite of the fact that the aforesaid letter from the Company's Court of Directors in 1826, as well as the Commission's own analysis of the previous seven years of cases of torture, clearly showed the extreme leniency adopted in such cases. Finally, the Report pushes the blame further away from the European officers by talking about the enormity of the tasks they perform, the huge size of their areas they administer and the minuscule numbers of Europeans in the administration (MADRAS, 1855, p. 37).

## *2.2 The recommendations of the Report*

The Commissioners noted that although the practice of torture was being powerfully impacted by the reform of the native character through "the spread of education, the opening of communications" and "the increased intercourse of mind and mind," these were only "gradual" and "general remedies" (MADRAS, 1855, p. 39). Instead they suggested a solution to the problem that they thought was specific to the Indian case. The Report states the proposition thus:

*It cannot be denied that a greater strength of European government servants in a province must tend to its more perfect administration, and the question is how and in what direction such additional force could be most beneficially employed and rendered serviceable in putting down the native practice of resorting to such illegal personal violence as we have been engaged in commenting on. (MADRAS, 1855, p. 39).*

The Report further elaborated on its views regarding the respective characters of the natives and the Europeans. It explains,

*the whole police is underpaid, notoriously corrupt, and without any of the moral restraint and self-respect which education ordinarily engenders; and that the character of the native when in power displays itself in the form of rapacity, cruelty, and tyranny, at least as much as its main features are subservience, timidity, and trickery, when the Hindoo is a mere private individual. (MADRAS, 1855, p. 40).*

Such a group of people would not surprisingly be capable of a practice, "the bare assertion of the existence of which is as startling to European ears as its reality is abhorrent to European morality" (MADRAS, 1855, p. 40).

The solution was thus simply to have European superintendents of police

for each district. This, according to the Commission, “would in a very short time interpose an effectual check to the resort of torture to elicit confessions” (MADRAS, 1855, p. 42).

The Report, having found the Holy Grail, then enthusiastically details the “powerful effect upon the welfare of the people” that it would have. The final result, it suggested, would be that

*the same conduct which has sufficiently guaranteed the peace and safety of European countries during the last thirty years, within which time the science of police may be said to have been entirely originated, would speedily afford to this Presidency an admirable constabulary, preventive and detective. (MADRAS, 1855, p. 43).*

The Report concludes by clarifying that its suggestion for “a copious infusion of European agency” into the civil administration was not due to any hostility towards the natives or to deprive them “from their fair share in the government of this country.” It then disarmingly argues for the relative merit of the term “moral” agency (as against “European” agency), as “there are many East Indians and some natives who, in our opinion, might as safely be trusted with power as any among ourselves” (MADRAS, 1855, p. 46).

The Commission finally ends its Report by modestly listing the purposes that its existence has served:

*the assurance which has been afforded the people at large, that whatever may have been the practice, it was not countenanced by the Government; the pointed manner in which the attention of all Europeans in authority has been called by government to the subject; the salutary fear which cannot but have been inspired in the breasts of the native officials; the confidence which publicity must have given to the people to resist their oppressors. (MADRAS, 1855, p. 47).*

### 3. Understanding the Report

*Torture has ceased to exist. (Victor HUGO, 1874 apud PEERS, 1991, p. 5).*

*Pain is not merely negativeness. It is, literally, a scandal. (TALAL ASAD apud ASAD, 1998, p. 290).*

The question arises: why was the Madras Torture Commission set up? Or, more precisely, why would a colonial government be interested in instituting an enquiry into the practice of torture? As discussed in the previous section, incidents of torture in the Madras Presidency had been reported by various government authorities right from the early nineteenth century, but little or no action had been taken (GUPTA, 1974, p. 308-310). This approach was summed up by a critic of the Company, who wrote, “cases of torture by the police are notoriously of frequent occurrence [...] but as no political purpose can be served by taking

notice of them, they are looked upon with perfect placidity by the government" (PEERS, 1991, p. 51).

However, the revelations in Parliament and the press coverage that followed in 1854 spurred the administration into action, and the Commission was instituted. The original letter from the Court of Directors of the Company, asking for the Commission to be set up, is revealing in its candour. It admits that action would now have to be taken because of the public outcry "rather than the earlier reports of our own servants" (PEERS, 1991, p. 51).

The objective of the Commission was thus to enable the government to deny all allegations. As we have seen, it performed this task admirably. The recurring theme throughout the Report is an anxious attempt at denying any complicity on the part of the British authorities in the practice of torture. However, though the report tries to rationalize it, the Commission's own findings point decisively to some degree of complicity on the British part. The Report discusses, for instance, the 1826 letter from the Company authorities in London to those in Madras, which quotes a circuit judge as saying, "I see no other way of accounting for it than in the leniency with which such aberrations are noticed by their immediate superiors" (PEERS, 1991, p. 49).

Instead of focusing on the role of British superior officers, however, the Report consistently tries to explain the persistence of torture by the "innate propensity of the natives." This "propensity" was seen as so deeply-rooted that even European "moral agency" was only partially and gradually able to undo it. As Anupama Rao puts it in another context, "the police was understood as a cultural institution compromised by the fact of being 'native', and hence fundamentally irrational and prone to excess" (RAO, 2001, p. 4127). The Report is indeed a classic example of the process that I have referred to as "the othering of torture."

Radhika Singha sums it up aptly: "The Torture Committee's primary address," she writes, "was to the British public, to reassure them that the natives could not possibly believe that European functionaries condoned torture" (SINGHA, 1998, p. 305). The language of the Report leaves one in no doubt as to whom it was addressing. It would therefore be pertinent to examine contemporary British attitudes to the question of torture – generally, as well as in the specific context of the history of British rule in India.

### *3.1 Torture and its histories*

In the mythology of the universal history of torture, the nineteenth century is seen as a period when torture disappeared in Europe and, thanks to European influence, declined even in the colonies.<sup>5</sup> Indeed, from 1750 onwards, the provisions for torture were being gradually removed from the criminal codes of Europe (PEERS, 1991, p.74). Alongside these legal changes, there emerged a burgeoning body of literature which condemned torture on moral grounds. The most famous example of such anti-torture texts was perhaps Cesare Beccaria's *On Crimes and Punishments*. By the nineteenth century, then, the question of torture had become, as Edward Peters puts



it, “the focal point of much Enlightenment criticism of the *ancien regime* (PEERS, 1991, p.74). Torture became a universally pejorative term: the greatest threat to law and reason that the nineteenth century could imagine (PEERS, 1991, p.75). The abolition of torture was a major landmark in the evolutionary path of progress that Europe was supposed to be by the late eighteenth century. The end of torture was now a powerful symbol of the new modern Europe and was used to contrast contemporary Europe with the Middle Ages, making it an important aspect of the self-definition of 19<sup>th</sup> century Europe.

The new moral sensibility thus gained a central role in the historiography of the abolition of torture. In the work of nineteenth century European and American historians, the process of illegalisation of torture was explained solely by a particular kind of progressivist narrative. Indeed, this history often describes these changes in terms of an “abolition movement” that parallels, for instance, the movement for the eradication of slavery. The story goes that the system of torture continued till the 18<sup>th</sup> century, when a series of notable publicists like Beccaria and Voltaire revealed its deficiencies and shocked the conscience of Europe, inspiring the great Enlightenment monarchs to abolish torture (PEERS, 1991, p.75).

John Langbein (1977), in his now-classic work, *Torture and the Law of Proof*, dismissed this version of things – rather provocatively – as a “fairy tale.” Rejecting the notion that the humanitarian influence was the decisive factor in the eighteenth century abolition of torture, Langbein emphasises instead that the purely juridical innovations in the law of proof, which were being deployed increasingly from the early seventeenth century, gradually made torture redundant. The Roman canon law of proof, which required either confession or the testimony of two eyewitnesses to convict, was gradually declining. With new forms of criminal sanctions like the galley, the workhouse and the practice of transportation coming into use, judges could exercise greater discretion than before in the sentences they pronounced. Increasingly, therefore, in cases where the high standards of evidence could not be met, even circumstantial evidence could now be used to convict, with a less severe punishment – a practice analogous to the modern system of “plea-bargaining” (PETERS, 1985, p. 84). Torture was thus no longer needed as an essential part of criminal procedure.

However, even Langbein acknowledges that “the writers played some role” in the “outlawing” of torture, and that its abolition “was an event linked to many of the deepest themes of eighteenth century political, administrative, and intellectual history” (LANGBEIN, 1977, p. 69). The condemnation of torture did have moral overtones strongly related to Enlightenment thought. Though recent scholarship has provided far wider and more complex explanations for the abolition of torture than the singular influence of the moral passion of Beccaria et al, the fact remains that the late nineteenth century identification of torture with an entirely rejected world-view was made on moral as well as legal grounds. Indeed, ever since, torture has been attacked primarily on moral grounds, as a symbol of the barbarities of the *ancien regime*. These interventions reshaped the

very meaning of torture – giving it the power of a rhetorical device, so that it became an argumentative trump par excellence.

Darius Rejali, however, argues against the very notion of abolition of torture and thereby contests the linkage of the move from torture to punishment with the transition to modernity. He contends that, far from being a barbaric remnant from the past, torture is in fact integral to the modern state (REJALI, 1994).<sup>6</sup> In his study of the history of torture in Iran since the late eighteenth century, Rejali shows that torture has been essential for and widely employed by each successive regime there. Taking a Foucaultian approach (FOUCAULT, 1995), he argues that there was a gradual shift away from ceremonial torture in the nineteenth century. This change was considered a sign of progress, especially by the colonialists (REJALI, 1994, p. 16). The new form of torture that replaced it was different. It was carried out outside the public domain, in the context of policing operations and prison discipline, the inseparable components of modern disciplinary society. The public rituals of torture were replaced by a new secretiveness. As Talal Asad explains, “modern torture as part of policing is typically secret, partly because inflicting physical pain on a prisoner to extract information, or for any purpose whatsoever, is ‘uncivilized’ and therefore illegal” (1998, p. 290). This new sensibility about physical pain necessitated that the modern state could practise torture only alongside a simultaneous “rhetoric of denial.” The Torture Commission Report is indeed a classic case of the practice of this rhetoric of denial.

### 3.2 “Rule of law” and “the native propensity to torture”

This period, when the debates on torture were taking place in Europe was also, of course, the heyday of the colonial encounter in the Indian subcontinent. As the British set about ruling India, they had to devise a vision of India’s past and future in order to justify their rule in India to themselves. Thomas Metcalf (1994) has argued that throughout the “Raj,” the ideas that most powerfully informed British conceptions of India and its people were those of India’s “difference.” Among the most widely-accepted such ideas in this period was the notion of “Oriental Despotism.” This concept became a popular way to conceive of Asians as people who voluntarily submit to absolutism. Enlightenment thinkers like Voltaire and Montesquieu would engage in polemics against the French monarchy by comparing it with “Oriental Despotism” (METCALF, 1994, p. 7). In his *History of Hindostan* published in 1770, Alexander Dow wrote about the Mughul Emperors as quintessential *Oriental Despots* presiding over a lawless state (COHN, 1989, p. 137-140). A contrast was thus made between the despotic times in pre-British India and the law and order that British rule would bring.

The model that had consigned torture to the *ancien regime* in Europe, when faced with “torture” in societies like India, came up with a similar explanation. In this progressivist model, the “primitive” unmodernized Asian state simply replaced the powers of the *ancien regime* and the allegedly primitive nature of early European

culture. Torture now became something that could exist either in Europe's past or in the "Oriental" present. Indeed, as Metcalf puts it:

*In India Europe could find, alive in the present day, its entire history. India was at once a land of Teutonic village "republics," it was "the old heathen world" of classical antiquity; it was a set of medieval feudal kingdoms; in the coastal cities "something like a likeness of our own civilization" could even be discerned; and India was, of course, also an "oriental" land forged by despotism (METCALF, 1994, p. 66).*

Guided by nineteenth century "historicism," the British histories of India helped construct the difference ascribed to India. Britain's "progress" was complemented by this history of Indian "decline" – making British rule inevitable and necessary. In this view, as John Barrow puts it:

*Mankind was one not because it was everywhere the same, but because the differences represented different stages in the same process. And by agreeing to call the process progress, one could convert the social theory into a moral and political one (BURROW, 1966, p. 98-99).*

According to Thomas Metcalf (1994, p. 17), the idea of "improvement" and "rule of law" were already central justifications for British rule by the end of the nineteenth century. These themes were famously played out in the high-profile drama surrounding the impeachment trial of Warren Hastings from 1787 onwards. While Hastings argued that as an "Asian" ruler, discretionary authority was needed and justified, his great opponent Edmund Burke sought to make him the symbol of the rapacity with which the East India Company was exercising "arbitrary power" in India (METCALF, 1994, p. 18). According to Sara Suleri, through the trial, Burke and his cohorts were weaving together a "fabric of colonial anxiety." It was not just a trial but "a documentation of the anxieties of oppression, where both the prisoner and the prosecutors are equally implicated in the inascribability of colonial guilt" (SULERI, 1992, p. 53).

Indeed, if Burke's rhetoric was to be followed to its logical conclusion, the whole of Company rule would be on trial, not just Hastings. But this was nobody's aim at the time. Instead, the trial became a spectacle, serving to renew faith in the British rule of law. As Burke said, "I am certain that every means effectual to preserve India from oppression is a guard to preserve the British Constitution from its worst corruption" (METCALF, 1994, p. 19). Arguing for the importance of "improvement," Burke said that there is nothing "which can strengthen the just authority of Great Britain in India, which does not nearly, if not altogether, in the same proportion, tend to the relief of the People" (METCALF, 1994, p. 19-20). The similarity of this case to the Torture Commission – another exercise for the exorcism of colonial guilt – is indeed glaring. In order to characterize British rule as a moral, "civilized" and "civilizing" regime, the idea of "rule of law" was crucial. Its enduring hegemony can be gauged from the fact that, in the 1950s, a group of

eminent historians concluded that the rule of law was the greatest benefit India received from the introduction of English legal ideas (LIPSTEIN, 1957, p. 87). Long before the 1950s, however, Sir James Fitzjames Stephen, legal member of the Viceroy's Council from 1869 to 1872, discussed its importance thus:

*The establishment of a system of law which regulates the most important parts of the daily life of the people constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which rendered it possible. It exercises an influence over the minds of the people in many ways comparable to that of a new religion [...] Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, a compulsory gospel which admits of no dissent and no disobedience (METCALF, 1994, p. 39).*

The obsession with law-making in India began as early as the late nineteenth century, with William Jones attempting to make Cornwallis "the Justinian of India" and himself the Tribonian, by compiling a "complete digest of Hindu and Mussulman Law" (COHN, 1989, p. 146). As Jones wrote to Cornwallis, with such a code the British Government would give to the natives of India "security for the due administration of justice among them, similar to that which Justinian gave to his Greek and Roman subjects" (COHN, 1989, p. 146). The grandiloquent dream of law-making as panacea continued with James Mill, who worked for the East India Company for seventeen years, till his death in 1836. In his classic *History of British India*, first published in 1818, he traced the retrograde and debased state of Indian society to the despotism of native government and suggested a simple solution – codification of "good" laws (STOKES, 1959, p. 68-70). In fact, Bentham is reported to have boasted towards the end of his life that "Mill will be the living executive – I shall be the dead legislative of India" (STOKES, 1959, p. 68-70).

The blaming of torture on the "innate propensity of the natives" placed torture in the same league with the abolition of other "horrible practices" such as *hookswinging*, infanticide, *sati*, *thuggee* and human sacrifice, all forms of cruelty that seemed to characterise Indian society in particular (RAO, 2001). Paradoxically, the liberal enterprise of eradicating these manifestations of Indian "barbarism" itself only further deepened notions of Indian difference. The example of *hookswinging*<sup>7</sup> is instructive. In Nicholas Dirks' analysis of the inquiry conducted by the British authorities on this ritual, he quotes the presiding British official as concluding that,

*It is, in my opinion, unnecessary at the end of the nineteenth century and, having regard to the level to which civilization in India has attained, to consider the motives by which the performers themselves are actuated when taking part in hookswinging, walking through fire, and other barbarities. From their own moral standpoint, their motives may be good or they may be bad; they may indulge in self-torture in satisfaction of pious vows fervently made in all sincerity and for the most disinterested reasons; or they may indulge in it from the lowest motives of personal aggrandizement, whether for the*

*alms they might receive or for the personal distinction and local éclat that it may bring them; but the question is whether public opinion in this country is not opposed to the external acts of the performers, as being in fact repugnant to the dictates of humanity and demoralizing to themselves and to all who may witness their performances (DIRKS, 1997, p. 192-193).*

Talal Asad argues that in their attempts to eradicate such “cruel practices,” what really motivated the Europeans was “the desire to impose what they considered civilized standards of justice and humanity on a subject population – i.e., the desire to create new human subjects” (ASAD, 1998, p. 293). By placing police torture alongside these assorted acts of “barbarity,” the use of violence to extract confessions was normalized in British minds and the colonial context erased, with the Europeans emerging as knights in shining armour, trying against all odds to humanize the Indians: somehow, to save them from themselves.

#### 4. The Legacy of the Report

*Every native of Hindustan, I verily believe, is corrupt.  
(Lord CORNWALLIS apud LUDDEN, 1993, p. 255).*

As we saw in the first section, the Commission had recommended reorganisation of the Madras police in a manner that institutionalised and guaranteed complete European supervision of the native police at every level and sought to minimise their discretion. The Report had concluded with the warning that if action was not taken as per their suggested reforms, “the native officials will but have learned another lesson of their own power and impunity” (MADRAS, 1855, p. 47). Police reform was put forward as the solution to the problem of greater surveillance and control within the police force, the need for which was produced by the construction of the native police as fundamentally unreliable because of their racial inferiority.

In the words of the colonialist historian of the Indian Police, Sir Percival Griffith, the Report “galvanised the Madras Government into much needed action.” Proposals for police reform based on the Report were put forward by it in August 1855 itself (GRIFFITH, 1971, p. 81). These were, however, met with initial hesitation on the part of the Company administration in London, as their implementation involved considerable expense. The Court of Directors estimated an additional cost of one million rupees to implement the changes recommended (GUPTA, 1974, p. 322). Responding to these objections, the Governor of Madras replied that the chief additional expense due to the reforms would be the significant increase in European officers. He added that this was “absolutely required” and that “it would be useless to attempt a re-organisation of the force without, in the first instance, appointing a European officer to each district” (GUPTA, 1974, p. 325).

Soon enough, the Court of Directors came around and accepted the

diagnosis of the Report that the chief cause of the failure and inefficiency of the police was that "effectual supervision and control" had seldom been exercised "by the English Officers in charge of the Police" (GUPTA, 1974, p. 354) due to their heavy workload and that the native officers had not been "adequately overlooked and controlled" (ARNOLD, 1986, p. 22). The Court agreed with the Commission that the native police were naturally disposed towards "misconduct and corruption," and that this could only be stopped by "the higher intelligence and sterling honesty" of a sufficient number of European officers (ARNOLD, 1986, p. 22). Incorporating these suggested changes, the Madras District Police Act No. XXIV of 1859 was finally passed. The Madras model was eventually extended to most of British India by the Indian Police Act of 1861, which continues to be the primary statute regulating the police in India till today.<sup>8</sup> Thus the police reform that resulted from the Torture Commission was the complete removal of Indians from positions of administrative responsibility, and the simultaneous strengthening of European supervision.

#### *4.1 The reformed structure of the Madras Police*

The new Madras Police Department was to be structured in such a way as to ensure maximum control and supervision by the superior European officers. In their initial enthusiasm for reform, the Madras authorities were attracted by the model of the London Metropolitan Police set up in 1829. But it was soon felt, as David Arnold suggests, "that a police system designed for the imperial metropolis would not meet all the requirements of a colonial province" (1986, p. 25). The model of the Irish Constabulary began to be seen as much better suited for this purpose. Colonial Ireland had a centralised, paramilitary police force, while England and Wales at the time<sup>9</sup> had a completely decentralized police system, with separate police forces for almost every county and major city (ARNOLD, 1986, p. 25). This model was obviously not considered suitable for India as the colonial state needed a colonial police, answerable only to itself.

The Irish Constabulary, on the other hand, was completely centralised with an Inspector-General as its chief officer, who was directly answerable to the Chief Secretary of the government. The Irish Police was not responsible to the people of the area, but only to the government. The Irish model was also particularly popular among British officers in India because many of them had had previous experience in Ireland, either because they came from the landed classes there or because they had served there. As Sir Hugh Rose, who had previously served in Ireland and was now Commander-in-Chief of the Indian Army, said in October 1861, "[n]o system of police has ever worked better for the suppression of political agitation, or agrarian disorder, than the Irish Constabulary" (ARNOLD, 1986, p. 26). Since these objectives of the British were also broadly applicable in India and the colonial context similar, the model primarily followed for the reconstitution of the Indian police was that of colonial Ireland, a precedent later followed in many other colonies in the latter half of the nineteenth century (ARNOLD, 1986, p. 27).

The supervisory principle articulated by the Torture Commission and ratified by the Madras Government and the Court of Directors formed the organisational basis of the police structure of the Madras Presidency under the new Act. According to David Arnold, there were three interlocking parts to this new system of supervision and control: first, control over the police department by the civil administration; second, supervision of subordinate Indian police officials by their European superiors; and third, “a rigid hierarchy of rank and function between the superintendency at the top, the inspectorate in the middle and the constabulary proper at the bottom” (ARNOLD, 1986, p. 29). The whole system was organised in such a way as to institutionalise European distrust of Indians, even if they were only serving the colonial state. It was presumed that the corruption and inefficiency of the Indian subordinates could only be rectified by a rigid system of supervision that culminated in European superintendents. Although Indians continued to form the bulk of the police, in terms of numbers, because of resource constraints and the need of local knowledge and language, they were allowed little initiative if inspectors – and none at all if they were constables. On the other hand, the expensive European officials were concentrated in key supervisory posts.

David Arnold (1986, p. 29) argues that the colonial police structure was meant to be an institutional realization of the Benthamite ideal of the Panopticon. Indeed, the designations given to the superior officers of the police force – Inspector, Superintendent, Inspector-General – accurately convey their respective supervisory roles. The superior police officials were there primarily to keep watch over their subordinates and not to actively engage in ordinary police functions. Their role was thus to “police the police” (ARNOLD, 1986, p. 29).

#### *4.2 The colonial bureaucracy*

The case of the police is perhaps an extreme example, but the suspicion with which the British viewed the subordinate Indian bureaucracy had a long and chequered history. David Ludden notes how William Jones’ desire to compile a comprehensive “Digest of Hindu and Mohammadan law” in English arose primarily because he did not trust the native interpreters. Similarly, Thomas Munro’s agrarian reforms in Madras were inspired by the idea of avoiding any intermediary authority between the Company and the cultivator (LUDDEN, 1993, p. 254-257). The driving imperative was to control Indian agency in the administration more strictly.

Richard Saumarez Smith has argued that statistics, survey and record operations played a crucial role in providing the British with the technical means to control “native agency” within the bureaucracy (SMITH, 1985, p. 153-176). The technical functioning of the whole subordinate section of the bureaucracy was stringently bound by the mid-1840s. Elaborate manuals were compiled, tightly circumscribing their duties. Using the example of the *patwari* (village accountant) in Punjab, Smith discusses how it was deemed necessary to regulate his activities and the headings under which he compiled information, since he had become the

central figure in the local revenue administration. A remarkable instance of this "Rule of the Manual" is the four-part "educational course for village accountants (*patwaris*)" published in Punjab in 1845. The four parts comprised of official designations of objects (months, crops, Government posts, and types of official documents), including the names of twenty-nine different castes; a computation, which included a special way to write quantities; weights and measures, which included the method of calculating areas from linear dimensions; and a complete model of agricultural and village accounts (SMITH, 1985, p. 159).

While the functions of government expanded, Indians were increasingly confined to subordinate rather than managerial functions, local as opposed to provincial offices and technical as against political functions. As Smith says:

*Throughout the period of British rule in the Punjab a partition was maintained between the upper levels of the bureaucracy, manned by the Indian Civil Service working in English, and the lower levels, manned by the provincial and local cadres working in the vernacular. (SMITH, 1985, p. 161).*

This racial partition of the bureaucracy is an example of what Partha Chatterjee has called "the rule of colonial difference," which was central to the deployment of disciplinary power in the colonial state. He explains this "rule" thus:

*The colonial state was not just the agency that brought the modular forms of the modern state to the colonies; it was also an agency that was destined never to fulfil the normalizing mission of the modern state because the premise of its power was a rule of colonial difference, namely, the preservation of the alienness of the ruling group. (CHATTERJEE, 1993, p. 10).*

As the institutions of the modern state were being introduced into the colony in the latter half of the nineteenth century, the European rulers laid down clearly the racial difference between the rulers and the ruled, whether it be in lawmaking, bureaucracy or the administration of justice. The more the process of bureaucratic rationalization gathered momentum during this period, as per the logic of the modern regime of power, the more the question of race kept being raised, further emphasizing the specifically colonial character of British rule in India (CHATTERJEE, 1993, p. 19).

It is the legacy of the Torture Commission Report that the "rule of colonial difference" is inscribed in perhaps even more virulent terms in the structure of the Indian police than in any other bureaucratic apparatus in India.



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## NOTES

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1. The three Commissioners were E. F. Elliot, H. Stokes and J. B. Norton. Elliot had been Superintendent of police and Magistrate of Madras City from 1834-1853, and Norton had been the Advocate General (GUPTA, 1974, p. 311).

2. The Commission expanded the definition to include extortion of money as well.

3. Revenue collector for the *tehsil*, an administrative unit (cf. SINGHA, 1998, p. xxviii).

4. It would be interesting to note here an article in the *Calcutta Review* of 1846, according to which 70 percent of all convictions in India were based on confessions (cf. PEERS, 1991, p. 48).

5. See, for an interesting example, The Amnesty International Report on Torture (1973).

6. It is interesting to note here Douglas Peers' argument that the growing intrusiveness of the state provided the context for the increased cases of police torture in the Madras Presidency in the mid-nineteenth century. New crimes of a 'moral' nature were being added to crimes against the person and property as behaviour that militated against British sensibilities now came under state monitoring and invited criminal sanctions. These included begging, gambling, selling obscene books, "wantonly destroying trees," disobedience of orders (based on the master-servant laws of Britain), "pretending to witchcraft," "bartering spirits for grain," "riding or driving furiously," "exciting charity by exhibiting bodily deformities" and refusing to pay a promised dowry. Also, vagrancy was supposed to be punished and the activities of "idle" people

monitored. Thus, people's activities were being disciplined in ways completely unknown before in India (PEERS, 1991, p. 43).

7. "Hookswinging involves a ceremony in which the celebrant swings from a cross-beam built for the purpose on a cart, suspended by two steel hooks thrust into the small of his back." (ASAD, 1998, p. 306).

8. A Police Act Drafting Committee was formed to re-examine police laws in India, and in 2006 it submitted a new draft law. Though the Parliament is yet to approve the draft, in 2006, the Supreme Court of India issued a directive with some basic principles of policing to State governments. The Court asked State governments to follow these principles in the interim until a new legislation is adopted. Following this, many State governments have begun to revise their police laws. Meanwhile, the Police Act of 1861 still exists in the statutory books, and it remains questionable if the recent reforms would amount to a fundamental departure in the contours of relations of power between the superintendency, the inspectorate and the constabulary, the hierarchy which formed the bedrock of the colonial police. The continued use of terms like "teeth to tail ratio" (the ratio of police officers, from the rank of an Assistant Sub-Inspector and above, to lower subordinates i.e., Head Constables & Constables) in official government documents points towards the enduring nature of the same colonial ideas discussed here. See, for example, [www.mppolice.gov.in/crimeinindia/CHAP17.htm](http://www.mppolice.gov.in/crimeinindia/CHAP17.htm).

9. The exception was, of course, London, where the Commissioner had to report directly to the Home Secretary.

## RESUMO

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Embora seja comumente defendida a idéia de que a tortura policial constitui uma prática institucionalizada na Índia, o único estudo confiável apoiado pelo governo na história moderna indiana é o Relatório da Comissão sobre Tortura de Madras, k de 1855. No contexto do silêncio que encobre a violência policial atualmente praticada na Índia, o curioso fenômeno de uma Comissão investigativa, instituída por um Estado colonial há mais de cento e cinquenta anos atrás, é particularmente intrigante. Nesse artigo experimento uma análise textual do Relatório, e uma investigação de seu contexto ideológico e histórico. Defendo que o Relatório serviu, primeiramente, para discursivamente “tratar” do tema da tortura, negando a cumplicidade do Estado colonial em sua prática, além de argumentar que as reformas por ele sugeridas resultaram na institucionalização de um modelo colonial específico na reestruturação da polícia indiana, uma estrutura que substancialmente sobrevive até os dias de hoje.

## PALAVRAS-CHAVE

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Tortura – Polícia – Colonialismo.

## RESUMEN

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Si bien se suele sostener que la tortura policial está institucionalizada en la India, el único estudio respaldado por el gobierno sobre esta práctica en la historia moderna de la India es el Informe de la Comisión sobre la Tortura en Madrás de 1855. En el contexto de silencio que rodea a la violencia policial actual en la India, es particularmente interesante el curioso fenómeno de una Comisión de investigación creada por un Estado colonial hace más de ciento cincuenta años. En este artículo, intento realizar un análisis textual de este Informe y una investigación sobre su contexto ideológico e histórico. Sostengo que el Informe sirvió sobre todo para “manejar” discursivamente la cuestión de la tortura, borrando la complicidad del estado colonial en su práctica, y que las reformas que sugirió resultaron en la institucionalización de un modelo específicamente colonial en la reestructuración de la policía india, una estructura que sobrevive sustancialmente hasta hoy día.

## PALABRAS CLAVE

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Torturav – Polícia – Colonialismo

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## ABSTRACT

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This article identifies and analyses some of the theoretical implications of rape being subsumed within the international crime of genocide and argues that such an analysis is essential for creating a clearer framework to address rape. Genocide is defined as a violation committed against particular groups. In contrast, rape is conceptualised as a violation of an individual's sexual autonomy. As such, can rape understood as a violation of an individual's sexual autonomy be compatible with rape being subsumed within the category of a group violation such as genocide? A key conclusion of this article is that if conceptual space can be created within the crime of genocide to include both the individual and the group, then rape (when categorised as genocide) can operate both as a violation against the group and as a violation against the individual. However, the space allotted to each of the individual and the group can never be equal; the group will always need to occupy the majority of the space, because the central motivation for viewing genocide as a crime is the survival of human groups. When rape is subsumed within genocide, which is conceived, placed and treated as a crime against enumerated groups, its dynamic changes. Rape is no longer simply a violation of an individual. Rape becomes part of a notion developed to protect the group.

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## KEYWORDS

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Rape – Genocide – Group Violation – Individual's Sexual Autonomy



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# RAPE CHARACTERISED AS GENOCIDE

Daniela De Vito, Aisha Gill  
and Damien Short

## 1. Introduction

How rape<sup>1</sup> has been conceptualised and treated by various institutions and entities within international human rights and humanitarian law presents both inconsistencies and, in recent times, innovative conclusions. With respect to inconsistency, when rape is mentioned explicitly within the context of international humanitarian law, it tends to be associated with a woman's "honour" and not as a crime of violence<sup>2</sup>. As a result, an emphasis is placed on the protection of women and not on the prohibition of rape. This emphasis on honour and protection obscures the violence and criminality of rape within international law<sup>3</sup>. As long as there is no single authoritative provision for defining rape within regional and United Nations (UN) human rights instruments, it will not be possible to point to an overarching definition of rape that can be utilised within the context of international humanitarian law. However, in 1998, the Trial Chamber for the International Criminal Tribunal for Rwanda (ICTR) included within its Judgement in the case of the Prosecutor v. Jean-Paul Akayesu an attempt to define rape within international law<sup>4</sup>. Highly innovative, since this was the first time that an international criminal tribunal had formulated a definition of rape, this definition has been used as a starting point for subsequent international criminal tribunal reflections on how rape can be categorised. In contrast to how rape has been understood, especially within the parameters of international humanitarian law, there is a series of international crimes such as torture. International crimes have been conceptualised and treated as crimes of violence and in turn their prohibition within international law is considered paramount.<sup>5</sup> Furthermore, beyond rape being subsumed under the categories of such international crime as torture, genocide,

*Notes to this text start on page 49.*

the grave breaches provisions of the Geneva Conventions (1949), or crimes against humanity, rape currently does not stand on its own as an enumerated international crime.<sup>6</sup> Rape is prohibited under international law, but is not designated specifically as an international crime.

As such, this article identifies and analyses some of the theoretical implications of rape being subsumed within the international crime of genocide and argues that such an analysis is essential for creating a clearer framework to address rape. Rape categorised as genocide is a recent occurrence within international law (EBOE-OSUJI, 2007; SHARLACH, 2000). Genocide is defined as a violation committed against particular groups. Is the supposition that rape is defined as a violation of an individual's sexual autonomy compatible with rape being subsumed under the category of a *group* violation, e.g. genocide?<sup>7</sup> In addressing this question, we will take into account the current concept of human rights, with its focus on the individual, and also the fact that the concept of human rights leaves room, albeit limited and at times controversial, for recognition of the group. The article concludes that if conceptual space can be created within the crime of genocide to include both the individual and the group, then rape (when categorised as genocide) can operate both as a violation against the group and as a violation against the individual. However, the space allotted to each of the individual and the group can never be equal; the group will always need to occupy the majority of the space, because the central motivation for viewing genocide as a crime is the survival of human groups. When rape is subsumed within genocide, which is conceived, placed and treated as a crime against enumerated groups, its dynamic changes. Rape is no longer simply a violation of an individual. Rape becomes part of a notion developed to protect the group. Hence, there is a place for both the individual victim of genocide and the individual victim of rape as genocide. However, as with the current concept of human rights, this space is unequal and not always comfortable. Crucially, even with innovative jurisprudence such as the ICTR case<sup>8</sup> and literature on the interplay between the individual and the group within the context of human rights, there is a need to assess this complex relationship between rape, which affects the individual, and rape as genocide, which is placed within the group dynamic.

## 2. Feminist Theory of Rape

The feminist theory of rape has mainly evolved from the radical feminist position that views it as an act motivated by a need to dominate others and has little or nothing to do with sexual desire – the theory that “all rape is an exercise in power” is still accepted by many radical feminist scholars today (BROWNMILLER, 1975, p. 256). In her book *Against Our Will: Men, Women and Rape*, Brownmiller argues that rape is a historically pervasive, yet largely ignored, mechanism of control upheld by patriarchal institutions and social relations that reinforce male dominance and female subjugation. Brownmiller also examines the history and various functions of rape in war, arguing that acts of dominance and subjugation reflect and

reproduce broader patriarchal social and gender arrangements. Her seminal work has provided a framework that anchors feminist socio-cultural, social-psychological and psychoanalytical studies of rape. For instance, socio-cultural feminists have analysed the connections between processes of socialisation and forms of violence against women, drawing the conclusion that rape is a by-product of patriarchal culture and socialisation that predisposes men toward violence, while encouraging them to view women as sexual objects (SORENSEN; WHITE 1992).

The work of radical feminists has unfortunately given rise to what Mardorossian (2002, pp. 743-786) calls the “backlash theoretical approach”, the proponents of which are so-called “conservative” feminists who downplay the severity of rape and endorse arguments about the biological imperative. At the same time, Giles and Hyndman (2004, p. 15) have criticised the radical feminist position that defines rape as an individually executed act which neglects collective rape and ignores the socio-political aims of all forms of sexual violence against women, including rape in war. Researchers have only recently considered the role of power with respect to the phenomenon of rape in war, arguing that it:

1. affirms constructions of women as male property
2. demasculinises conquered male enemies
3. is a form of misogynist male bonding that strengthens the solidarity needed for battle
4. is a component of the military socialisation that preconditions soldiers to dehumanise the enemy
5. is a strategic weapon of war used to carry out ethnic cleansing and genocide (for this point, see GREEN, 2004; THOMAS, 2007; COPELON, 1995).

While this strategic approach is popular amongst social scientists, human rights activists and international organisations working against violence against women, however, the arguments of Brownmiller – and, more recently, Copelon (1995) – continue to be significant in the feminist understanding of rape in war.

### 3. Rape and International Law

Research on the history and theory of rape during armed conflict has established that, despite the prevalence of rape over the centuries, effective legal prohibitions against it have only recently emerged, and that prosecution is still rare. The concept of “rape as a war crime” was first addressed to a significant degree in the early 1990s, after the war in Bosnia, when human-rights violations were reported, including the use of Serb-based concentration camps, ethnic cleansing, and the systematic rape of Muslim women<sup>9</sup>. The international community responded by demanding that the UN Security Council create an *ad hoc* tribunal to prosecute war crimes, on the grounds that unabated atrocities constituted a threat to international peace. The Council adopted Resolution 808/827, which led to the establishment of the

International Criminal Tribunal for the former Yugoslavia, although it did not specify the jurisdiction or criminal Statute of the proposed tribunal (MEZNARIC, 1994). This task was left to the UN Secretary General, who lobbied a number of governments and international human rights organisations to submit proposals for a draft statute, which led to the enabling statute that rape can be a war crime. This created an opportunity for legal scholars to shape the key arguments within international law prohibiting the types of rape that were occurring in Bosnia, which in turn provided the tribunal with the moral and legal justification to prosecute rape as a war crime. The Tribunal also ruled that rape could be constituted as a crime against humanity if found to be committed in a widespread or systematic manner based on political, social or religious grounds and aimed at a civilian population. More importantly, these developments situated the committing of rape during armed conflict firmly within the broader discussions about the moral and ethical obligations to hold individuals and nations accountable for the crimes they commit against humanity, making its definition as a social problem even more pressing (ASKIN, 1997).

In 1998, the Trial Chamber for the International Criminal Tribunal for Rwanda (ICTR) delivered an innovative judgement in the case of the Prosecutor *v. Jean-Paul Akayesu*.<sup>10</sup> Jean-Paul Akayesu was a local official (*bourgemestre*) when the genocide against the Tutsi group in Rwanda began. He was convicted of being a key instigator of the massacres in his area, and was the first person in history to be tried and found guilty by an international court of aiding and abetting acts of rape as a method of genocide. In its judgement, the Trial Chamber argued that women were raped because they were members of the Tutsi ethnic group. Because genocide was deemed by the Trial Chamber to have occurred in Rwanda during 1994, rape in relation to this case constituted genocide.

#### 4. Aspects of Genocide

The formal appearance and definition of genocide, under international law, began with the work of one individual, the Polish lawyer Raphael Lemkin. His efforts and influence, during and after the Second World War, contributed greatly to the emergence of the UN Convention on the Prevention and Punishment of the Crime of Genocide (1948)<sup>11</sup>.

As the Genocide Convention (1948) outlines:

##### *Article II*

*In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:*

- (a) killing members of the group;*
- (b) causing serious bodily or mental harm to members of the group;*
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,*



- (d) *imposing measures intended to prevent births within the group;*  
 (e) *forcibly transferring children of the group to another group.*

A number of areas of international law, and even general theoretical traditions, have influenced the deliberation and the creation of a definition of the crime of genocide. Lemkin focussed on the life of the group and, in particular, on national groups.

According to Lemkin (1947, p. 146), genocide could be understood as “[...] the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups.”

Lemkin makes it clear that genocide involves both groups and individuals (because groups cannot exist without individual members). However, individuals are targeted due to their membership of a particular group. The implications of this for rape categorised as genocide will be explored later.

In 1946, the newly formed UN General Assembly passed resolution (96-I), which stated that “[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings [...]”.

At that juncture, and within the UN, influences from three types of law were being interwoven to produce the concept of genocide: international criminal law (for individual criminal responsibility), human rights law, and humanitarian law (SCHABAS, 2000, p. 5). From international human rights law, a critical connection emerges. The right to life, outlined in the Universal Declaration of Human Rights (UDHR, 1948) and in the International Covenant on Civil and Political Rights (ICCPR, 1966), is a human right accorded to individuals. The right to life is not an absolute right, since under certain circumstances, such as in times of war, it may be suspended. In addition, capital punishment is technically not prohibited under international human rights law; however, its eventual cessation is encouraged by human rights organisations. In contrast to the above, although the right to life is imprinted within the Genocide Convention (1948), it is the right to life of human *groups* that is in fact protected. In particular, it is the right of these human groups to exist (the right to existence) that should be protected (SCHABAS, 2000, p. 6). Furthermore, the prohibition against genocide is pivotal since it is a crime “[...] directed against the entire international community rather than the individual.” However, genocide has also been described by William A. Schabas (2000, p. 14) as “[...] a violent crime against the person.” It is this two-pronged interplay, a violation against the group and a violation against the individual, which makes genocide and rape as genocide, such complex concepts.

In simple terms, “groups consist of individuals” (SCHABAS, 2000, p. 106). The term “group” or “groups” is used in several UN instruments. For instance, the UDHR mentions the family as a “fundamental group unit of society” and that education will “[...] promote understanding, tolerance and friendship among all nations, racial or religious groups” (GHANDHI, 2000, pp. 21-25). In Article 30, the UDHR speaks of “any State, group or person”, which means that a group consists of more than one individual (SCHABAS, 2000, p. 106). Other instruments, such

as the ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination (ICERD, 1966), speak of “peoples” having the right to self-determination and of “racial or ethnic groups” respectively (GHANDHI, 2000, pp. 56-64). In the ICERD, Article 14 addresses the right of petition for individuals or for groups of individuals who have suffered racial discrimination.

A more formal understanding, within the framework of international law, has been proposed by Lerner (2003, p. 84). Critically, what emerges from his proposal is that groups (which consist of individuals) that are protected under international law possess a permanent unifying factor, such as race or ethnicity. It may be more difficult to place religious groups within Lerner’s understanding of a “group”, because some may argue that religious beliefs can change. The Genocide Convention (1948), including the reference to religious groups, was framed with the notion of focussing on the “permanence” of groups, thereby excluding other groups<sup>12</sup>. However, Lerner’s wording does allow for some flexibility in interpretation since he includes the words “permanent factors that are, as a rule, beyond the control of members.”

Furthermore and crucially for this discussion, but specifically with reference to minority rights “[...] the right extends to “persons belonging to such minorities,” and not the minority as a group” (BOWRING, 1999, pp. 3-4). According to this definition, it is the individual who is the holder of rights, but only insofar as she or he is the member of a minority. To elaborate, this understanding of individuals with rights and as perhaps being part of a minority group, can relate to genocide as follows. The groups outlined in the Genocide Convention (1948), national, ethnic, racial or religious, are not necessarily minorities. Such groups may be in the minority, or may constitute the majority in a State, or may lack power within the State. There are no provisions for minorities within the Convention. Genocide is an international crime that covers actions against national, ethnic, racial or religious groups. Individuals are the particular victims of genocide, as a consequence of their membership of the group in question. The relevance of this to the subsuming of rape within genocide is clear. This may contradict the UN’s vision with reference to this crime. Specifically, in its 1946 Resolution, a distinction was made between the right to life of human groups and of individuals. In turn, Kuper’s (1981, p. 53) work in understanding what constitutes genocide is characteristic of more recent literature that emphasises the group. Kuper argued that genocide “[...] is a crime against a ‘collectivity’, it implies an identifiable group as victim.” However, as will be argued shortly, any understanding of genocide must allow the possibility of examining not only what happens to the group as a whole, but also to individual victims of genocide within the group. This overall conclusion may, or may not, seem to follow the ICTR Judgement in the Jean-Paul Akayesu case. In the Akayesu Judgement<sup>13</sup>, genocide was understood to involve an act (taken from the list of five which are enumerated in the Genocide Convention (1948) that is committed “[...] with the specific intent to destroy, in whole or in part, a particular group targeted as such”.

## 5. Rape and Genocide: Some Theoretical Implications

Rape is one of the most destructive weapons of armed conflict. This is due, in part, to its capacity to demoralise a conquered group. Rape, or the threat of rape, can lead to population displacement, causing people to flee countries to avoid the sexual violence that military invasion can bring. Rape also generates shame and trauma, which can prevent marriages from occurring, bring about divorce, compel women to abandon or kill any children that are the products of rape, divide families (LENTIN, 1997) and destroy the very foundations upon which human culture is based and maintained. Nor are such crimes confined to sexual offences: other forms of violence include feticide if the victim is pregnant, which can also result in death. Askin succinctly states: “while male civilians are killed, female civilians are typically raped, then killed. In torturous interrogation, males are savagely beaten. Females are savagely beaten and raped” (ASKIN, 1997, p. 13).

Rape during war also serves as a form of social control that can suppress efforts to mobilise resistance among a conquered group. In such cases, rape is often committed in front of relatives and family members; the victims are abused, killed, and left on public display as a reminder to others to submit to and comply with invasion policies. It is evident that women are targeted in war because of their gender, because they are part of a particular racial/ethnic group or because they are perceived by the enemy as political conspirators or enemy combatants. Within this context, it is clear that rape in war acts as a vehicle for deep-seated hatreds: racism, classism, and xenophobia are expressed towards the enemy group and actualised through the mass abuse of its women<sup>14</sup>. As Grayzel (1999, p. 245) insightfully observes, in war the female body becomes the symbolic battleground upon which age-old cultural and geopolitical differences are acted out, and where new forms of hatred are implanted that fuel a desire for revenge in the future. The psychological, social, cultural, ethical and medical consequences of rape in war are devastating. Yet rape in war continues without any serious form of redress under international humanitarian law (ASKIN; KOENIG, 1999).

It was only after the devastating violations committed in the former Yugoslavia that effective connections were made between genocide, rape and ethnic cleansing. Brownmiller (1975, p. 49) nevertheless notes that during World War II Germans and Japanese committed rape to achieve the “total humiliation and destruction of inferior peoples and the establishment of their own master race”. The Nazis also employed additional forms of gender and sexual violence, such as medical sterilisation, feticide, and femicide, with the intent to destroy so-called “inferior groups” by controlling or manipulating women’s reproductive abilities. To be sure, given this intent to destroy the group’s social power, the derivative term “femicide” is ultimately defined as the *gender-dimension of genocide* (SHAW, 2006, p. 69). However, rape as a crime, or as a violation of human rights, is conceptualised as an act committed against the *individual*<sup>15</sup>. In contrast, genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) includes a series of acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups” (GHANDI, 2000, p. 19). In other

words, genocide is ultimately a denial of the right to life of certain human *groups*.

The critical focus of genocide, understood as an international crime, is the protection of entire human groups. Often referred to as the most serious of international crimes, genocide is influenced by the “right to live” of individuals. However, it is the “right to existence” of human groups and not of individuals which is the concern. This formulation of genocide *seems* to contrast with the overall current concept of human rights with its emphasis on the individual. The Convention on the Prevention and Punishment of the Crime of Genocide (1948) lists the following groups that could be targeted for genocide – national, ethnical, racial, or religious. Despite this built-in mechanism for the protection of certain human groups within genocide, an interesting interplay does emerge. That is, genocide is most definitely a violation against the group as a whole. Yet, acts of genocide are in turn committed against individuals within these groups. It is individual members of said groups who are killed, are harmed, are raped, etc. It is these individual stories, along with what has happened to the group as a whole, that for instance are told before international criminal tribunals. This interplay, between space for groups and space for the individual within genocide, is what will be taken and assessed from the real life international criminal tribunal cases. In contrast, and as developed from the Enlightenment period with the advent of natural rights and to the post World War II establishment of human rights, certain features of these types of “rights” continue to affect how these are conceived and to a certain degree implemented. One critical feature in how the current concept of human rights has emerged pertains to an emphasis placed on the rights and the importance of the individual. The current concept of human rights is one that reflects an ongoing and, in reality, an imperfect relationship – how the State treats individuals within, and at times without its borders. One aspect that has influenced this rise in the status of the individual has been the political theory of liberalism.

The growing role for the individual and the development of rights attached to the individual, along with an examination of what role the individual should have within the State (or public realm) and even in private matters such as in the family, have been issues taken up by a myriad of thinkers formally or informally associated with liberalism. From Thomas Hobbes’ and John Locke’s works on certain and limited natural rights for the individual to the current United Nations, regional, and national human rights instruments, echoes of liberal influences are evident. The UDHR (1948), emphasises the individual and his/her rights. Articles pertaining to everyone having the right to life, not to be subjected to slavery, to vote, etc. are framed within the needs and the importance of the individual, regardless of – in theory of course – one’s standing or role in the State. However, as with liberal political theory, the current concept of human rights does make limited room for “the group.” Various international human rights instruments recognise the right of peoples to self-determination. It is not the individuals within a group of “peoples” that have this right but in fact the peoples as a whole. Although the machinations of this right are still in the process of being worked through under international law and its application has thus far been limited to situations whereby

peoples have been living in situations of colonialism, this right does demonstrate some accommodation for the group within the current concept of human rights. Furthermore, Article 16 of the UDHR (1948) relates to the family.

Minority rights, which shall be discussed subsequently, travel the schism between rights of the group as a whole and much more frequently (especially within international human rights law) as the rights of individuals within the group. This tension, as found within liberalism and within the current concept of human rights, of determining if the emphasis should solely be on the rights of individuals or if the concept of human rights also has room for the group will form the basis for understanding the implications of when rape is considered on its own (a violation against the individual) and when it is considered as genocide (a violation against the group). It is the proposal of this article that accommodation is indeed possible, albeit limited and imperfect, for rape to be considered as both a crime against the individual and as a crime against the group.

One way to approach the question posed in the introduction is to consider that in some situations it is more beneficial to subsume rape within the international crime of genocide. Genocide is often characterised as the most heinous of all human rights violations<sup>16</sup>. Its long history (pre-1940s and during more recent events such as in Rwanda)<sup>17</sup>, its devastating impact on groups and societies, contribute to this conclusion. It could be argued that the result of subsuming rape under the category of genocide is to elevate rape above other international crimes and human rights violations. It might be that such an approach will be helpful to counter the problematic status that rape has, in that it is absent from much of international human rights law and, as noted above, is distorted within international humanitarian law. In addition, some women who have been raped during genocidal events may deem that an association between rape and genocide is of greater consequence than to focus solely on rape as the violation of an individual's sexual autonomy. It may be that the need to ensure a record of this association, for instance, that Tutsi women were raped because they were part of the Tutsi ethnic group, is more important than treating the violations as acts committed solely against individuals. The shift of definition from sexual crime to genocide helps repair the social bonds that rape, especially public rape, destroys. This definition draws the men and family members who are forced to witness the rapes back together with the women since all are victims. It also removes the stigma of lost honour which affixes to rape in many cultures. Finally, "genocidal rape" helps remove the shame from victims, and focuses the responsibility solely on the perpetrators. One reason why the individual victim of rape and of rape as genocide needs a voice when determining whether or not rape should be associated with genocide rather than solely as a violation against sexual autonomy relates to the harm caused by rape and specifically rape committed in *public*. To borrow a term used in an article on the genocide in Rwanda by Llezlie L. Green, rapes that happen in public result in a "dual harm"<sup>18</sup>. As Christine Chinkin (1994, p. 1-17) argues: "In other words, rape in public not only harms the individual victim but also the family or the wider community who is witness".

For the individual victim of rape in public, the following harms may be

*amplified* – shame, social exclusion, physical and psychological harm<sup>19</sup>. Thus, the individual who is raped in public suffers harms linked to the rape(s)<sup>20</sup>. They are also harmed in that the public aspect of the rapes may exacerbate the expectations placed on women within respective societies and negatively alter how an individual victim/survivor is perceived. As a survivor of rape during the genocide in Rwanda explains: “[...] after rape, you don’t have value in the community”<sup>21</sup>.

By contrast, some have criticised emphasising the importance of placing rape within the crime of genocide, on the grounds that the effect may be to lessen the importance of other types of rape. As Copelon (1995, p. 67) states “[b]y treating genocidal rape differently, one is in effect saying that all these terrible abuses of women can go forward without comparable sanction.” Clare McGlynn (2008, p. 79) has argued that using terms such as “genocidal rape” takes the focus away from victims and emphasises the “[...] status or motivation of the perpetrator.” Although this caveat is an important consideration, depending on the circumstances, it is crucial for rape to be considered as genocide for the sake of the victims and/or to reflect more precisely the context of a particular genocide. In other words, acknowledging that genocide has taken place and that rape was used as one “method” to perpetrate genocide is important not only within the context of international law but also in terms of presenting a more complete understanding of particular events. Linking rape and genocide may not occur every time, but this may be necessary when relevant.

It is critical to examine the dichotomy between individual human rights and the suggestion of group rights. For *if* rape as genocide is conceptualised as a violation against an individual who is part of a group, and not as a violation exclusively committed against the group as a whole and without considering the individual, then the implications of formulating this crime within the accepted understanding of the current concept of human rights must be assessed. This requires a brief overview of the current concept of human rights, with its emphasis on the individual and its acknowledgement of the “group”, and an introduction to the debate of whether human rights are applicable to groups as a whole, rather than solely to individual members of a group. Thus, the next section will address minority and group rights, to bring out a clearer understanding of the challenges that still exist within the current concept of human rights regarding the individual and the group. The purpose will be to understand how the individual and the individual as part of a group is currently conceptualised and treated within the context of international law, and to determine whether compatibility between the individual and the group exists within differently constructed violations such as rape and rape characterised as genocide<sup>22</sup>.

## 6. The Current Concept of Human Rights and the Suggestion of Group Rights

It was not until the rise of Nazism and the Second World War that the current concept of human rights emerged. Before this, during the seventeenth and eighteenth centuries in Western Europe, the notion of natural rights was proposed. Thinkers

such as Thomas Hobbes (MACPHERSON, 1982) and John Locke (LASLETT, 1967) wrote about limited natural rights for individuals, such as the right to self-preservation and the right to life, liberty and property. The idea of rights was later invoked by movements to abolish slavery, support trade unions, and advance minority rights. After the end of World War II, the newly formed United Nations set about articulating the idea of human rights. This process can be found *inter alia* in the UN Charter (1945) and in the UDHR. The current concept of human rights addresses the rights and freedoms of the individual. As Donnelly (1996, p. 12) states, theoretically, human rights exist outside the modern State because they are not conferred upon human beings by the State. Individuals, by the mere fact that they are human beings, already exist with certain rights. It is a separate process that entrenches these rights into law. Yet, the individual can, to varying degrees, also have a place, a role, and duties, and receive benefits within his or her respective community. Indeed, the individual has a role within larger social and political frameworks, such as the community or the State. The current concept of human rights acknowledges the “group” under certain circumstances. Article 16(1) of the UDHR mentions “family”, and in the Preamble to the ICCPR, “peoples” are said to have the right to self-determination (FREEMAN, 2002, p. 75).

International law<sup>23</sup> and liberal theory in general, have had a difficult time in accepting that human rights could apply to groups. Liberal theory has traditionally focused primarily on the relation between the *individual* and the state. From Hobbes and Locke to Rawls (1999), liberal theorists have been concerned with exploring the individual-state relationship and its inherent problems. Arguably, the most crucial premises of liberal thinking are first, that the *individual* is regarded as the most fundamental moral agent, and second, that all individuals are morally *equal*. Individual rights and the rule of the majority are the bedrock of liberal democratic nation-states. Yet, majority rule implies the existence of *subordinate minorities*, which liberal-democratic theory deals with as sets of “outvoted individuals” (FREEMAN, 1995, p. 25). The legitimation of their situation is based on the guarantee of their individual rights, which provide them with the opportunity to become a member of the majority on occasion. On the face of it, this system of majority rule does not obviously lead to a minority problem. However, it is arguable that the creation of modern nation-states has been partly achieved with the mastery and attempted assimilation<sup>24</sup> of native or minority communities that has resulted in the formation of *permanent* minorities whose interests are *persistently* neglected or “*misrecognised*” by the majority (TAYLOR, 1995, p. 225). The state apparatus and the dominant majority may be, in effect, a permanent bar to the recognition of certain minority interests.

Yet, it would be wrong to assert that liberal democracy has favoured individual concerns *over* collective issues, as it has merely granted the individual distinguished normative standing within the collectivity that is the nation state. The explicit irregularity within liberal theory is the collectives that are persistently unrepresented or, as Taylor (1995) puts it, “*misrecognised*” by their liberal-democratic states. To this end, there now appears to be broad agreement among liberal rights theorists

that an individual is likely to suffer if his/her culture or ethnic group is neglected, disparaged, discriminated against or misrecognised by wider society. As Taylor (1995) observes, social recognition is central to an individual's identity and well-being, and misrecognition can seriously damage both.

The case for recognising and protecting a minority via collective or so-called "group" rights stems from the failure of the prevailing liberal doctrine to deal with the problem of persistently disadvantaged individuals as members of a *collective*. In overlooking sources of discrimination like gender or ethnic grouping, the liberal individualism is found wanting. Kymlicka (1997) has argued that for anti-discrimination policies to be effective, they require the appreciation that individuals are often discriminated against by the wider society, not merely as individuals but as members of a cultural group. Moreover, the well being of their members may require that their culture be protected to a certain extent from the wider society, as it may be hostile to the traditional values and practices of their communities.

However, Donnelly (1996, pp. 149-150) insists that while there may be a good case for collective rights, they should not be considered collective human rights. Donnelly's objection to the notion of collective human rights is rooted in an individualistic view of human rights, which he suggests were developed solely to protect individuals. The collective dimension to this viewpoint is that there are some individual human rights that can be exercised collectively. This position reflects the dominant approach within international law (CASALS, 2006, p. 44; Ingram, 2000, p. 242). For example, Article 27 of the ICCPR outlines the rights of individuals as part of a listed minority group(s) – "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities [...]".

This article, however, does not set out rights for the minority group as a whole (BOWRING, 1999, p. 14). Even in a more recent UN initiative, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), the emphasis is on "persons" belonging to such groups (GHANDHI, 2000, p. 132-134). In other words, as currently framed, "[...] minority rights are individual rights" (BOWRING, 1999, p. 14). However, Bowring (1999, p. 16) argues that international human rights law must move beyond this narrow interpretation and that it should recognise group and minority rights as such. Indeed, as Lyons and Mayall (2003, p. 6) suggest, "the question is whether the existing regime can expand to include group rights or whether a new set of obligations needs to be added. One approach is to develop group rights as a branch of human rights. Another possibility is to retain human rights with its focus on the individual as rights bearer (CASALS, 2006, p. 37) but to create alongside it, a new category of group rights that are separate from, but influenced by, the current human rights regime<sup>25</sup>. Perhaps the key to development on these issues is the recognition that there is an individualistic justification for group rights. Indeed, as Kymlicka and Taylor observe, an individual is likely to suffer if his/her culture is persistently disadvantaged or misrecognised. The key contribution that Kymlicka's thesis can offer towards understanding the implications of genocide and of rape as genocide is the connection between the individual and group rights: a theme that



is hinted at within the international legislation on genocide. Kymlicka (1997, p. 34) acknowledges that “group-differentiated rights” may seem counter to efforts to emphasise the individual, in that his theory focuses on the group. Yet, Kymlicka argues that individual rights and group-differentiated rights can be compatible.<sup>26</sup> Addressing both the individual and group elements of the issues, Kymlicka (1997, p. 47) points out:

*Just as certain individual rights flow from each individual's interest in personal liberty, so certain community rights flow from each community's interest in self-preservation. These community rights must then be weighed against the rights of the individuals who compose the community.*

Hence, according to Kymlicka (1997), the preservation of the group which is deemed critical can operate alongside the rights and needs of individual members of the community or group. There may be conflict, for example, if groups impose restrictions on their members, but Kymlicka (1997, p. 35) differentiates between *internal* (“claims of a group against its own members”) and *external* (“claims of a group against the larger society”) protections, both of which have limitations, such as falling within human rights or balancing opportunities, between groups. Kymlicka’s theory of minority rights is helpful in clarifying the crime of genocide, which aims at destroying, in whole or in part, a national, ethnical, racial or religious group. In turn, it is individual members of the groups who are the victims of harmful action. The two components of Kymlicka’s vision, the group and the individual within the group, can co-exist within this formulation. This does not exclude the current concept of human rights with its emphasis on the individual and his/her human rights. This part of Kymlicka’s approach, contrary to Donnelly’s fears, does not completely subsume the category of group rights within human rights, thereby negating a place for the individual. Rather, an area of accommodation is created whereby both the group and the individual within the group are protected and in turn acknowledged and can play an active role.

## 7. Rape categorised as Genocide

By incorporating certain elements from Kymlicka’s work, one can bring together the notion of rape as a crime against the individual, and the notion of genocide as a crime against the group.

In the International Criminal Tribunal for the former Yugoslavia Judgement<sup>27</sup>, the Trial Chamber determined that rape could be understood as “a serious violation of sexual autonomy.” In its overview of several common and civil law jurisdictions in relation to definitions of rape, the Trial Chamber concluded that the main principle linking these systems “[...] is that serious violations of sexual autonomy are to be penalised.” In turn, “sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant” (KUNARAC et al, 2001, at 441; MACKINNON, 2006, p. 950). As with the

international crime of torture, this conclusion emphasises that rape should be conceptualised as a crime committed against the individual. As such, rape is an act perpetrated against the individual, and it specifically violates the sexual components of the individual.<sup>28</sup> As Mackinnon (2006) observes within the context of consent definitions of rape, “this crime (rape) basically occurs in individual psychic space”.

One understanding of sexual autonomy has been offered by Schulhofer (1998, p. 111) and consists of three components:

*The first two are mental – an internal capacity to make reasonably mature and rational choices, and an external freedom from impermissible pressures and constraints. The third dimension is equally important. The core concept of the person [...] the bodily integrity of the individual.*

Although this definition of sexual autonomy crucially includes both mental and physical aspects, the mention of making choices is problematic. A similar link can be made with theories of human rights, according to which if individuals are to have human rights, they must have the capacity to claim them.<sup>29</sup> In his examination of sexual autonomy, Schulhofer (1998, p. 104) goes on to add that the determination of whether or not a violation of sexual autonomy constitutes rape can be linked to cultural factors or social conditions.

In contrast, the International Criminal Tribunal for Rwanda in its pivotal Judgement (Prosecutor v. Jean-Paul Akayesu 1998) conceptualises rape under certain circumstances as genocide for the first time in international law. The women who were raped during the genocide of 1994 were, according to the Trial Chamber, targeted for rape because they were members of the Tutsi ethnic group.

The rapes were therefore considered as genocide within this context since, in the words of the Chamber, “[...] the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women [...] and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole”<sup>30</sup>.

The Chamber added, “[t]hese rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities”<sup>31</sup>.

One way in which the rapes contributed to the destruction of the Tutsi group, was that many of the Tutsi women and girls who were raped were killed afterwards or died from their injuries (BANKS, 2005, pp. 9-10). Another critical point regarding how the rapes were categorised as genocide relates to the fact that Tutsi women were considered as “sexual objects” and as the Trial Chamber in the Akayesu case observed “[...] sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself” (ASKIN, 1997, p. 1010). The rapes of Tutsi women, within this context, could be placed “[...] under the legal definition of genocide because they represent the enemy’s intent to destroy” (SHARLACH, 2000, p. 93). In addition, when properly categorised as genocide, rape can be understood as a “particularly effective tool of genocide”<sup>32</sup> and a way to inflict serious bodily or mental harm on a group<sup>33</sup>.

Some of the after effects of the rapes that took place within the context of genocide in Rwanda included survivors becoming socially outcast and excluded (SHARLACH, 2000, p. 91). Hence, an additional layer of complexity emerges, linked to cultural opinions and sensitivities. As noted in the introduction, this article has identified and analysed theoretical implications emanating from juridical decisions (Kunarac and Akayesu) which associate rape as a violation committed against the individual and rape within the context of a group crime respectively. As such, it was necessary to incorporate the selected international criminal tribunal judgements not to assert compatibility between the two conceptions of rape but in order to understand what can occur to rape when it is subsumed within an established international crime. It is the theoretical implications of these juridical decisions and not the legal assertions that have influenced this article.

If both cases (Kunarac<sup>34</sup> and Akayesu) are considered together, does the innovative link between rape and genocide as presented in the Akayesu case result in rape losing its status as a violation of autonomy? Upon closer examination of the Akayesu Trial Chamber comments quoted above, it would appear that the judgment in this case allows for compatibility within genocide between the individual and the group. Yes, the Trial Chamber focuses on the fact that individual victims were targeted due to their membership in the Tutsi ethnic group. However, the Trial Chamber also acknowledges that both the Tutsi group and the individual victims of rape were targeted for genocide. Recalling the words of the Chamber: “[...] and specifically contributing to *their* destruction and to the destruction of the *Tutsi group as a whole*.”

Therefore, in this particular case, the crime of rape categorised as genocide is conceived of as both an act committed against an individual (Tutsi women) and an act committed against the group (Tutsi ethnic group). As such, rape characterised as genocide has retained its status as a violation against an individual’s autonomy, but also as a violation against the group as a whole.

Using this particular Judgement by the ICTR Trial Chamber as an example, it is our assertion that an area of accommodation can exist whereby the group (Tutsi ethnic group) and the individual (individual Tutsi) are acknowledged with the aim of hopefully protecting both in the future. However, although the judgment in this case projects the group and the individual as compatible with respect to genocide, it should be emphasised that the Trial Chamber insisted that the women who were raped were victims because they were Tutsi. The attachment to the group is not completely removed, despite the fact that the Chamber has also acknowledged space for the individual. This approach may further deny the “individuality”<sup>35</sup> of the victims since they have been placed by the Trial Chamber within the category of Tutsi women and not within the general category of “women”. It could be argued that the notion of “women” also denies the individuality of victims because it could be considered as another group category. As we have argued, the accommodation created for the individual within the group centred international crime of genocide is not perfect and can be uncomfortable. The construct of the Genocide Convention (1948), which the ICTR Trial Chamber must follow, would explain the restriction of focusing only on the Tutsi ethnic group.

Legal scholars therefore regard Akayesu as monumental for four reasons: (i) it provided a clear and progressive definition of rape where none had existed before in instruments of international law; (ii) it was the first case that involved prosecution of rape as a component of genocide; (iii) it contributed to a growing dialogue about sexual violence in war and discourse about its role in preventing future abuses of women in conflict zones; and (iv) most importantly, it moved certain instances of rape toward inclusion within a category of crimes (genocide, torture, war crimes, crimes against humanity) that have *jus cogens* status and are prosecutable on the basis of universal jurisdiction. In short, crimes that have reached *jus cogens status* “do not need a nexus of war and do not require ratification of a treaty” for prosecution (ASKIN, 1997, p. 106).

## 8. Conclusion

This article has determined that recent innovative international jurisprudence decisions in relation to rape have important theoretical implications for how rape is conceptualised and treated within international law. The article focused on one such case (Prosecutor v. Jean-Paul Akayesu, 1998), whereby rape (conventionally understood as a violation committed against an individual) was subsumed within the established international crime of genocide. In this article, we have identified and addressed the potential problems and inconsistencies that arise when an act traditionally defined as a violation of individual rights, is redefined as a crime against a group. These implications are both theoretical and practical, insofar as conceptualising rape as a sexual violation of an individual woman, or as a crime of war (e.g. an instrument of “ethnic cleansing”), or as genocide has substantial effects both on how the crime is experienced by its victims and on how its perpetrators are punished. The paper clearly presented that when rape is subsumed into the group crime of genocide, its dynamic changes since rape no longer functions solely as a violation committed against the individual. We have argued that the view of rape as a violation of an individual’s sexual autonomy (Prosecutor v. Kunarac et al. 2001), and of rape as a crime of genocide may exist within the same parameters. As with the concept of human rights, given its origins in individualistic liberal political theory, the relationship between the individual and the group is problematic – often unequal and uncomfortable - but ultimately not incompatible.

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## NOTES

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1. Since this article is grounded within recent developments in international human rights and humanitarian law in relation to rape, the author acknowledges earlier definitions and a cultural perspective found in national definitions of rape, but does not address these extensively. For more on these issues, such as the emphasis on either consent or coercion, please refer to: Catherine A. Mackinnon (2006, p. 940-958).
2. Copelon has argued that where rape is mentioned in the Geneva Convention (1949) it is conceptualised as an "attack against honour", rather than depicted as a crime of violence. She argues that this is problematic, because it marginalises the seriousness as well the violent nature of rape under international humanitarian law. She urges that rape should be viewed as a form of torture, in order to remove the ambiguity that is the legacy of sexism (COPELON, 1999, p. 337).
3. For instance, *Article 24* from the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War states: "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." (ROBERTS; GUELFF, 2000, p. 310). See also, Vetlesen (2005, p. 212-213).
4. Prosecutor v. Jean-Paul Akayesu (1998) provided a clear and progressive definition of rape where none had existed before in instruments of international law. The case also established that rape could be tried as a component of genocide if committed with the intent to destroy a targeted group. In its findings, the Trial Chamber defined rape as "[...] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive". The Chamber also stated: "[...] rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. This approach is more useful in international law." (ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, 138).
5. See Articles 1, 2, 4 and 5 from the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984). See also P.R. Ghandhi (2000, p. 109).
6. This point is crucial since, for instance, rape must be attached to an established international crime if it is to be prosecuted under the Statutes of current international criminal tribunals (ICTY and ICTR) and the recently established International Criminal Court.
7. The Trial Chamber from the International Criminal Tribunal for the former Yugoslavia (ICTY) argued that rape constitutes a violation of an individual's sexual autonomy. More on this subsequently (ICTY, Prosecutor v. Dragoljub Kunarac, 2001, 208).
8. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998.
9. Foca (South Eastern Bosnia and Herzegovina, now renamed Srebrenica), was the site of one of the most heinous crimes against civilians; the women were subjected to a brutal regime of gang rape, torture and enslavement by Bosnian Serb soldiers, policemen and members of paramilitary groups after the takeover of the city in April 1992 (HUMAN RIGHTS WATCH, 2002).
10. ICTR, Prosecutor v. Jean-Paul Akayesu 1998, p. 165-166.
11. Raphael Lemkin's seminal work where the term "genocide" appears is (1944).
12. There was, and continues to be, concern with the Genocide Convention's limited enumeration of groups that can be targeted. The exclusion of "political" groups is one such example. There have also been calls to consider the category of "female" as a group that can suffer genocide. For more on these issues, please see Lisa Sharlach (2000).
13. ICTR, Prosecutor v. Jean-Paul Akayesu 1998, 731.
14. The punitive aspects of rape during war can also be interpreted as an attempt to demasculinise defending soldiers and ultimately subjugate "the enemy".
15. In a rape-case trial, it is the prosecutor who faces the defendant. It is also the individual victim's story that is considered. Furthermore, and if appropriate, it is the individual victim who testifies before the court.
16. For instance, the opening sections of the Convention on Prevention and Punishment of Genocide (1948) reads: "that at all periods of history genocide has inflicted great losses on humanity; and that, in order to liberate mankind from such an odious scourge, international co-operation is required:" (GHANDI, 2000, p. 19).
17. The notion of genocide, within this article, has not been confined solely to the Twentieth Century.
18. Green uses this term "dual harm" in connection to "physical mutilation and violence". (GREEN, 2002, p. 733-776). This list of harms also relates to rape that does not take place in public or during times of armed conflict. It is the possibility of an amplification of harm, due to rapes occurring in public, which may develop. In relation to rape and harm, see also Archard (2007, p. 374-393), Fein (1999, p. 43-63) and Jones (2000, p. 185-211).

19. This list is taken from Green (2002). See also Mary R. Fabri (1999).
20. For instance, during the genocide in Rwanda many women were gang raped (GREEN, 2002).
21. As the stories of other survivors demonstrates: "Fatuma thought that because of the rape the respect from the members of her community was lost. The participants emphasised the fact that their public rape was the ultimate act of humiliation. Furaha reported: 'The chief militia who caught me said that everyone who wanted to see how sexually sweet Tutsi women are, could have a taste.'" (Mukamana; Collins, 2006, p. 150).
22. The aim of this section is not to outline or to resolve all the various positions within human rights discourse related to "who is the bearer of rights – the individual; the individual as a member of a group; or the group as a whole?" The position adopted in this article is that human rights are individual rights but that the group, based on factors such as race, ethnicity, and gender, also plays an important role.
23. As Jack Donnelly, in reference to minority rights, observes: "I am not, let me repeat, challenging the idea of minority rights as they are already established in the major international human rights instruments (i.e. as individual rights that provide special protections to members of minority groups)." (DONNELLY, 2003, p. 37).
24. "Assimilation" is a term used to describe the process by which an outsider, immigrant, or subordinate group (e.g. the Australian Aborigines) becomes indistinguishably integrated into the dominant host or settler society.
25. This possibility has been articulated in relation to certain minority groups (JACKSON-PREECE, 2003, p. 68). In general, the line of inquiry can be understood as attempts to "[...] distinguish between, on the one hand, rights that depend on an individual's belonging to a group or community, and, on the other, individual rights common to all human beings." (CASALS, 2006, p. 57).
26. This part of Kymlicka's argument relates to minority language rights, in that a right is attached to an individual member of a group and to the group as a whole. In Canada, as his example follows, the right of to use French in courts is one exercised by individuals. The right may be aimed at the entire francophone group, but it is exercised by individual. Other rights in Canada, such as fishing/hunting rights for indigenous peoples, are accorded to groups (KYMICKA, 1997, p. 45-46). Kymlicka (1997, p. 46) also insists that French Canadians are a national minority, thereby ensuring they can be accorded group-differentiated rights. Although language and cultural rights are not directly linked to rape and to rape as genocide, it is the essence of Kymlicka's thesis which attempts to bridge the individual and group schism that is relevant for this article.
27. ICTY. Prosecutor v. Dragoljub Kunarac (et al), 2001.
28. As Catherine A. Mackinnon (2006, p. 941) states: "Force abrogates autonomy just as denial of self-determination is coercive."
29. For more on this topic, please see Peter Jones (1994, p. 67-71).
30. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, p. 165-166.  
It should be noted that, in the Akayesu Judgement, rape and other sexual violence within the parameters of genocide was "[...] defined by whatever causes serious bodily or mental harm." This is because of the way in which the Genocide Convention (1948) has been formulated. Catherine A. Mackinnon, p. 941.
31. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, 731.
32. This reference relates to "The devastation that follows rape makes it a particularly effective tool of genocide because it destroys the morale of a woman, her family, and perhaps her entire community." (SHARLACH, 2000, p. 91).
33. ICTR, Prosecutor v. Jean-Paul Akayesu, 1998, 731.
34. Prosecutors were according to Kuo (2002, p. 5) "ready to come out and say rape on its own can be a war crime [...] even a single act of rape could be a crime against humanity if it occurred in the context of widespread or systematic attack". As a result, Foca became the first Tribunal case that dealt solely with war crimes of a sexual nature (KUO, 2002, p. 305).
35. The inspiration for the term "individuality", in conjunction with genocide, comes from Leo Kuper's phrase: "As a crime against a collectivity, it (genocide) sets aside the whole question of individual responsibility; it is a denial of." (KUPER, 1981, p. 86).

## RESUMO

O presente artigo identifica e analisa algumas das implicações teóricas ao tipificar o estupro como crime internacional de genocídio, bem como sustenta que tal análise seja essencial para a criação de marcos mais claros para tratar da questão do estupro. Genocídio é definido como violação perpetrada contra grupos específicos. Em contrapartida, o estupro é conceitualizado como um crime contra a autonomia sexual de um indivíduo. Sendo assim, a definição do estupro como uma violação à liberdade sexual individual seria incompatível com a definição deste como uma violação contra todo um grupo, à semelhança do genocídio? A principal conclusão a que se chega neste artigo é que, se for possível estabelecer uma concepção abrangente de genocídio – capaz de englobar tanto a esfera individual, quanto coletiva - o estupro (quando tipificado como genocídio) pode ser compreendido como violação cometida tanto contra o indivíduo, quanto contra o grupo. Entretanto, estas duas esferas – individual e coletiva – nunca poderão ocupar o mesmo patamar, uma vez que a proteção de grupos humanos constitui a própria fundamentação da criminalização do genocídio. Ao relacionar o estupro à idéia de genocídio, concebido, situado e tratado como crime contra inúmeros grupos, seu cerne muda. Neste sentido, estupro não poderá mais ser compreendido como simples violação a um indivíduo – antes, torna-se parte de uma concepção desenvolvida para a proteção do grupo.

## PALAVRAS-CHAVE

Estupro – Genocídio – Violação contra grupos específicos – Autonomia sexual do indivíduo.

## RESUMEN

Este artículo identifica y analiza algunas de las implicancias teóricas de subsumir el delito de violación en el crimen de genocidio y sostiene que este análisis es esencial para la creación de un marco más claro a fin de hacer frente a tal delito. El genocidio se define como una violación cometida en contra de determinados grupos. En cambio, el delito de violación es concebido como un atentado contra la autonomía sexual de una persona. Como tal, ¿puede el delito de violación, entendido como un ataque a la autonomía sexual de un individuo, ser compatible con el delito de violación subsumido dentro de la categoría de violaciones de derechos que afectan a un grupo como el genocidio? Una conclusión clave de este artículo es que si, dentro del espacio conceptual puede considerarse al delito de genocidio incluyendo tanto al individuo como al grupo, entonces, el delito de violación (tipificado como genocidio), puede funcionar tanto como una violación contra el grupo y como una contra el individuo. Sin embargo, el espacio asignado al individuo y al grupo nunca puede ser igual. El grupo siempre necesita ocupar la mayoría del espacio ya que la motivación central para considerar al genocidio como un crimen es la supervivencia de los grupos humanos. Cuando el delito de violación es subsumido en el de genocidio, el cual está concebido como un crimen contra determinados grupos, su dinámica cambia. El delito de violación ya no es simplemente la afectación a una persona sino que deviene como parte de un concepto desarrollado para proteger al grupo.

## PALABRAS CLAVE

Violación – Genocidio – Violación Colectiva – Autonomía Sexual del Individuo.



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#### ABSTRACT

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This article presents some cases that are emblematic of the application of the International Labour Organisation's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, by courts of Latin America. It discusses: a limited number of cases that cover various topics and represent the distinct countries of the region; and the regional court of human rights – the Inter-American Court of Human Rights. These cases are highlighted either according to their subject, by the innovative insight they offer, or by the relevance of their consequences. Before outlining these cases, however, some clarifications are presented which might be useful in explaining the material set forth below and the context in which the material should be situated.

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#### KEYWORDS

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Convention 169 – ILO – Indigenous and Tribal Peoples – Courts. Latin America – International Treaties Applicatio



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# NOTES ON THE IMPLEMENTATION BY LATIN AMERICAN COURTS OF THE ILO CONVENTION 169 ON INDIGENOUS PEOPLES

Christian Courtis

This paper presents some emblematic cases of the application of the International Labour Organization's (ILO) Convention 169 Concerning Indigenous and Tribal Peoples in Independent Nations by Latin American courts<sup>1</sup>. I chose a small number of cases that cover diverse topics and represent different countries in the region, as well as the regional court of human rights – the Inter-American Court of Human Rights. It is clear that there has been considerable experience in the application of Convention 169 in Latin America, with some countries having developed important jurisprudence through a significant number of judgments in the field. Therefore, this work makes no pretense of being an exhaustive review of the material: the perspective adopted is simply to select a handful of cases, based on the novelty of interpretation offered or on the relevance of its consequences. Before outlining the cases, I make some preliminary clarifications that may be useful in explaining the material presented here, and the context in which they should be understood.

## **1. Some facts on the legal context of the countries of the region.**

The Latin American and Caribbean region is that in which the greatest number of ratifications of Convention 169 have taken place – 14 (fourteen), at the time of this writing (May 2009)<sup>2</sup>. This is no accident: many countries in the region are multilingual and multicultural, and in some cases, indigenous people constitute a majority or significant portion of the population. In addition to ratifying Convention 169, along with a series of constitutional reforms taking place at the end of the 1980s, an important number of these countries have incorporated

*Notes to this text start on page 79.*

provisions relating to the rights of indigenous peoples and communities into their constitutions.

It is no wonder, then, that many of these constitutional and legal changes have impacted the jurisprudence of many countries. Some common factors – applicable to different degrees in each country, but nevertheless representing a regional tendency – can help us understand this panorama.

### *1.1 The relationship between the processes of constitutional reform and democratic transition or consolidation*

A significant number of countries in the region have experienced a transition from authoritarian regimes to the implementation of democratic institutions in the period ranging from the mid-1980s to the early 2000s (GARGARELLA, 1997, p. 971-990; SERNA DE LA GARZA, 1998; UPRIMNY; GARCÍA VILLEGAS, 2004). In many cases, the process was accompanied by substantial constitutional reforms. In other cases, although there was not exactly a transition from an authoritarian to a democratic regime, constitutional reforms accompanied important processes of political mobilization and renewal. The majority of these reforms have led to a significant number of new rights and institutional innovations, as described in the following paragraphs.

### *1.2 The expansion of constitutional justice*

Although the idea of constitutional justice was not foreign in many of the region's jurisdictions, the fact is that, during much of the twentieth century, judicial control of constitutionality was not common in the region. Many of the constitutional reforms that took place in the last decade of the twentieth century have reinforced constitutional control through the creation of special constitutional courts or constitutional sections within superior courts of justice or supreme courts, and through the express provision of actionable rights within the constitution – such as allowing for “amparo” complaints or judicial review. This has led to a notable expansion of the use of constitutional jurisdiction, which is unprecedented in many countries in the region (BAZÁN, 2007, p. 37-61).

### *1.3 Ratification and the grant of privileged status to international human rights treaties.*

Other innovations tested in many countries in the region have stemmed from the privileged status of international human rights treaties. During the period described, many of the region's nations have augmented the number of ratifications of international human rights treaties – a message reinforcing their acceptance of the Rule of Law and the observance of fundamental rights, as opposed to an authoritarian past characterized by massive human rights violations. The ratification of international human rights instruments can be understood as confidence in the

international human rights system, which, in the past, was the forum in which grave human rights violations could be denounced, and at the same time as a message to the international community about the State's new commitment to the rule of law and respect for human rights.

However, the ratification of a substantial number of international human rights treaties, both regional and universal, have taken place in the context of a prevalent monist tradition that helps define the relationship between international and domestic laws. This means that ratified international human rights treaties become part of domestic law, and that the rights recognized in those treaties can be added to the expanded list of fundamental rights consecrated by the region's new constitutions<sup>3</sup>.

Finally, although not uniformly, many countries in the region have conferred upon human rights treaties a privileged legal status, at least with respect to ordinary laws (CORAO, 2003). In some cases, such treaties have been given constitutional status<sup>4</sup>, while in other cases they are considered part of the so-called "block of constitutional law" (UPRIMNY, 2001), and in still other cases they have an intermediate status – below that of the constitution but above ordinary legislation.

#### *1.4 Strengthening the regional human rights system*

This renewed relationship between local constitutional law and international human rights law has been buttressed by the strengthening of the Inter-American System of Human Rights. Practically all of the countries in the region have ratified the American Convention on Human Rights and have accepted the contentious jurisdiction of the Inter-American Court of Human Rights.

One effect of this expansion has been, of course, a considerable increase in the activities of the organs of the system – the Inter-American Court and Commission for Human Rights – in terms of the cases received and resolved, the countries involved and the breadth of the themes considered. At the same time, the countries that make up the regional human rights system have had to internalize its decisions and the interpretive criteria defined by said system. The process is slow and complex and is far from being complete. But it has resulted in many local courts being more receptive to Inter-American jurisprudence – especially that established by the Inter-American Court of Human Rights. This can explain how courts have become gradually accustomed to invoking international human rights standards.

#### *1.5 Recognition of new constitutional rights*

A final element consists of the recognition of the rights of indigenous peoples in the constitutions of the region. Constitutional reforms in the region have been characterized by the expansion of the list of fundamental rights and substantive principles, which include the full range of known rights (civil,

political, economic, cultural, collective, minority, and environmental rights). In this context, there has also been constitutional recognition of the rights of indigenous communities – a theme that would be impossible to ignore considering the strength and degree of political mobilization of indigenous peoples and communities in the region (SIEDER, 2002; BARIÉ, 2003; FLORES JIMÉNEZ, 2004; BONILLA, 2006).

Many of the constitutional provisions that recognize the rights of indigenous peoples have been inspired by related international standards, which include, as a prime example, Convention 169 of the International Labour Organization.

## **2. Convention 169's influence on countries in the region**

While these factors vary from country to country and do not fully explain the phenomenon being analyzed, they at least offer some elements that may be helpful in understanding the success Convention 169 has had in the region, especially in comparison with other regions of the world. Part of the Convention's influence is reflected in the aspirational character of the constitutional and legal reforms related to indigenous peoples in the region – in the sense that many of the concepts articulated therein, such as “indigenous peoples and communities,” “self-identification,” “traditional territories,” “autonomy,” “consultation,” and “uses and customs,” amongst others – are incorporated in one way or another in the constitutions and legal norms of various countries in the region (BARIÉ, 2003, p. 58-62).

However, what is important for the purposes of this study is that the influence of Convention 169 is not limited to the role of “model legislation” to be followed by local political powers. Convention 169 has been employed and invoked by indigenous peoples and communities themselves, as well as by other actors – both public institutions and civil society – that have acted in defense of the rights and interests of these communities. Additionally, this international instrument has been employed in litigation before local courts and, when necessary, before the bodies of the regional human rights system.

## **3. Some criteria for understanding the selection of cases presented in this paper**

As mentioned above, this paper includes, in a selective manner and without any claim to exhaustivity, some judicial decisions that have applied Convention 169 of the ILO. The decisions come from both national courts and the Inter-American Court of Human Rights. I have grouped the decisions thematically to demonstrate certain lines of convergence between the courts of distinct countries in the region and the regional human rights court.

However, it is useful to put these cases in context in order to properly understand the reasons behind their selection. The different case backgrounds and the diversity of local legal systems and juridical traditions give a mixed picture.



It should be clarified that the degree to which the application of Convention 169 has been developed varies significantly amongst the region's local courts: in some countries, there are few cases and the application of Convention 169 by local courts is in its beginning stages, while in others – including Colombia and Costa Rica – the richness and variety of cases are enormous<sup>5</sup>. In either case, although the examples cited here are few, the reader can get an idea of the variety of existing cases if certain variables that must be taken into account are explained.

### *3.1 Regional Judgments/National Judgments*

Convention 169 has been applied both by the local courts of various countries<sup>6</sup>, as well as by the bodies of the regional human rights system, namely the Inter-American Court and Commission for Human Rights.

In the former case – with some exceptions, such as in Belize – Convention 169 is a legal norm incorporated into the domestic law of the countries in question. In the latter case, in contrast, it is important to note that Inter-American bodies do not have jurisdiction in resolving controversies based on violations of Convention 169, as their jurisdiction is based on regional human rights instruments. However, the regional human rights bodies have used the ILO's Convention 169 as an interpretive norm in specifying the obligations of States established by other international agreements (such as the American Convention on Human Rights and the American Declaration of the Rights and Obligations of Man) as applied to indigenous peoples or communities and their members. Thus, for example, regional human rights bodies have interpreted the right to property ownership or the right of due process, as applied to the rights of indigenous peoples and communities – in light of those rights established by Convention 169.

Although the majority of cases discussed here consist largely of domestic jurisprudence, I have also included some extremely important cases decided by the Inter-American Court for Human Rights, not only because the Court's interpretation is noteworthy, but also because regional jurisprudence often has a subsequent effect on the local jurisprudence of countries that form part of the regional system for human rights.

### *3.2 Countries with a monist tradition/ Countries with a dualist tradition; normative hierarchy of the Convention*

A related question is how the treaty is incorporated into domestic law and its normative hierarchy in cases where there is direct incorporation of international law. The dominant tradition in Latin America is monist – that is to say, an international treaty is incorporated into domestic law once it is ratified. However, it is important to remember that some countries in the region have a *common law* tradition, in which dualism predominates. Amongst such countries, Belize was involved in an interesting case invoking Convention 169 as an interpretive or persuasive tool, even though the country is not part of the agreement<sup>7</sup>.

Rather, it is a second question which derives from the relationships between international and domestic law in the monist tradition and which captures some significant differences between countries in the region that have had experiences with the judicial application of Convention 169. Here, needless to say, there are different approaches in different jurisdictions, which are in some cases reflected in the judgments discussed.

In some countries, international human rights treaties and Convention 169 have been assigned to a category similar to the constitution. These countries include Bolivia and Colombia, which have assimilated Convention 169 into the constitution by employing the notion of a “constitutional block.” According to this idea, the incorporation of international human rights treaties into domestic law requires an interpretation that blends the fundamental rights found in the constitution with the human rights included in international treaties. Both groups of rights should complement and support each other, forming a unit where, in the case of differences between the sources, a *pro homine* interpretation should be employed – that is, the source extending rights the furthest should have primacy.

The way in which Argentina’s 1994 constitutional reforms addressed the topic is distinct, but the results have been similar: a number of explicitly listed international human rights treaties have been given constitutional status, and Congress may give constitutional status to other international treaties with a qualified majority vote (Art. 75, sec. 22). However, Convention 169 does not form part of this list. The Constitution of the Bolivarian Republic of Venezuela assigns constitutional status to all international human rights treaties (Art. 23), although in practice the courts have been less inclined to directly implement treaties than in other countries. It is also an open question as to whether the ILO’s Convention 169 is a human rights treaty – a question that has not yet been discussed in these terms. The case of Costa Rica is peculiar: although the text of the Constitution assigns international treaties a level of importance more rights to the people<sup>8</sup>.

In other countries in the region that have considered the question of the normative hierarchy of human rights treaties in a higher than that of the law but lower than that of the Constitution (Art. 7), the Constitutional Tribunal of the Supreme Court has interpreted international human rights treaties at the same level of importance as the constitution or of even greater importance, in cases where the treaties go domestic law, the tendency has been to assign them to a level lower than that of the Constitution but higher than that of ordinary legislation. This is the case in Ecuador (Art. 425<sup>9</sup>) and in Guatemala (Art. 46). This is also the case in Argentina for treaties not included in the *numerus clausus* list of human rights treaties with constitutional importance – a list that does not include Convention 169. In Mexico and Brazil, despite the constitutional text not being clear on this question, we can see a slow rise in the interpretation of treaties as supralegal, but still infra-constitutional, although this interpretation has not been definitively established<sup>10,11</sup>.

In any case, and beyond the specific solution adopted, the trend in case law and legislation in the region is to give greater weight to international human rights treaties, and to consider them more frequently in court rulings.

### *3.3 Types of Litigation*

Other factors that can help explain the scope of the application of Convention 169 by Latin American courts (and, in some cases, the Caribbean courts) is the wide variety of lawsuits in which it has been employed. Moreover, within this range of lawsuits, the Convention has been used by plaintiffs, and as an exception or justification by the defense, and, in some cases, it has been used in this way by State bodies.

For example, Convention 169 has been invoked in complaints of unconstitutionality, requests for protection against illegal conduct or for constitutional guardianship, in disputes between the branches of government, in political-electoral actions, in actions for annulment in contentious administrative matters, in ordinary civil actions (which discuss issues of property or eviction, for example), in criminal cases, and in cases concerning agricultural laws, amongst others. In some countries – such as Chile, Colombia, and Guatemala – qualified parties may request an opinion concerning the compatibility of the constitution with a treaty or other norm from the court assigned to handle constitutional questions: in these instances, Convention 169 has been the object of consultation with the regular or constitutional courts.

In terms of variety with respect to the parties in cases employing Convention 169, the indigenous community, its members, or their representatives invoke the Convention in a significant number of cases. In several cases, the Ombudsman (Attorney General) invokes the Convention – in cases where the law allows the state to bring cases in defense of human rights, either on behalf of specific groups or on behalf of named collective or diffuse interests. In some criminal cases, the prosecutor or public defender has invoked Convention 169. In another series of cases, the Convention is employed by public authorities – legislative or administrative – as a basis for the public policy adopted. For example, in a ruling by the Constitutional Court of Colombia, Congress invoked Convention 169 to justify a law in the face of the President's objections, noting that the matters being considered were enacted with the purpose of complying with international obligations arising from the Convention<sup>12</sup>. In a case before the Bolivian Constitutional Court, the administrative authority charged with agrarian reform invoked Convention 169 as a defense<sup>13</sup>.

In short, the experience in Latin American courts shows a great wealth of possibilities for the invocation of Convention 169, which is not at all limited to cases of a constitutional nature.

### *3.4 Themes*

If the variety of the types of lawsuits is large, the thematic variety of these cases is even greater. The areas in which Convention 169 is relevant and those in which it has been used as an interpretive tool are manifold.

However, it must be noted that a significant percentage of the cases decided by courts in the region deal with disputes related to land and the exploitation

of natural resources situated therein, and that several of these cases relate to the consultation and participation of the community in decisions related to this theme.

Another significant portion of the cases deal with the relationship between State criminal law and customary or tribal criminal law, in at least two ways: regarding the limits of the application of State criminal law once community criminal justice is exercised, and regarding the limits placed on the use of indigenous criminal law by the constitution and other human rights instruments.

Finally, there are also cases that cover a variety of other aspects: the right to education and health care for indigenous communities, respect for political autonomy and the manner in which authorities are elected, respect for cultural identity and cultural symbols, and the formation of State bodies to effectuate the obligations relating to indigenous peoples and communities laid out in the constitution and in Convention 169.

### *3.5 Different ways Convention 169 is used by the courts*

Finally, there are also differences in the ways in which different courts in the region use Convention 169. Some of these differences are due to the distinct *status* of the Convention in domestic law, but this factor does not explain all the variations recorded in cases where it has been used. At least two other variables can be useful in capturing nuances that help to clarify the issue.

On the one hand, there is a difference between cases in which the court directly applies Convention 169, and those cases in which the Convention is used as an interpretive standard or instrument for other laws. This difference does not exactly correspond with monist or dualist traditions: although the majority of countries in the region have adopted a monist approach with respect to the relationship between international and domestic law, many courts in the region still do not directly apply international law – perhaps due to a strong legalist tradition, which stems from the culture of codification. Even in these cases, Convention 169 has been used as an interpretive tool for other laws – at times, for constitutional norms, and at other times for legal norms and other infra-constitutional norms.

Another useful distinction is the use of the interpretive norm or standard offered by Convention 169 as a main argument used to decide a question, as opposed to using it “in addition to,” that is, as a supplementary argument or simply illustrative point. In effect, although in many cases the criteria offered by Convention 169, or by the interpretation of a domestic law in light of or in harmony with Convention 169 – an “interpretation finding the two to be consistent” – constitutes the basis of the decision, in many others the Convention is cited as the decisive issue, as an argument that can reinforce or complement the decision-making criteria – that is to say, it can add some argumentative weight to a decision made on the basis of another law. In some cases, judges appear to construct an argument in two parts: the first based on domestic laws, and the second explained by the fact that the solution described on the basis of domestic law does not violate, but is consistent with, the international obligations assumed by the State.

Different sources, however, inform the gradual introduction of criteria from international law into domestic law. In either case, national courts have become more conscious of the need to take seriously the international obligations of the State, and to translate them into judicial decision-making criteria in cases of conflict.

#### 4. Overview of Cases

I chose to group some of the illustrative cases by theme, taking into consideration matters which indicate the relevance of the ILO's Convention 169 for the claims of indigenous peoples and communities, which have been the subject of court decisions in various countries. I will review cases related to four thematic areas: a) the claims related to collective title for the ancestral lands of indigenous peoples and communities; b) the right of indigenous peoples and communities to be consulted before decisions are made that may affect their rights and interests; c) the positive obligations of the State in situations where there is an acute lack of indigenous peoples and communities; and d) applications of Convention 169 in criminal law.

##### *4.1. Claims for Collective Title of the Ancestral Lands of Indigenous Peoples and Communities*

Not surprisingly, one of the most important claims made by indigenous peoples and communities concerns the recognition of title for their ancestral lands. Land constitutes an identity trait for indigenous people, defining their way of life and world view. The land has, for indigenous peoples and communities, a religious significance, and is also the foundation of their economy, which generally fluctuates with the seasons. One unique characteristic about indigenous claims on land is the claim of collective ownership, in the name of the people or the community as the owners, and not in terms of individual property of the members of the community. In Latin America, the ancestral land of indigenous communities and people has frequently been the object of pillage and plunder by the State and by third parties. The close relationship of indigenous peoples and communities to the land has led to the recognition that their collective property ownership constitutes a condition for the survival of those peoples and communities.

Given the importance of the issue, the jurisprudence of the region has not been blind to these claims, in which the invocation of the ILO's Convention 169 has played a relevant role. The Inter-American Court for Human Rights, for example, has employed Convention 169 as the interpretive standard for property law in those cases where a claim about the ancestral territory of indigenous peoples and communities is at stake<sup>14</sup>.

In the case of *Yakye Axa*<sup>15</sup>, the Inter American Court of Human Rights confronted a claim for land title of an ancestral territory of a hunter-gatherer indigenous community, living in a situation of extreme poverty, from the Chaco forest in Paraguay. The community's ancestral land was held as private property

by third parties. In this case, it was argued that the lack of effective action by the Paraguayan government to recognize the legal character of the indigenous community, and grant it title to its ancestral lands, led the community to wait for a response to pending claims in an inhospitable environment, in extremely precarious conditions. The lack of access to health care and a means of survival caused the death of many members of the community. Given the conditions of the settlement, children of the community were deprived of food, health care, clothing, and adequate education. The State was charged with a violation of the right to life, to private property, due process and legal protection.

In the case, the Inter-American Court considered that, in cases where issues of the right to property – and the right to life, due process, and legal protection – are applied to indigenous communities, the Court must refer to Convention 169<sup>16</sup>. In this sense, the court notes that “the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations”<sup>17</sup>. In particular, the Court states that

*[t]he above relates to the provision set forth in Article 13 of ILO Convention No. 169, that the States must respect “the special importance of cultures and spiritual values of the peoples with respect to their relationship with lands or territories or both, as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”<sup>18</sup>.*

In this case, the Court decides that the time that elapsed since the community first made its claims, without the State granting effective title to their ancestral lands, constitutes a violation of the community’s right to property.

Furthermore, the Inter-American Court consults Convention 169 to determine the extent of the measures the State must adopt to reinstate community ownership over its ancestral lands, given the situation of occupation of these lands by private property owners. In this regard, the Court invokes Article 16.4 of Convention 169, which states that when the return of the people to their ancestral lands is not possible,

*[...] these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.*

The Court added that the payment of just compensation or both is not subject to the pure discretion of the State, but must be – in conformity with an integrated interpretation of Convention 169 with the American Convention – decided in concert with the affected peoples, in accordance with their own consultation processes, values, customs, and traditional laws<sup>19</sup>.

The Inter-American Court has repeated this doctrine in the **Sawhoyamaxa**<sup>20</sup> and **Saramaka**<sup>21</sup> cases.

Some local courts have had to resolve similar issues. One case resolved by the Argentine courts provides a good example of interpreting the common law – in this case, the notion of property from the Civil Code – in light of the standards established by ILO's Convention 169. The case is related to a community from **Quera y Aguas Calientes**<sup>22</sup>, in the Jujuy province of northern Argentina, in which the Civil and Commercial Court decided a case about usurpation (adverse possession), initiated by an indigenous community. The petition concerned a claim for collective or community ownership of the land in the name of the community as the property holder – and not in the name of its individual members.

The complaint grants the rights of ownership to the community itself, referring to the norms of the Argentine Constitution and the concept of indigenous peoples stemming from Article 1 of ILO's Convention 169. It also talks about the special cultural and spiritual relationship that the indigenous have with the land and with the territories they collectively occupy, recognized by the cited Convention, which Argentina has ratified.

For its part, the provincial State asks that the complaint be rejected, citing the fact that the community only acquired legal personality juridical in 1996, and therefore could not have complied with the twenty-year time period necessary for the application of adverse possession.

The court finds that the recognition of the legal personality is merely an act that formalizes a pre-existing community: when they asked for legal personality, the people had to prove that they possessed a common language, religion, conservation of customs, group identification, and willingness for communal land ownership, in addition to holding free election of representatives, amongst other requirements. The granting of legal personality is merely declarative, and not constitutive of the legal personality of the community. The Court states that, after the constitutional reforms of 1994;

*the constitutional norm is designed to allow for the granting of legal personality to operationalize an existing right, that is to say the right is not established with the grant, but the grant signals that the right is preexisting and merely makes it effective, guaranteeing, amongst other rights, the right of collective property ownership. In other words, it recognizes that the aboriginal communities pre-date the national government [...] and they adopt, as a precautionary measure, the ownership of lands "that they traditionally occupy," with which they are guaranteed the right to communal ownership of lands which has been exercised historically and not just since such communities became juridical persons.*

What is interesting is that a civil and commercial court, accustomed to deciding cases of individual and corporate ownership, has to directly apply constitutional norms as well as Convention 169 to adjust the institutions of private law to a notion of collective ownership that pre-exists its legal recognition (i.e., the indigenous

community) and the notion of collective or community land ownership in general. To do this, the court must interpret the twenty-year requirement for adverse possession – established in the Civil Code - in accordance with constitutional and international norms when it is applied to the indigenous community. As such, the court states that:

*the aboriginal community that has recently received its legal personality will not be treated as a universal or particular successor in terms of private law; rather, we have to take into account that our positive law has incorporated a new concept of ownership, specifically communal property, in which possession is not exercised by a specific physical person, but instead by the group that forms this community.*

Based on testimony and a visit to the community, the court held that the intergenerational “indigenous community” not only complied with the requirement of peaceful and uninterrupted possession for twenty years, but also had been in possession of its lands since pre-Hispanic times. Therefore, the court tested the peaceful and uninterrupted possession by the community, accepted its demand, and granted collective title to the parcel of land claimed.

#### *4.2. The right of peoples and communities to be consulted before decisions are made that may affect their rights and interests*

One of the most important common themes in the area of indigenous rights in the region is linked to the right of the peoples and communities to be adequately consulted before the public authorities make decisions that may affect them. These measures include, for example, those involving the exploitation of natural resources found in their territory, the provision of educational services in indigenous communities, and the design of development plans for indigenous peoples and communities. It is a procedural requirement that must be complied with before a decision is made, and a lack of compliance renders invalid decisions made without consultation. The international instrument where this right is most clearly expressed is Convention 169 of the ILO<sup>23</sup>.

The Inter-American Court of Human Rights has established case law on the issue<sup>24</sup>. I will outline here, however, various cases decided by domestic courts.

The Constitutional Court of Colombia has clearly established the need for consultation with indigenous communities, fixing the interpretive basis in the requirement of “appropriate consultation,” and invalidating administrative and legislative acts adopted without fully complying with this requirement. Two important cases illustrate its position.

In ruling SU-039/97<sup>25</sup>, a true *leading case* on the continent on this question, the Constitutional Court had to consider a petition for protection (equivalent to an *amparo* in Colombia) presented by the Ombudsman, who was representing a group of members of the U’wa indigenous community, against the Ministry of the Environment and Western Society of Colombia, Inc., arguing that the defendants



violated the rights of the community by not effectuating a complete and serious consultation before granting a license for oil exploration within their territory. According to the complaint, defendants only had meetings with a few leaders from the community, which did not satisfy the requirement of adequate consultation. The Ombudsman requested the suspension of concession of the environmental license, and the adoption of necessary measures to carry out the procedure of prior consultation with and for the protection of the indigenous community. He also asked, in a separate complaint, for both the nullification of the administrative act that granted the environmental license and the provisional suspension thereof. Both legal actions were based, furthermore, on the violation of the indigenous people's rights to territory, self-determination, language, and ethnic culture – since the exploitation of non-renewable natural resources is determinative of the preservation of the cultural, social and economic integrity of the indigenous community and the participation of its representatives in those decisions, as prescribed by Articles 6 and 15 of Convention 169.

In its decision, the Constitutional Court emphasized not only that individual members of the indigenous community are the subjects of rights, but also that the Constitution recognizes that these rights apply to the community as a group. Later, the Court states that the interests in the exploitation of natural resources in a manner that guarantees sustainable development must be harmonized with the rights of communities living in the exploited areas to conserve their cultural, ethnic, economic, and social identity. The form of harmonization and balancing of these interests is the creation of a participation mechanism for the communities concerning the decisions that affect them. The Court states that this is a fundamental right, as it is this participation mechanism that ensures the survival of the community as a social group, affirming that Convention 169 forms part of a “constitutional block” – which requires an integrated interpretation of the fundamental rights recognized in the political constitution and the other normative instruments that form this block. As a consequence, the harmonized interpretation of the constitution and Convention 169 requires the right of consultation with the indigenous peoples when exploiting natural resources. The consultation must seek to give the community full knowledge of the project and its possible impact on their social, cultural, economic, and political development, as well as an assessment of the project's advantages and disadvantages. The affected communities must be heard and, should they not reach an agreement, administrative action must not be authoritarian or arbitrary, but objective, reasonable, and proportionate. In any event they must find mechanisms to mitigate, restore, or correct the effects of any detrimental administrative measures affecting the community or its members.

The Court found that the consultation process with the U'wa concerning the oil exploration project was not carried out in a full and appropriate manner, as the meetings were attended by various community members, but not with their leaders. The defendants also did not hold a meeting to review the effects of the project – which was never planned because the license had already been issued.

Therefore, because the defendants did not effectuate the consultation process within established parameters, and in anticipation of the possible damage the project could cause for the indigenous community, the Court found that the U'wa community's rights of participation, of ethnic, cultural, social and economic integrity, and of due process had been violated. The ruling granted the temporary injunction, suspended the environmental license and ordered due consultation.

This doctrine has been reiterated and applied in subsequent decisions<sup>26</sup>.

In a recent case of the utmost institutional importance, the Colombian Constitutional Court brought this doctrine one step further by *declaring a law unconstitutional* for lack of adequate consultation with indigenous and Afro-Colombian communities potentially affected by it. In effect, with decision C-030/08<sup>27</sup>, the Constitutional Court considered the constitutionality of the so-called General Forest Act (Law 1021 of 2006), in light of its having omitted prior consultation established by article 6 of the ILO for affected indigenous and Afro-Colombian communities.

The Constitutional Court reinforced the jurisprudential line drawn in recognition of ethnic and cultural diversity as a constitutional and fundamental principle of Colombian nationality. It emphasized that this special protection is translated into a duty to create a consultation process for indigenous and Afro-Colombian communities, turning the adoption and implementation of decisions that affect them, a duty that arises from various constitutional norms and from Convention 169 of the ILO.

However, given that the case questioned the sanction of a law without prior consultation, the Court added new criteria to its old jurisprudence. As such, the Court states that, when it comes to legislation, the duty of consultation does not arise in any case that may affect indigenous communities, but only in those that directly affect them. The Court clarified, however, that a law may be considered as having a direct effect when dealing with themes covered in Convention 169, as well as when, due to its general nature, such law has a direct impact on indigenous and tribal communities. The court also considered issues related to the manner and timing of consultation in cases of legislation, as well as the possible legal consequences of non-compliance.

The Court considered that, although there were legal provisions which preserved the autonomy of indigenous and Afro-Colombian communities for the use and enjoyment of forests in their territories, the law also establishes general policies, definitions, guidelines, and criteria that may, in a general manner, affect areas in which indigenous and Afro-Colombian communities are settled, with possible repercussions for their livelihoods and the close relationship such communities maintain with the forest. A lack of consultation, the Court determined, renders a law unconstitutional.

The Court also set guidelines with which the law must comply to be considered valid: to inform communities about the legislation; to illustrate the scope of legislation and how such legislation could affect them, and to give them effective opportunities to respond to such legislation.

The Constitutional Section of the Costa Rican Supreme Court has followed a similar path in declaring unconstitutional the adjudication of a concession for hydrocarbon exploration and exploitation to a private company by the Executive branch for a failure to engage in adequate prior consultation with the affected indigenous community. In vote 8019 of 2000, the Court decided on a related petition for relief, initiated by development associations in indigenous communities and other litigants, and founded, amongst other laws, in a violation of Convention 169<sup>28</sup>.

The court decided that the authorities failed to comply with the requirement of prior consultation with indigenous communities, as established in article 15.2 of ILO Convention 169. The court interpreted the indigenous communities' right of prior consultation as a necessary requirement for the respect and participation of minorities in a democracy. The Constitutional Section offered as proof the Minister's failure to order consultation, which was compulsory, and the failure to publish details concerning the bidding process in the press. Consequentially, the court approved the petition for relief and nullified the administrative adjudication.

A final example comes from the Constitutional Court of Ecuador. This court also considered, in the case of *Arcos v. Dirección Regional de Minería*<sup>29</sup>, a petition for relief – filed by the Ombudsman, on behalf of the Chachis indigenous community and the Afro-descendent community from the Esmeraldas province – concerning a concession that had been granted by the government to a private mining company to “prospect, explore, exploit, benefit, smelt, refine, and market minerals” existing in the territory of these communities. Amongst other grievances, the petition was based on the non-compliance with the requirement of prior consultation with affected communities, invoking article 15 of the ILO's Convention 169.

The petition claims that the concession and the commencement of mining activities caused irreparable harm to natural resources and the health and life of families in communities residing in the territory, in addition to violating the collective rights of the black and indigenous communities by ignoring the requirements of prior consultation with the communities and the obtainment of their approval for an environmental impact assessment.

The Constitutional Court upheld the decision of the lower court and ordered the suspension of the mining license in question, citing the proof that said mining concession would affect the environment where the Chachis and black populations resided and would alter their way of life. The court stressed that both the Constitution and ILO Convention 169 require prior consultation

*to assess the effects of exploitation on the lives of the people, determine if their interests would be prejudiced, and to what extent, before undertaking or permitting any prospecting or exploitation of resources existing on their land. Hence, the act of prior consult was imperative, and its omission rendered the act illegal.*

It is also interesting to note that one of the defenses presented by the State was the

lack of a statutory framework concerning prior consultation. The Court rejected this argument, sustaining that the State could not claim ignorance of the right of indigenous peoples and communities to be consulted merely due to the lack of a regulatory framework.

#### *4.3. The positive obligations of the State in situations of extreme need amongst indigenous peoples and communities.*

Another area in which Latin American courts have produced very interesting judgments is that concerning the positive obligations of the State in those cases where indigenous communities face situations of extreme shortage. An important aspect of these cases refers to compliance with positive obligations relating to economic, social, and cultural rights of indigenous peoples and communities – and, more specifically, compliance with enumerated core minimum obligations that are essential to these rights. Many of these cases have to do with situations where, due to the lack of compliance with essential rights such as the right to food, health, and life of the community members, in some cases the survival of the community itself is at risk.

Concerning this problem, Convention 169 offers a rich approach that articulates various facets that emerge from a complex understanding of the principles of equality and the prohibition against discrimination. On the one hand, it obliges the State to adopt measures to promote the full realization of economic, social, and cultural rights of indigenous communities without discrimination – that is to say, it emphasizes the State's obligation to not exclude the indigenous community from its obligations with respect to economic, social, and cultural rights (article 2.2 a and b, and article 3). Moreover, the Convention establishes the specific obligation to adopt measures aimed at eliminating socioeconomic differences between members of indigenous communities and other members of the national community (Article 2.2, c). On the other hand, Convention 169 requires that the measures adopted by the State respect the identity, integrity, and specific ways of life of the indigenous peoples and communities, even though these special measures may undermine the rights generally accorded to the rest of the population (articles 2.2, b 3.2 and 4). Convention 169 also requires the participation of the indigenous peoples and communities in determining their own development (articles 2.1 and 4.2).

In this sense, the Inter-American Court of Human Rights has set new standards, developing an extensive interpretation of the right to life. Two of the cases already mentioned, *Yakye Axa v. Paraguay* and *Sawhoyamxa v. Paraguay*, address the scope of positive obligations arising from the duty of the State to guarantee that right<sup>30</sup>. In both cases, the lack of access for both communities to their ancestral land and the resulting impossibility of satisfying their basic needs through their own traditional means resulted in a situation of extreme need, reflected in a serious demonstration of malnutrition, a high incidence of preventable illnesses and deaths caused by both of these.

The court interprets the right to life in the broadest sense, deriving its

interpretation from it the State obligation to ensure conditions for a dignified life. In the case of *Yakye Axa*, the court synthesizes its doctrine in the following way:

*This Court has asserted that the right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one. When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist. Due to the basic nature of this right, approaches that restrict the right to life are not admissible. Essentially, this right includes not only the right of every human being to be free from arbitrary deprivation of life, but also the right to be free of conditions that impede or obstruct access to a decent existence.*

*One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human being and with not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk and whose care becomes a high priority<sup>31</sup>.*

The Court has identified, amongst these obligations, duties related to access to healthcare, education, potable water and food, and has put emphasis on the need to take into consideration, when adopting measures to comply with said obligations, the identity as well as the vulnerability of indigenous peoples and communities, in line with ILO Convention 169 – considered by the court to be part of the international *corpus juris* with respect to the rights of indigenous people. Accordingly, the court has held that:

*In the instant case, the Court must establish whether the State generated conditions worsened the difficulties of access to a decent life for the members of the Yakye Axa Community and whether, in that context, it took appropriate positive measures to fulfill its obligation, taking into account the especially vulnerable situation in which the community members were placed, their different manner of life (different worldview systems than those of Western culture, including their close relationship with the land) and life aspirations, both individual and collective, existing international corpus juris regarding the special protections required by the members of the indigenous communities; the provisions set forth in Article 4 of the Convention; the general duty to respect rights, as embodied in Article 1(1); the duty of progressive development set forth in Article 26 of that same Convention; and Articles 10 (Right to Health), 11 (Right to a Healthy Environment), 12 (Right to Food), 13 (Right to Education) and 14 (Right to the Benefits of Culture) of the Additional Protocol to the American Convention, regarding economic, social, and cultural rights, and the pertinent provisions ILO Convention 169<sup>32</sup>.*

In both cases, the Inter-American Court decided that the State failed to comply with these positive obligations, and it condemned the State for violations of the right to life. Amongst the remedies, the Court ordered the provision of essential services to cover the basic needs of the affected indigenous communities<sup>33</sup>.

Faced with similar facts, the Supreme Court of Argentina has responded vigorously to a petition presented by the Ombudsman against the national government and the Chaco province, denouncing the situation of extreme misery suffered by members of the Toba ethnicity, inhabitants of the province<sup>34</sup>. The petition demanded compliance by the State with its obligation to adopt positive measures in relation to the situation of the indigenous communities as well as, in accordance with the Argentine legislation and Constitution, with ILO Convention 169.

The complaint states that the indigenous population finds itself in a grave socioeconomic situation, and consequently the vast majority of the population suffers from endemic diseases that are the result of extreme poverty and lack of adequate food, medical attention, and dignified housing. It denounces the fact that, in the month before the complaint was presented to the court, the community registered 11 deaths.

The Argentine court considered the statements of the Ombudsman as credible, and placed an injunction on the state to:

- a) inform the court, concerning the protective measures taken on behalf of the indigenous community residing in the region, of: 1) the communities that populate these territories and the quantity of inhabitants integrated therein; 2) the budget dedicated toward indigenous matters, describing the end use of legally mandated resource streams; 3) the implementation of health, food, and well-being programs; 4) the implementation of programs for the provision of potable water, fumigation and disinfection; 5) the implementation of education plans; and 6) the implementation of housing programs;
- b) appear at a public hearing before the Supreme Court to present and discuss the information requested; and
- c) as a precautionary measure, provide potable water and food to the indigenous community residing in the affected region, as well as adequate modes of transportation and communication at each one of the health posts.

The Colombian Constitutional Court has also had the opportunity to rule on this issue. In decision T-704/06, the court had to consider a petition for protection, which was initiated by an association of indigenous chiefs representing a community living in extreme poverty, against municipal and national authorities<sup>35</sup>. The community denounced an omission on the part of the authorities in effectuating the surrender of budget allocations meant for the community and their associates during a period of four years. According to the petition, the municipal authority in Uribe did not deliver to the corresponding parties, and did not include any recognition of a prior debit in the administrative agreement needed to formalize payment to the parties. The petition also names the federal government for failure to monitor the issuance of funds. The representatives of the community allege violations of the rights of human dignity, participation, autonomy of the indigenous communities, recognition of cultural diversity,

to not be discriminated against for cultural reasons, to health, education, the recognition of legal personality and to the right to petition the authorities, in accordance with constitutional norms and international human rights treaties, including ILO Convention 169.

The Court recalls the constitutional and international obligations assumed by the Colombian State with respect to the subsistence and cultural identity of indigenous peoples, making an important reference to ILO Convention 169. The Court states that the State is obligated to undertake positive actions to ensure that indigenous communities are granted the full enjoyment of these rights, emphasizing the close relationship between the enjoyment of economic, social, and cultural rights, the right of subsistence, and the right to cultural identity. This translates into an obligation to support the indigenous communities, especially those that are the least developed, with the resources necessary to satisfy the abovementioned rights. The Court also states that despite the existence of decentralized regimes for the separation of powers within the government, the guiding principles of coordination, subsidiarity, concurrence and solidarity still apply – meaning that with these, all involved local entities have the responsibility to ensure that resources effectively reach indigenous communities.

In this case, the Court proved that, although the resources had been handed over to the municipality, the municipality had neither given them to the community nor conserved them. However, the court also finds the departmental and national organs responsible for violations of the rights of the indigenous community, for failure to effectively control the dispersal of funds meant for the communities. The Court also stated that the State had an obligation to train the community so that it could adequately monitor the dispersal of funds – an obligation with which it also failed to comply. In conclusion, the Court declared that the rights of respect for human dignity, health, education, participation, and the autonomy of the indigenous communities, as well as the right to not be discriminated against for cultural reasons, had been violated. The Court has made available, as a form of reparation, the transfer of funds that are due to the indigenous community but were never dispersed, dividing the financial burden amongst the organs found responsible. The Court also ordered the municipality to sign the administrative agreement needed to transfer the funds.

For its part, the Constitutional Section of the Supreme Court of Costa Rica handed down a sentence in favor of an indigenous community following a petition for relief filed by the Development Association of the Indigenous Reserve of Guaymi de Osa, which denounced an omission by the administrative authorities in providing necessary assistance to repair a bridge that had been washed away by heavy rains in the area<sup>36</sup>. The population on the Indigenous Reserve of Guaymi was incommunicado for several days, forcing inhabitants to cross the river swimming or on horseback. The authorities ignored inhabitants' requests for assistance, providing the excuse that they had not renewed the position of work supervisor, which was necessary to complete the requested repair. The Association alleged that the authorities had violated, amongst other laws, article 6 of ILO Convention 169.

The Constitutional Section accepted the arguments of the complaint, and found that the administrative organ had not taken the necessary steps to address the emergency situation and to guarantee the community's access to health and education centers, amongst others. The Court employed Convention 169 to emphasize the positive obligations the State has in terms of the economic, social, and cultural rights of the indigenous community. Accordingly, the Court granted relief and ordered the appropriate measures to restore the bridge over the Rincon River without delay.

#### *4.4. Applications of Convention 169 in Relation to Criminal Law*

Convention 169 also includes aspects related to the application of criminal law, which has been an additional object of consideration before courts in various countries in Latin America.

Schematically, it can be noted that Convention 169 requires, on the one hand, respect for the justice systems of indigenous peoples and communities, limited by the observance of fundamental rights established by the constitution and internationally recognized human rights (article 9.1). On the other hand, in those cases where an indigenous person is subject to the State's criminal justice system, Convention 169 imposes some specific guarantees, like the right to an interpreter (article 12), the preference for non-custodial sentences whenever possible (article 10.2) and the duty of the judicial authorities to take into account the customs and cultural characteristics of indigenous people in criminal matters (articles 9.2 and 10.1).

Several examples from the Guatemalan justice system illustrate how Convention 169 is applied in this area.

Respect for the judicial decisions of the indigenous community has resulted in the dismissal of cases from the State criminal justice system in cases where an issue has been resolved by community authorities applying the principle of *ne bis in idem*. This was the thesis sustained by the Lower Criminal Court of Drug Activity and Crimes Against the Environment in Totonicapan, in a case where the Public Ministry initiated a criminal investigation for aggravated robbery against three indigenous people, when the act in question had already been adjudicated and a sanction applied to those responsible by the indigenous authorities. The judge stated that recognition of the legal validity of the sanction applied by the community rendered impossible the application of new criminal sanctions to those responsible and ordered the case dismissed, citing ILO Convention 169<sup>37</sup>.

Consideration for the customs and culture of the indigenous people has also led judges to uphold the inappropriate criminal nature of certain kinds of conduct, and therefore to dismiss charges or acquit the accused of such charges. One example occurred before a justice of the peace in the municipality of San Luis, in the department of Peten, in northern Guatemala. This example concerns a criminal case initiated against a member of the indigenous community after agents of the National Police reported such community member. The accused charged



with “trafficking national treasures.” According to the police, the accused traded objects of archeological value, transporting them from one community to another.

The judge dismissed the criminal case, relying on evidence that the accused was a Mayan priest. The judge also found credibility in the fact that the accused transported the objects of historical and cultural value for use in Mayan ceremonies and rituals, not with the intention of selling or otherwise commercializing them. The decision was based on constitutional norms and on ILO Convention 169<sup>38</sup>. According to the decision:

*Subparagraph (a) of Article 5 [of Convention 169] establishes: “The social, cultural, religious and spiritual values and practices of these people shall be recognized and protected, and the nature of the problems which face them both as groups and as individuals shall be duly considered.” Subparagraph (b) of the same Article of the same Convention establishes that the integrity of the values, practices, and institutions of these peoples must be respected. Consequently, numeral 1 of Article 8 of the international instrument mentioned above, establishes: “In applying national laws and regulations to the people in question, due regard shall be given to their customs or customary laws.” Numeral 2 of the same article establishes: “These peoples shall have the right to retain their own customs and institutions, where such are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts that may arise in the application of this principle.” What this implies for state institutions, including the courts, is that as a fundamental principle, they must respect the institutions and customs of indigenous people. Taking into account what is established in numeral 1 of Article 9 of ILO Convention 169 states: “To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned to deal with offences committed by their own community members shall be respected.” If within customary law there is an individual or community authority, the institutions created according to state law, including the judiciary, may not reproach or consider criminal any activity that is in practice or observance of a custom, that is to say, an activity of an indigenous community institution; on the contrary, the [S]tate must respect and distinguish the institutions that function in parallel within indigenous law, whenever government institutions, and especially the judiciary are called upon by constitutional law to impart justice, must make a clear distinction between the law and justice, considering that our indigenous law, which enjoys international recognition, also has its own institutions, in which case the law must not be applied, but instead prompt and comprehensive justice; this interpretation conforms with numeral 2 of Article 9 of the same international instrument cited, which establishes: “The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.*

In the same vein, the Appellate Court of Guatemala, in considering a petition for relief, held that the imposition of the rule obliging indigenous women deprived of their liberty to wear uniforms in prison, and the corresponding prohibition of their

use of traditional dress, violate the obligation to respect the customs and culture of indigenous peoples, affecting the right to cultural identity<sup>39</sup>. The case was initiated by the Ombudsman for Human Rights, with a basis in several sections of ILO Convention 169. The Court sustained that prohibition of the use of traditional dress constitutes a typical case of discrimination against indigenous groups and especially against indigenous women. The Court emphasized the incompatibility of the resolution with the State's obligation to recognize, respect, and promote the culture and traditions of indigenous peoples, amongst which is the use of traditional dress:

*To force male or female Mayan prisoners to wear a uniform, as in the present case, constitutes flagrant discrimination and a violation of article 66 of the Political Constitution of the Republic, which recognizes that Guatemala is formed by diverse ethnic groups, including indigenous groups of Mayan descent.*

*The State recognizes, respects, and promotes indigenous groups' ways of life, customs, traditions, forms of social organization, use of traditional dress by men and women and use of dialects; on the other hand, it cannot accept a law, which is completely arbitrary and without legal basis or justification, that attempts to force members of Mayan-descendant indigenous groups to wear uniforms, in an act that clearly constitutes discrimination against these citizens, notwithstanding the fact they are subject to the laws of the courts.*

Consequently, the Court reversed the administrative order and restored the right to use traditional dress to affected prisoners.

The Constitutional Court of Bolivia has also considered questions related to the application of criminal sanctions in the community. In Constitutional Decision 295/03, the court had to consider a petition for constitutional protection for a married couple who were members of an indigenous community upon whom the community had imposed – but not yet executed – the sanction of expulsion and threats to cut off energy and water services<sup>40</sup>. The impugned alleged that the sanction infringed on their “rights to work, to enter, remain, and move freely throughout the national territory, the right to have private property and to receive just remuneration for work.”

After holding a hearing and completing an anthropological survey, the Constitutional Court found that the sanction imposed by the community was in response to non-compliance, on the part of the impugned, with community laws – like the fixing of a common price for service, the payment of fees and fines, and the obligation to do communal work.

The Court noted that the Bolivian Constitution recognizes the right of indigenous peoples and communities to maintain their traditional laws and exercise community justice in cases of violations of these laws. The Court recalls, however, that the application of community laws and sanctions is limited by the Constitution, also citing Article 8 of ILO Convention 169<sup>41</sup>. In this case, the Court accepted the petition and ordered the community to allow the impugned parties to stay in the community, under the condition that they adjust to the community laws. It also

ordered the community authorities to inform the Court, within the following six months, “whether the appellants had adapted their lifestyle to the customs of the Community.”

The decision seeks to balance both the interests of the community in preserving its communal order and the interests of the impugned in staying in the community. By implementing a conciliatory settlement of claims, the court agreed to revoke the pending punishment, but only if the appellants adjusted to the community’s laws – recognizing, in this way, the legitimacy of the community authorities’ decision regarding breaches committed by the impugned parties.

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## NOTES

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1. On Convention 169 and on the rights of indigenous peoples in international law generally, see Anaya (2005).
2. May 2009. Ratifying States are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Paraguay, Peru and Venezuela.
3. On the implementation of human rights treaties by local judges, see generally Abregú and Courtis (1997); Abramovich, Bovino and Courtis (2007). Specifically, on the application of ILO conventions locally, see Gianibelli (2007, p. 355-388) and Goldin (2007, p. 315-354). See also Thomas, Oelz and Beaudonnet (2004, p. 249-285).
4. In the case of Argentina, for a list of human rights treaties including Article 75, paragraph 22 of the Constitution, which may be extended if a human rights treaty is adopted with a qualified majority. It is also the case of Brazil, which gives human rights treaties adopted by a qualified majority procedure the value of a constitutional reform (Federal Constitution, Article 5, § 3).
5. In Colombia, for example, the Constitutional Court has decided more than forty cases in which the Convention is invoked 169. See, for example, Botero Marino (2003, p. 45-87).
6. Among the countries of the region in which there have been judicial applications of Convention 169 are Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Peru and Venezuela.
7. BELIZE. Supreme Court. Aurelio Cal on his own behalf and on the behalf of the Maya Village of Santa Cruz and others v. the Attorney General of Belize and others, consolidated claims, claims 171 and 172 of 2007. Decision. 18 Oct. 2007, par. 130.
8. COSTA RICA. Supreme Court. Constitutional Chamber. Decisions 1992-3435 and 1993-5759.
9. Still, article 417 of the 2008 Constitution of Ecuador sets forth that, "[i]n the case of the agreements and other international human rights instruments, the principles of no restriction on rights, direct applicability and open-endedness, as set forth in the Constitution, shall be applied to human beings" – a solution that addresses the "constitutionality block."
10. MEXICO. Supreme Court of the Nation. Theses P. LXXVII/1999, *Semanario Judicial de la Federación*, t. X, Nov. 1999, p. 46; Thesis P. VIII/2007. Apr. 2007, *Semanario Judicial de la Federación*, t. XXV, Apr. 2007, p. 6.
11. As I said earlier, Brazil's human rights treaty was approved through a special procedure, and a qualified majority have constitutional status, but the problem of legal hierarchy of human rights treaties not approved as such remains, i.e., practically most human rights treaties that were ratified before the adoption of the constitutional reform establishing the special procedure with a qualified majority.
12. See COLOMBIA. Constitutional Court. Decision C-088/01. Jan. 31, 2001. [Presiding Judge SÁCHICA Martha Victoria Mendez].
13. See BOLIVIA. Constitutional Court. Constitutional Case 106/2003. File 2003 to 07,132-14-RDN. Decision. Nov. 10, 2003.
14. The Inter-American Court began its case law on the subject with the *Awas Tingni* case. Such case, considered for the first time that the right to property established in Article 21 of the American Convention on Human Rights, whose text is similar to Article 1 of Protocol 1 to the European Convention on Human Rights, must be interpreted, when concerning indigenous peoples and communities, as a right to collective or communal ownership of land. See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Mayagna (Sumo) Awas Tingni v. Nicaragua*. Ruling. 31 Aug. 2001, par. 148-149. In the cases discussed here, the Inter-American Court extends its foundations, making use of Convention 169.
15. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005.
16. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 127 y 130.
17. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 131.
18. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 136.
19. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, par. 150 y 151.
20. See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Sawhoyamaya Indian Community v. Paraguay*. Decision of March 29, 2006, par. 117-119 and 150-151.
21. See INTER-AMERICAN COURT OF HUMAN RIGHTS. *Saramaka People v. Suriname*. Decision. 28 Nov. 2007, par. 93-94 and 131.
22. See ARGENTINA. Civil and Commercial Chamber of Jujuy. First room. *Aboriginal community of Quera and Aguas Calientes - Cochinoca People v. Jujuy Province*, decision of September 14, 2001.
23. See Convention 169, Article 6:1(a): "[I]n applying the provisions of this Convention,

governments should] consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly." See also articles 7 and 15 of the Convention.

24. See, e.g., INTER-AMERICAN COURT OF HUMAN RIGHTS. *Saramaka People v. Suriname*. Decision. 28 Nov. 2007, paras. 133-137.

25. COLOMBIA. Constitutional Court. Decision SU-039/97. Feb. 3, 1997. [Presiding Judge: Antonio Barrera Carbonell].

26. See, for example, among others, COLOMBIA. Decisions T-652/98, Nov. 10, 1998; T-606/01, Jun. 7, 2001; C-418/02, May 28, 2002a; C-891/02, Oct. 22, 2002b; and T-955/03, Oct. 17, 2003.

27. COLOMBIA. Constitutional Court. Decision C-030/08. Jan. 23, 2008. [Presiding Judge: Rodrigo Escobar Gil].

28. COSTA RICA. Supreme Court. Constitutional Chamber. Vote 2000-08019. Case 00 to 000,543-0007-CO. Decision. Sept. 8, 2000.

29. ECUADOR. Constitutional Court. No. 170-2002-RA: Claudio Arcos v. Mueckay Regional Bureau of Mines of Pichincha: Regional Director. Decision. Aug. 13, 2002.

30. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, paras. 161-169, 172 and 175, and *Sawhoyamaya Indian Community v. Paraguay*. Decision of March 29, 2006, paras. 152-178.

31. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, paras. 161 and 162.

32. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community v. Paraguay*. Decision. June 17, 2005, para. 163.

33. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Yakye Axa Indigenous Community*

*v. Paraguay*. Decision. June 17, 2005, paras. 205, 220 and 221; and *Sawhoyamaya Indian Community v. Paraguay*. Judgment of March 29, 2006, paras. 224, 229, 230 and 232.

34. ARGENTINA. Supreme Court of the Nation. Ombudsman's Office c / National State and other (Chaco Province) s/ investigative process. Provisional Measure: Decision. Sept. 18, 2007.

35. COLOMBIA, Constitutional Court. Case T-704/06. Aug. 22, 2006. [Presiding Judge: Humberto Antonio Sierra Porto].

36. COSTA RICA. Supreme Court. Constitutional Chamber. Vote 2003-08990. Case 03 to 007,279-0007-CO. Decision. Aug. 26, 2003.

37. GUATEMALA. District Court. Criminal, Drug Trafficking and Environmental Offenses Tonicapán Department. Case Of E.312.2003. 6th. Decision. June 25, 2003a.

38. GUATEMALA. Justice of the Peace Community of San Luis Municipality, Department of Peten. Trial No. 517-2003 Of. I. Decision. Nov. 18, 2003c.

39. GUATEMALA. Court of Appeals constituted for the Court of Relief. Third Chamber. Amparo No. 46-2003 Of. 1. Decision. Oct. 30, 2003b.

40. BOLIVIA. Constitutional Court. Constitutional Case 0295/2003-R. Decision 2002-04940-10-RAC. Decision. Mar. 11, 2003.

41. See ILO Convention 169, Article 8: "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle. 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties."



## RESUMO

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O artigo apresenta alguns casos emblemáticos da aplicação da Convenção 169 da Organização Internacional do Trabalho sobre Povos Indígenas e Tribais em Países Independentes por tribunais da América Latina. O trabalho discute: um número reduzido de casos sobre temas diversos e que representam diferentes países da região; bem como o tribunal regional de direitos humanos – a Corte Interamericana de Direitos Humanos. Os casos selecionados foram aqueles que apresentaram perspectivas particularmente interessantes com relação à temática abordada, inovação em sua interpretação ou relevância de suas consequências. Antes de apresentar os casos, entretanto, exponho alguns esclarecimentos que podem ser úteis para a compreensão do material selecionado e o contexto no qual estes casos estão inseridos.

## PALAVRAS-CHAVE

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Convenção 169 – Organização Internacional do Trabalho – Povos Indígenas e Tribais – Cortes – América Latina – Aplicação de Tratados Internacionais.

## RESUMEN

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Este trabajo presenta algunos casos emblemáticos de aplicación del Convenio 169 de la Organización Internacional del Trabajo sobre Pueblos Indígenas y Tribales en Países Independientes por tribunales de América Latina. Discute un número reducido de casos que cubren temas diversos, y representan a distintos países de la región, y al tribunal regional de derechos humanos –la Corte Interamericana de Derechos Humanos y se destacan por su temática, por lo novedoso de la interpretación que ofrecen o por la relevancia de sus consecuencias. Antes de reseñar los casos, se efectúan algunas aclaraciones previas que pueden ser útiles para explicar el material que aquí se expone, y el contexto en el que debe situarse.

## PALABRAS CLAVE

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Convenio 169 – OIT – Pueblos Indígenas y Tribales – Tribunales – América Latina – Aplicación de los tratados internacionales



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## ABSTRACT

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The increased popularity of intercountry adoption is not anything recent. What is recent, however, is the increased attention African children are attracting from prospective adoptive parents living in other parts of the world, as exemplified by the adoptions by Angelina Jolie and Madonna. Opinions are divided over the necessity and propriety of intercountry adoption, but considering the practice as a panacea for children without parents and parents without children is a prevalent view. On the other hand, some sending states have resisted placing Third World children deprived of their family environment in homes outside of their native countries – a purportedly “imperialistic” practice. The operative language that has emerged in recent times has been that intercountry adoption should be used as a measure of last resort, but one can hardly find any research on what it actually means (or should mean), and what its implications are for child welfare policy and law in Africa. This paper intends to contribute to filling this gap.

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## KEYWORDS

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Intercountry Adoption – Principle of Subsidiarity – Last Resort Measure – Rights of Children – Africa

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# INTERCOUNTRY ADOPTION AS A MEASURE OF LAST RESORT IN AFRICA: ADVANCING THE RIGHTS OF A CHILD RATHER THAN A RIGHT TO A CHILD

Benyam D. Mezmur

## 1. Introduction

The increased popularity of intercountry adoption since its introduction to the international legal scene following World War II is not anything recent. What is recent, however, is the increased attention African children are attracting from prospective adoptive parents living in other parts of the world. Amongst other factors, there is no doubt that this recent interest is fuelled by the expanded media coverage which continues to bring the plight of abandoned and orphaned children from Africa to audiences all over the world, coupled with recent news stories that have chronicled high profile intercountry adoption cases from Africa. Here, the intercountry adoptions by Angelina Jolie (from Ethiopia) and Madonna (from Malawi) spring to mind.

Opinions are divided over the necessity and propriety of intercountry adoption. To consider the practice as a panacea for children without parents and parents without children is a prevalent view. Intercountry adoption as an opportunity to deliver children from destitute lives is a perception held by many. However, the need to place some of the Third World children who are deprived of their family environment in homes outside of their native countries has met some resistance from the sending states, who perceive such procedures as “imperialistic.” Some African countries have decided to restrict intercountry adoption to certain narrowly defined situations<sup>1</sup>, and at the extreme end, there prevails a preference to prohibit intercountry adoption altogether<sup>2</sup>.

While the debate for and against the practice is raging, the operative language that has emerged in recent times has been that intercountry adoption should be used as a measure of last resort. The Committee on the Rights of the Child (CRC Committee) re-confirmed this stance when it concluded that “intercountry adoption should be considered, in the light of Article 21, namely as a measure of last resort”

*Notes to this text start on page 102.*

(CRC COMMITTEE, 2004, §47). Influential organisations such as the United Nations Children's Fund (UNICEF) and the United Nations High Commissioner for Refugees (UNHCR) concur with this position. According to one of the main principles that (GUPTA, 1974, p. 311). Accordingly, on the 9<sup>th</sup> of September 1954, a three-member Commission underpin the practice of intercountry adoption - the subsidiarity principle - intercountry adoption is envisaged only when it has been established that no substitute family or other suitable caring environment is available in the child's country of origin.

While to parrot that intercountry adoption should be a measure of last resort has become commonplace, what it actually means (or should mean), and what its implications are for child welfare policy and law in Africa are issues that have hardly been researched, about which little knowledge exists. This piece is a modest attempt to contribute to filling this gap. To this end, several issues present themselves for comment: is intercountry adoption categorically supposed to be a measure of last resort? What does last resort mean anyway? Taking into account the socio-economic and cultural environment, is it fitting to ask how "last resort" should be understood and implemented on the African continent. Can biological family (parents and/or extended family) members invoke the last resort requirement to disavow intercountry adoption when it is clear that it is not in the best interests of the child to remain with its biological family? Can prospective domestic parents invoke the "last resort" requirement so that preference should be given to them categorically over and above any prospective adoptive parents abroad? Can African states defy intercountry adoption altogether under the guise that the cultural identity of the country of origin of the child trumps it? In no particular order, this article attempts to address these issues. Accompanied by tentative recommendations, a concluding section summarizes the work.

## 2. International legal framework

Under international law, neither the 1924 nor the 1959 Declarations on the Rights of the Child clearly provide for the principle of subsidiarity in the context of alternative care for children deprived of their family environment<sup>3</sup>. However, the three instruments that make intercountry adoption a subject of international human rights law have provisions pertaining to the principle of subsidiarity, including on intercountry adoption. These instruments are the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the HAGUE CONVENTION on Protection of Children and Co-operation in Respect of Intercountry Adoption.

As identified by the CRC Committee, the so called "four pillars" of the CRC accord children the right against non-discrimination; the right to have their best interests be "a primary consideration" in all actions concerning them; the inherent right to life; and the right of a child "who is capable of forming his or her own views [...] to express those views freely in all matters affecting the child" (CRC, Art. 12). According to Article 21, the CRC seeks to ensure, amongst other things, the use of the "best interests of the child" standard. In fact, it is worth noting that adoption is the only sphere covered by the CRC where the best interests of the child are to be *the* primary consideration<sup>4</sup>.

The CRC considers intercountry adoption appropriate only when “the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin” (CRC, Art. 21(b)). There are also other provisions of the CRC that do not directly address adoption, but nonetheless have important implications for intercountry adoption<sup>5</sup>. The CRC has been ratified by 193 states<sup>6</sup>.

In the African context, the CRC is supplemented by the ACRWC<sup>7</sup>. Intercountry adoption is dealt with by Article 24 of the ACRWC. A comparison between Article 24 of the ACRWC and Article 21 of the CRC highlights a number of stark similarities and very few differences. It suffices for this article’s purpose to mention that the ACRWC indicates explicitly that intercountry adoption is a measure of “last resort.” The ACRWC enjoys the ratification of 45 countries.

The HAGUE CONVENTION is the most directly applicable treaty in the intercountry adoption sphere. It states in its Preamble that the signatory parties “recognize that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” The Preamble also states that for children who cannot remain with their family of origin, “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” Of more direct relevance for the hierarchy of intercountry adoption within options for children deprived of their family environment is Article 4(b), which provides that:

*An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin; b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child’s best interests. (THE HAGUE CONVENTION).*

Though the CRC and the ACRWC cover intercountry adoption, these instruments appear to take a very limited and unclear view of when intercountry adoption is appropriate. However, it is important to mention the compatibility of the CRC’s and ACRWC’s preference for in-country over intercountry adoption, with the Hague Convention. Nonetheless, the preference that appears in the CRC and the ACRWC for in-country foster care and institutionalisation over intercountry adoption is more controversial, and appears to be in contradiction with the Hague Convention.

### 3. Analysis of intercountry adoption as a measure of last resort

Whereas, under international law, children who are deprived of their family environment should benefit from alternative care, such as (to quote the relevant CRC provision) “foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children” (CRC, art. 20(3)), the hierarchy to be followed, and the place to be accorded to intercountry adoption amongst these options remains elusive. For instance, is it intercountry adoption or institutionalization that should be considered as a measure of “last resort”? What does and should “last resort” actually mean in the best interests of the child? Should domestic adoption always be preferred over other alternative care options?

Given the seemingly different hierarchy of alternative care options accorded to intercountry adoption in the implementation of the principle of subsidiarity under the CRC and the ACRWC on the one hand, and the Hague Convention on the other, a position that is legal and ultimately capable of promoting the best interests of the African child through intercountry adoption must be sought.

### *3.1 Spin-offs of intercountry adoption as a measure of last resort: some preliminary observations*

At the outset, it is important to underscore that intercountry adoption as an alternative means of care was a contentious point during the drafting of the CRC. Citing the *travaux préparatoires*, Detrick underscored that the representative of Brazil had indicated that her country's delegation understood Article 21(b) to provide for an alternative means of care "when all other possibilities are exhausted" (DETRICK, 1999; UNITED NATIONS COMMISSION ON HUMAN RIGHTS [UNCHR], 1989, §369). As a result of this, and coupled with the non-recognition of the practice under Islamic law, an effort was made within the CRC to feature intercountry adoption as an exception rather than as a rule.

The idea of making intercountry adoption generally subsidiary to other alternative care options has its own motives that are inherently aimed at promoting the best interests of the child. The following is a brief look at some of these reasons and their implications.

### *3.2 Emphasis on biological family and domestic adoption*

One of the first implications of making intercountry adoption generally subsidiary, under the CRC, the ACRWC, and the Hague Convention, is that a general preference towards a family environment should prevail (DOEK, 2006)<sup>8</sup>. And as a subset of this general preference towards a family environment, children are assumed to be better off if they grow up with their birth family or extended family, if possible, and when in the best interests of the child<sup>9</sup>. In concurring with this assertion, Hodgkin and Newell contend that the CRC establishes a "presumption [...] that the children's best interests are served by being with their parents wherever possible" (HODGKIN; NEWELL, 2002, p. 295). The implication of this is that, according to the CRC Committee, it is only when all other options to keep the child with his/her family have been exhausted, and proved inefficient or impossible, that adoption (or for that matter, any other alternative care option) should be envisaged (SYLVAIN; BOECHAT, 2008, p 25).

The adage that "it takes a village, to raise a child" rings more true in Africa than anywhere else. Therefore, in the African context, recognising the role of the extended family and the community is even more apposite. As a result, by considering intercountry adoption to be generally subsidiary, efforts that recognize the role of the extended family and the community to care for its children should be encouraged and supported.

Another advantage of the last resort requirement, in accordance with the principle of subsidiarity, is to encourage domestic adoption over intercountry adoption (THE INTERNATIONAL REFERENCE CENTRE FOR THE RIGHTS OF CHILDREN DEPRIVED OF THEIR FAMILY - ISS/IRC, 2006b, p. 1). Domestic adoption normally

ranks high within the general hierarchy of options available as alternative care for children deprived of their family environment. The fact that domestic adoption is a national solution, a permanent placement, and in addition offers a family environment, puts it ahead of other alternative care options. Furthermore, there is evidence that in countries where adoption is well established, there is a demonstrated high level of success rate in permanent placement, especially when decisions have been guided by the best interests of the child, and children, preferably, have been adopted at a young age (TRISELIOTIS; SHIREMAN; HUNDLEBY, 1997).

### *3.3 Promoting the use of other domestic solutions*

Making intercountry adoption generally subsidiary and a measure of last resort would help pave the way for the development and use of other suitable domestic alternative care options. Foster care, *Kafalah* of Islamic/*Sharia* law as well as institutionalisation of children, while domestic in nature, are envisaged under international law, and could sometimes benefit children deprived of their family environment.

Foster care, which should be temporary, could nevertheless continue until adulthood, but should not preclude a child from returning to his or her biological parents. It also should not preclude adoption (VAN BUEREN, 1998, p. 103). The advantages of foster care include the fact that it offers a family environment, caters for children *temporarily* deprived of their family environment, and seems to financially contribute to the child welfare system<sup>10</sup>. In Africa, as in most of the less developed world, foster care tends to be informal (often called kinship care)<sup>11</sup>. It is less developed, and highly unregulated by law and policy compared to other alternative care options.

On a related note, the practice of *Kafalah* under Islamic law entails the acceptance of children without families in what is tantamount to a permanent form of foster care, but without the children concerned taking on the family name or enjoying the right to inherit from the family with whom they are placed (HODGKIN; NEWELL, 2002, p. 295-296). There are a number of African countries with a significant portion of their populations that adhere to *Sharia* law. A good example is Nigeria. Countries on the continent (apart from those in North Africa) that apply *Sharia* law with varying degrees also include Senegal, Somalia, Mali, Chad, Sudan, Djibouti, Eritrea, Ethiopia, Tanzania, Kenya, and Uganda. Therefore, the development of *Kafalah* as a domestic and family based solution embodies the capacity to promote children's rights on the continent.

Finally, while a detailed discussion pertaining to institutionalisation is deferred for a separate section, suffice it to mention that institutionalisation could play a short term and temporary role in promoting the rights of children deprived of their family environment. For instance, institutions can serve as transition places for children awaiting adoption.

### *3.4 Upholding the cultural identity of the country of origin*

The consideration of intercountry adoption as being subsidiary to other alternative care options has the capacity of promoting the cultural identity of the child. Cultural identity is a cross cutting theme that tends to place preference on the biological family (both parents and extended family members) and domestic adoption over intercountry adoption. The

former options generally cater for the continuity of the child's cultural identity as the child would grow up in the culture, language and background of his/her country of origin.

However, some proponents of intercountry adoption prefer a very loose interpretation of the notion of intercountry adoption as a measure of last resort. At times, under the guise of promoting the best interests of the child, this group might advance the interests of prospective adopters abroad, and prefer to give cultural identity little or no weight at all (SIMON; ALTSTEIN, 2000, p. 45-47). It is important to remember that such a loose definition should not be utilised to make intercountry adoption a "first resort" and act as a facilitator in making the child available for intercountry adoption before domestic solutions, such as adoption, are considered.

Such an approach would not be in accordance with the provisions of the CRC or the ACRWC. As Woodhouse (1995, p. 114) notes, "[...] culture of origin, no matter how hard to define with satisfying logic, do[es] matter to children and therefore should matter in adoption law." After all, Article 20(3) of the CRC reads that, when considering alternative care solutions, "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."

Interestingly, it is sometimes the same concept of cultural identity that is used by opponents of intercountry adoption to deny children a family environment, even when it is clear that intercountry adoption would be in the children's best interests<sup>12</sup>. The attitude that intercountry adoption allows dominant, developed cultures "to strip away a developing country's most precious resources, its children" (KLEEM, 2000, p. 325-326) prevails in these quarters. Because a child's right to a name and nationality are crucial for his or her identity (CRC, Art. 7 and 8), "opponents of intercountry adoption argue that rather than promoting a child's identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents" (OLSEN, 2004, p. 510). Unfortunately, it is a fact that some groups (sometimes a whole nation) consider the claiming of a right of custody or control over their children as an issue (WOODHOUSE, 1995, p. 112) that has priority over promoting the rights of these children's best interests.

However, one of the achievements of the CRC (and ACRWC, too) is to elevate children as subjects of rights. Making the claim that states have a right of custody or control over children, with no consideration for the best interests of the children, has a "children as objects" ring to it. As Woodhouse rightly advocates, "a child-centred perspective would suggest that the right to preservation of a group identity of origin is best analyzed as a right of the child, and a responsibility or trust of the group" (WOODHOUSE, 1995, p. 112).

In some instances it is the concepts of "continuity" and "background" under Article 20(3) of the CRC and Article 25(3) of the ACRWC that are used to argue the case for the primacy of cultural identity, and that serve as a ground for prohibiting or undermining inter-country adoptions as an alternative means of care. But as Cantwell and Holzscheiter correctly remind us:

*[...] while connected, the questions of "continuity" and "background" should not be seen as one and the same issue. The text of article 20 does not explicitly demand "continuity [...] in the child's [...] background" but requires that due regard be paid both to continuity in upbringing and to the child's background. (CANTWELL; HOLZSCHEITER, 2008, p. 61).*



This argument adds clarity to the position that culture cannot, and should not, be used as a smokescreen to deny children their right to grow up in a family environment, when that family can only be found abroad. In addition, “it is clear from the text of Article 20 that there is no absolute duty to ensure continuity or to base alternative care decisions on the child’s background, but only to have ‘due regard’ for each of these factors” (CANTWELL; HOLZSCHEITER, 2008, p. 63). However, in contrast, it is worth noting that “State Parties shall in accordance with their national laws ensure alternative care” (CANTWELL; HOLZSCHEITER, 2008, p. 63).

At the regional level, interestingly, the ACRWC purports to take into consideration “the virtues of their [African member States’] cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child” (ACRWC, 7<sup>th</sup> preamble clause). However, although it copies Article 20(3) of the CRC virtually word for word, the ACRWC omits the word “cultural” when listing the backgrounds of the child to which due regard shall be paid when considering alternative family care (ACRWC, Art. 25(3)). In this light, if the best interests of the child means anything at all, let alone being “the paramount consideration” (CRC, Art. 21; ACRWC, Art. 4), preserving cultural identity should be seen as a means, and not necessarily as an end in itself, in considering alternative care for children deprived of their family environment.

### *3.5 Protecting separated and refugee children*

The last resort requirement in intercountry adoption also has an implication for promoting and protecting the rights of separated and refugee children. In this regard General Comment n° 6 of the CRC Committee on separated and refugee children is of great guidance. The Comment first makes the general point that:

*States must have full respect for the preconditions provided under Article 21 of the Convention as well as other relevant international instruments, including in particular the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption and its 1994 Recommendation concerning the application to Refugee and other Internationally Displaced Children when considering the adoption of unaccompanied [...] children. (CRC COMMITTEE, 2005, § 90).*

Subsequently, it highlights that states should, in particular, observe that adoption of unaccompanied or separated children only be considered once it has been established that the child is in a position to be adopted. In practice, this means *inter alia*, that efforts with regard to tracing and family reunification have failed, or that the parents have consented to the adoption (CRC COMMITTEE, 2005, § 91).

Put bluntly, unaccompanied or separated refugee children must not be adopted in haste at the height of an emergency. In fact, adoption should not be considered where there is reasonable hope of successful tracing and family reunification, and unless a reasonable time has passed during which all feasible steps to trace the parents or other surviving family members have been carried out<sup>13</sup>. In addition, adoption

in a country of asylum should not be pursued when there is the possibility, in the near future, of voluntary repatriation under conditions of safety and dignity to the country of origin.

Both under the CRC and the ACRWC<sup>14</sup>, unaccompanied or separated refugee children should have access to basic services, an asylum procedure, temporary care, and protection. Thereafter, the relevant authorities must identify and determine the child's long term best interests and care. And even though identifying these long term best interests of the child could possibly include intercountry adoption as an option, such option should not be resorted to unless efforts with regard to tracing and family reunification have failed, in-country adoptions have been tried, and a reasonable period of time has lapsed. Therefore, intercountry adoption as a measure of last resort should be understood to severely restrict adoption for separated and refugee children.

### *3.6 Moving intercountry adoption from last resort to "no resort" in the best interests of the child*

The very fact of being a state party to the CRC and the ACRWC does not automatically impose on any country an international obligation to allow intercountry adoption as a means of alternative care. A close reading of the carefully crafted wording of Article 21 of the CRC (as well as Article 24 of the ACRWC) reveals that the caveat to Article 21 provides that "States Parties that *recognize and/or permit* the system of adoption [...]" (my emphasis), while Article 24 of the ACRWC speaks of "State Parties *which recognise* the system of adoption [...]" (my emphasis).

The *travaux préparatoires* to the CRC indicate that this caveat was added during the negotiations in response to interventions by a number of Muslim countries (particularly Bangladesh), since Islamic law does not recognise the concept of adoption (UNITED NATIONS CENTRE FOR HUMAN RIGHTS, 1995, p. 16). Therefore, intercountry adoption as a last resort is indicative of its subsidiary nature, and by extension, that the practice is not necessarily a prioritised, or for that matter necessarily a required means of alternative care. In other words, the non-existence of intercountry adoption in, or the suspension thereof by, a state party to the CRC and/or the ACRWC as an alternative means of care would not be a violation of these instruments.

Buoyed by this fact, it could be argued that the possibility of moving intercountry adoption as a measure of last resort to a measure of "no resort" is possible and sometimes necessary. But such a possibility (and sometimes necessity) should be explored only to promote and protect the best interests of children, and not to hamper them. In other words, the fact that there is no obligation to allow intercountry adoption as a means of alternative care also implies, *albeit* remotely, the possibility of suspending the practice when the best interests of a child is compromised. Therefore, the need and possibility to impose a moratorium on intercountry adoption in instances where a country is affected by a catastrophe or where irregularities are compromising the best interests of the child, exists. As an example, the Republic of Congo, part of which is still experiencing violence and armed conflict, announced it was suspending all international adoptions because of the events in Chad (INTERNATIONAL SOCIAL SERVICE [ISS], 2008a, p. 3). The

Ministry of Social Welfare of the Government of Zambia, the Government of Togo, and just recently, the Government of Liberia have also suspended intercountry adoption (ISS, 2008b, p. 3). The official reasons provided for the suspension of intercountry adoptions in these three countries were: the need to undertake the practice in the best interests of the child; and to address dysfunctions in the adoption systems which have the potential of violating children's rights (ISS, 2008b, p. 3).

#### 4. How last is “last resort”?

Central to this article is the attempt, if not to answer, at least to explore, the potential meanings and implications of what is, and should be, meant by intercountry adoption as a measure of last resort. Further to the above preliminary observations, such an exploration, amongst other things, requires one: to weigh the value of other alternative care options, in particular, to compare intercountry adoption with institutionalisation; to look into the position of the CRC Committee on the issue; and finally to resort to the rules of juvenile justice to draw a possible, but remote, parallel with the use of the “last resort” language in the context of deprivation of liberty, and to investigate if any guidance is forthcoming in attaining a better understanding of the concept of making intercountry adoption a measure of “last resort.”

##### *4.1 Hierarchy of alternative care options*

A number of scholars have criticised the fact that the CRC failed to successfully clarify the proper hierarchy of solutions to be provided for children deprived of their family environment (DILLON, 2008, p. 40). In a Preamble to a Draft Protocol to the United Nations Convention on The Rights of the Child (UNCRC) on Social Orphans, Dillon echoes the concern that “[...] Articles 20 and 21 of the UNCRC are not sufficiently clear about the relationship between the developing child and the urgent and time-bound need for permanency in a family setting” (DILLON, 2008, p. 85).

UNICEF sets out the following principles for the hierarchy of options which are generally held to safeguard the long term best interests of the child's care, once the need for such care has been demonstrated:

- *family-based solutions are generally preferable to institutional placements;*
- *permanent solutions are generally preferable to inherently temporary ones; and*
- *national (domestic) solutions are generally preferable to those involving another country*  
(UNITED NATIONS CHILDREN'S FUND -UNICEF, 1998, p. 5).

Assessed against this list, intercountry adoption fulfils the first two principles, but not the third, while foster placement fulfils the first and last ones, and often not the second one. The same cannot be said of institutionalisation<sup>15</sup> as it is neither family based nor permanent (often). Therefore, according to this listing of principles, intercountry adoption and foster placement are invariably to be considered subsidiary to any foreseeable solution that corresponds to all three principles - for instance, domestic

adoption. However, they must be weighed carefully against any other solutions that also meet two of these basic principles<sup>16</sup>, and should not automatically be considered excluded in favour of institutionalisation. This approach garners support from the fact that determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options<sup>17</sup>.

It is apposite at this juncture to express some words of caution. First, it is important to understand that the last resort language is relative, and depends on what options are available as alternative care. It could be argued that all alternative care options should be considered as a measure of last resort, when compared to the option of keeping the child with the birth family. In this regard, the CRC Committee is of the view that “[...] in many States parties the number of children separated from their parents and placed in alternative care is increasing and at a high level” (CRC COMMITTEE, 2006, § 654). As a result of this, the CRC Committee has expressed concern that “[...] these placements are not always a measure of last resort and therefore not in the best interests of the child” (CRC COMMITTEE, 2006, § 654). The reference to “their parents” by the CRC Committee implies biological or adoptive parents. Furthermore, the reference to “these placements” includes all alternative care options (such as foster care, residential care, and other forms of alternative care), and highlights that all these options generally should be measures of last resort after attempts to keep the child in his or her birth family have failed.

Even when the choice is between intercountry adoption on the one hand and other national alternative care options on the other, exceptional circumstances that might require intercountry adoption to be a measure of first resort might exist. To mention one example, it would be very difficult to sustain an argument that when a child deprived of a family environment has a chance of being placed with an aunt outside his or her own country, such a child should be institutionalised simply because intercountry adoption should be a measure of last resort. In other words, the principle of subsidiarity could be subject to the best interests of the child<sup>18</sup>.

In fact, the non-overriding nature of the principle of subsidiarity is well articulated in a judgment of the Constitutional Court of South Africa. The case *AD and Another v DW and Others*<sup>19</sup> concerned an application for sole custody and sole guardianship by citizens of the United States of America, who wished to adopt a South African child, Baby R. How to interpret and apply this principle to Baby R’s situation was debated both in the lower courts and the Constitutional Court. In its reasoning, although the Court agreed that the principle of subsidiarity “had to be adhered to as a core factor governing inter-country adoptions, and a contextualised case-by-case enquiry had to be conducted by child protection practitioners and judicial officers versed in the principles involved,” it cautioned by stating that “[t]his is not to say that the principle of subsidiarity is the ultimate governing factor in inter-country adoptions”<sup>20</sup> – rather, it is the best interests of the child principle that has been found to be the ultimate governing factor<sup>21</sup>.

A point worth highlighting in the context of intercountry adoption (or for that matter, any other alternative care option) is the role of child participation. As alluded to above<sup>22</sup>, the right of a child “who is capable of forming his or her own views [...] to express those views freely in all matters affecting the child” (Article 12 of CRC and Article 7 of ACRWC) is one of the four cardinal principles of both the CRC and the ACRWC.

Depending on the evolving capacity of a child, and the views of such child, there is a need to recognise that intercountry adoption could be either a measure of first or last resort.

Finally, the argument that the letter of CRC and ACRWC provisions favour national solutions above family based ones could be countered by the view that these instruments need to be interpreted progressively. After all, the CRC, as well as the ACRWC, like all human rights instruments, must be regarded as living instruments, whose interpretations develop over time. We are reminded of this fact by the CRC Committee (CRC COMMITTEE, 2007a, § 20). Pursuant to this, the initial assumption, under the CRC and the ACRWC that intercountry adoption, being a non-national alternative care, should be categorically subsidiary to other national alternative care options such as institutionalisation should not be accepted as valid, especially in the face of contemporary evidence on the serious shortcomings of the latter (EVERYCHILD, 2005; ISS/IRC, 2006a, p. 9).

#### *4.2 Intercountry adoption versus institutionalization*

In the context of alternative care for children, the word “institutions” appears in the CRC (Art. 3(3)), the ACRWC (Art. 20(2)(b)), and the Hague Convention (Art. 4(c)(1)). Nonetheless, the reference to “institutions” leaves unanswered the question of what it is intended to cover (CANTWELL; HOLZSCHEITER, 2008, p. 53). It is contended that “[r]esidential care’ or ‘institutional care’ refers to group living arrangements in which care is provided by paid adults who would otherwise not be regarded as traditional caregivers in that particular society” (UNICEF, 2006, p. 35). If “institutions” is meant to refer only to orphanages<sup>23</sup>, the question posed then is: what role is to be played by the so-called “intermediary care options” such as “group homes”<sup>24</sup>?

Since group homes by definition represent small, residential facilities located within a community, and designed to serve children, it could be argued that it is these types of homes that both the CRC (Art. 20(3)) and the ACRWC (Art. 25(2)(a)) refer to as “suitable institutions.” Therefore, while the current tendency is to put orphanages and group homes of varying sizes under the umbrella of “institutional care” (DILLON, 2008, p. 40), as opposed to orphanages, those resembling a family environment, like group homes, might better withstand scrutiny under human rights law.

The qualification of institutions with the prefix “suitable” finds its motivation in global experiences during and before the drafting of the CRC. Since the 1980s the international community has come to progressively realise the detrimental effect of institutionalisation on children (HUMAN RIGHTS WATCH - HRW, 1996). Thus, the ill-effects of institutionalisation on the emotional, psychological and developmental aspects of children are well documented (ZEANAH, 2003, p. 886-88; MARSHALL; FOX; BEIP CORE GROUP, 2004, p. 1327).

The Hague Convention’s policy on institutionalisation is not explicitly spelled out in the instrument. However, it is possible to decipher the position of the instrument on this issue through interpretation. For instance, since the Hague Convention recognises intercountry adoption as a valid alternative solution in situations where a “suitable family” (3<sup>rd</sup> preamble clause) cannot be found in the state of origin, it could

be argued that institutionalisation (which is a non-family based alternative care) under the Hague Convention is a measure of last resort ranking after intercountry adoption. The position expounded by the Hague Conference Bureau that “it is, as a general rule, not preferable to keep children waiting in institutions when the possibility exists of a suitable permanent family placement abroad” (PERMANENT BUREAU OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 2008, p. 30) is supported by the text of the Hague Convention.

The question of how the notion of last resort is to be interpreted when the option is between institutionalisation and intercountry adoption has been a subject of judicial scrutiny. In the recent *Madonna* case in Malawi<sup>25</sup> concerning the adoption of a child from an orphanage, the definition to be accorded to “last resort” was put on the spotlight by the High Court. The judge, after quoting in full Article 24(b) of the ACRWC, and emphasising the notion of “last resort” in the provision, reasoned that:

*Clearly inter-country adoption is supposed to be the last resort alternative. [...] It is evident however that CJ no longer is subject to the conditions of poverty of her place of birth as described by the Probation Officer since her admission at Kondanani Orphanage. In the circumstances can it be said that CJ cannot in any suitable manner be cared for in her country of origin? The answers to my questions are negative. In my view “in any suitable manner” refers to the style of life of the indigenous or as close a life to the one that the child has been leading since birth<sup>26</sup>.*

Partly based on this reasoning, the judge declined to grant the application for the adoption of the infant.

On appeal, however, the Supreme Court of Malawi rightly disagreed with the lower court. The Court recognized that there had neither been a single family in Malawi that had come forward to adopt infant CJ nor had there been any attempts by anybody to place infant CJ in a foster family<sup>27</sup>. This, in view of the Court, left only two options – the infant “can either stay in Kondanani Orphanage and have no family life at all or she can be adopted by the Appellant and grow in a family that the Appellant is offering”<sup>28</sup>. In a clear preference to intercountry adoption as opposed to institutionalisation, the Supreme Court concluded that “the welfare of infant CJ will be better taken care of by having her adopted by the foreign parent rather than for her to grow up in an orphanage where she will have no family life, no love and affection of parents”<sup>29</sup> and granted the appeal and allowed the adoption order.

In Africa, it is documented that the unfortunate lack of developed family-based alternative care options has led to “un-necessary over-use of residential placements” (ISS; UNICEF, 2008, p. 7). In support of this assertion, a joint working paper by ISS and UNICEF (2008, p. 7) cites the experience of Zimbabwe. Accordingly,

*[t]he average occupancy of Zimbabwean orphanages is 106% overall, and 128% in government institutions. Their experience is that one can never build enough orphanages to meet demand – those which are built are always full because they attract children, although usually for the wrong reasons. Research shows that the majority of children in institutions do not need to be*

*there [...] – only 25% have no known relatives [...] 45% have at least a mother alive. Most children could be reintegrated into their families with good social work. (MEETING ON AFRICAN CHILDREN WITHOUT FAMILY CARE apud ISS; UNICEF, 2004, p. 7).*

There is also anecdotal evidence that the move to make institutions the primary response to, and solution for, alternative care is susceptible to being counterproductive. For instance, it could weaken a community's motivation to address orphan issues, and divert resources away from the family based solutions that are better for children (OLSON; KNIGHT; FOSTER, 2006, p. 3).

In practice, there is a tendency to misconstrue the position of the relevant human rights instruments on the institutionalisation of children. It is not uncommon to witness the systematic planning and development of new institutions as a priority to cater for children deprived of their family environment<sup>30</sup>. Sometimes, such developments are justified on the basis of Article 18(2) of the CRC and Article 20(2)(b) of the ACRWC. However, the reference under Article 18(2) of the CRC (and Article 20(2)(b) of the ACRWC) that mandates states parties to “ensure the development of institutions, facilities and services for the care of children” does not mean the facilitation of a systematic policy to establish orphanages as a priority for the care of children. Rather, there is a need to make these institutions secondary and allow them to exist in a support relationship with parents. Children should not be made children of the state unnecessarily.

This whole discussion tends to point in one direction – that there is a growing trend in support of generally making institutionalisation (and not necessarily intercountry adoption) a measure of last resort. While institutionalisation should continue to play its temporary role as a transition platform for children deprived of their family environment, its use as a long term placement for children deprived of their family environment calls for serious reconsideration.

#### *4.3 “Last resort” through the lens of the CRC Committee: clarity or confusion?*

The CRC Committee, as the supervisory organ for the implementation of the CRC, has an authoritative say in the interpretation of the provisions of the Convention. Unfortunately, the CRC Committee has been sending confusing (if not contradictory) messages as regards what is to be considered a measure of last resort in the alternative care scheme for children deprived of their family environment.

To illustrate: it has already been alluded to above that the CRC Committee on a number of occasions has labelled intercountry adoption to be a measure of last resort<sup>31</sup>. Despite this position, that continues to surface in its concluding observations on state party reports, in General Comment No. 3 entitled “HIV/AIDS and the rights of the child,” the same Committee remarked that:

*[...] any form of institutionalized care for children should only serve as a measure of last resort, and that measures must be fully in place to protect the rights of the child and guard against all forms of abuse and exploitation. (CRC COMMITTEE, 2003, § 35).*

In the context of children with disabilities, the CRC Committee has reiterated a similar position<sup>32</sup>.

This leaves the CRC Committee's position as regards the question "is it intercountry adoption or institutionalisation that should *generally* be considered as a measure of last resort?" unanswered<sup>33</sup>. In the meantime, however, the CRC Committee's stand sheds light on the fact that institutionalisation could be considered as a measure of last resort. It is also indicative of the need for the CRC Committee to clearly articulate its position on the issue (perhaps through a General Comment), and thereby contribute towards State parties' understanding of the place of intercountry adoption within the alternative care scheme.

#### *4.4 Understanding "last resort": any lessons from the principles of juvenile justice?*

In an attempt to establish the meaning of last resort, guidance can (rather remotely) be sought from Article 37(b) of the CRC, which is the only provision within the CRC that uses this phrase. Pursuant to Article 37(b) of the CRC:

*No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

At the outset, however, it is pertinent to consider some general matters of context. The enquiry into the meaning and implications of the last resort requirement in the juvenile justice sphere does not assume that the purposes of the search for alternative care, on the one hand, and the deprivation of liberty as a measure of last resort in the context of juvenile justice, on the other, are the same. In light of the so-called 3Ps (protection, provision and participation of the CRC and the ACRWC), whereas the former is more of a blend of protection and provision, the latter fits mainly within the protection mantra. Secondly, more often than not, it is younger children who are affected by intercountry adoption, while juvenile justice often addresses older children. Thirdly, deprivation of liberty is a criminal law measure while intercountry adoption is not. Despite these differences, both the search for alternative care for children deprived of a family environment and the deprivation of liberty as a measure of last resort in the context of juvenile justice, are supposed to be undertaken in the best interests of the child. Such a common ground – the promotion and protection of the best interests of a child – is assumed to create a logical and conducive platform for comparison.

The standard for deprivation of liberty as a measure of last resort requires one to consider "whether the intended deprivation of liberty is really the last option (without any alternatives interfering less with the child's right)" (SCHABAS; SAX, 2006, p. 84). In alternative care, therefore, this could mean resorting to intercountry adoption because it has been found to be the last suitable alternative care, as there are no other alternatives that would better suit the situation of the individual child. Just recently, in 2008, Liefhard further argued that the last resort principle does not imply that all



alternatives must be pursued first, before deprivation of liberty is imposed<sup>34</sup>. If “last resort” is to be interpreted in a similar fashion with regard to intercountry adoption, namely, that all alternative care options must not necessarily be pursued first, and that authorities exercise some level of discretion in accessing different options, and finally deciding which of these options is likely to have the intended effect, then the use of the term seems to maintain its capacity to promote the best interests of children who are deprived of their family environment.

Thus, the interpretation under juvenile justice that last resort does not necessarily lend itself to a structured or checklist approach that considers and pursues all alternative options before embarking on deprivation of liberty, fits well with the best interests of the child. Within an alternative care scheme, too, such an interpretation has a better potential to promote the rights of children who are deprived of their family environment. If the approach of trying every available alternative care option was to be subscribed to in order to comply with the last resort requirement in a non-flexible manner before intercountry adoption is considered, it would mean that, amongst other things, children would wait unnecessarily for a longer than usual period of time before a family environment is found for them.

In addition, if the contention, that the last resort requirement under juvenile justice implies that imprisonment may not be “imposed without a proper assessment taking into account the specific circumstances of the case and the specific needs of the individual child” (LIEFFARD, 2008, p. 195), is to be considered in another context, it may have positive implications for the application of alternative care options. Primary amongst these is the connotation for alternative care that a truly principled child-centred approach requires a close and individualised examination of the precise real life situation of the particular child involved. Accordingly, a rule that categorically requires that intercountry adoption be made a measure of last resort should not be used in such a way that would compromise the best interests of the child.

## 5. Concluding remarks

A range of literature exists that testifies to the tendency to construe intercountry adoption as *categorically* being a measure of last resort. It is also contended that, based on the subsidiary principle, intercountry adoption is a last resort. In Africa, the fact that Article 24 of the ACRWC explicitly requires intercountry adoption to be a measure of last resort, might give African states a further ground to treat the practice as such.

Based on the preceding discussion, it is possible to arrive at some conclusions and recommendations. The idea of making intercountry adoption generally subsidiary to other alternative care options has its own merits that are inherently aimed at promoting the best interests of the child. In the context of Africa, this would mean, for instance, giving the extended family (and communities) a greater role in the care of children deprived of their family environment, before undertaking other alternative care options. Furthermore, in Africa, financial and material poverty alone, or conditions directly and uniquely imputable to such poverty, should never be a justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his

or her reintegration into the family<sup>35</sup>. These scenarios should be seen as a signal for the need to provide appropriate support to the family. It would also help to promote domestic solutions, which could in turn contribute to maintaining the child's cultural identity.

However, while we Africans pride ourselves in our culture, it is important that the rights of individual African children are not enmeshed in discussions of the larger trends of history, of intercountry adoption being “essentially a vestige of colonialism,” and of national pride. Having named children as the bearers of rights, no ideas of national pride or children as national “resources” should be used to deny children a suitable alternative form of care, even if such suitable care could only be found through intercountry adoption. “Intercountry adoption as a measure of last resort” should be read to mean “intercountry adoption as being *generally subsidiary* to other alternative means of care,” but subject to exceptions. In addition, “last resort” should not mean when all other possibilities are exhausted<sup>36</sup>.

A checklist approach, where all available care options are to be pursued first before intercountry adoption is considered, would go contrary to the assumption that the placement of children at a very young age is an important goal. An understanding of “last resort” that does not hinder legally appropriate early placement should be fostered. In addition, in understanding intercountry adoption as a measure of last resort, child participation, depending on the evolving capacities of the child, should be allowed to play a role.

The lack of a clear-cut formula as far as the hierarchy for alternative care options is concerned has its own, rather unintended, positive side too. This argument is validated by the fact that determining the best interests of the child cannot be circumscribed by mechanical legal formulae or through rigid hierarchical rankings of care options. As argued above<sup>37</sup>, a truly principled child centred approach requires a close and individualised examination of the precise real life situation of the particular child involved. To apply a predetermined inflexible formula for the sake of certainty, irrespective of the circumstances, could in fact be contrary to the best interests of the individual child concerned.

African countries should join the international trend towards understanding institutionalisation, particularly if long-term, as a measure of last resort. It is advisable that the CRC Committee or the African Committee of Experts on the Rights and Welfare of the Child under the ACRWC give clear guidance to this effect.

In conclusion, caution (including some level of self-restraint) needs to be exercised not to misuse the phrase “last resort” disingenuously, to either promote the interests of domestic and international prospective adoptive parents, child welfare organisations, or a state's nationalistic interests. In other words, the African continent's political, social, cultural, and economic needs and priorities need not conflict with the best interests of the African child, who is deprived of a family environment or of alternative suitable care. Therefore, where intercountry adoption has been found to be in the best interests of a child, it should be considered as an alternative means of care, irrespective of the last resort requirement. States should be prudent not to provide proof to critics who view intercountry adoption as operating in the interest of a family seeking a child, rather than in the best interests of the child seeking a family.

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## NOTES

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1. For instance, some countries like Botswana, Malawi, Sierra Leone, and Zambia have a residency requirement for prospective adoptive parents.
2. For instance, Nigeria.
3. If anything comes close to the principle of subsidiarity under the 1959 Declaration, it is Principle 6 which, in pertinent part, states that the child shall, wherever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security.
4. This is as opposed to being simply a primary consideration in all other fields.
5. These include Article 8, which preserves the right of the child to his or her identity, nationality, name, and family relations without illegal interference. Further, Article 18 addresses parental responsibility, while Article 20 relates to children deprived of their families.
6. Two countries, namely Somalia and the United States, have yet to ratify it.
7. It was in order to give the CRC specific application within the African context that the ACRWC was adopted by the OAU (now African Union or AU).
8. Doek (2006) describes this principle as a "leading principle for the implementation of the CRC."
9. "Removal of a child from the care of the family should be seen as a measure of last resort and for the shortest possible duration. Removal decisions should be regularly reviewed, and the child's return to parental care should be assured once the original causes of removal have been resolved or have disappeared." (UNITED NATIONS, 2007, Art. 13).
10. As research suggests, typically the cost of residential care has been shown to be three times the cost of family foster care (BROWNE, 2005, p. 1-12).
11. Providing inputs to the debate and practice of foster care, this study underscores that it contains information on foster care experiences in developing countries, which tends to be informal and undocumented.
12. See, for instance, the interview with Baroness Emma Nicholson, European Parliament's Rapporteur for Romania (CENTRUL ROMAN PENTRU JURNALISM DE INVESTIGATIE [CRJI], 2001).
13. This period of time may vary according to circumstances, in particular, those relating to the ability to conduct proper tracing; however, the process of tracing must be completed within a reasonable period of time.
14. See Article 22 of the CRC and Article 23 of the ACRWC for some of the rights that refugee children have.
15. Though this is partly arguable, as, in exceptional circumstances, institutionalisation could be considered to be permanent for children who are often referred to as "hard to place."
16. Naturally, the solution chosen, and the manner in which it is effected, must always fully respect the rights and best interests of the child.
17. SOUTH AFRICA. Constitutional Court. *M v The State*. Sentence. 26 sep. 2007a, § 24.
18. It is argued that the position the subsidiarity principle assumes is in a itself subsidiary one — one subservient to the best interests of the child (NICHOLSON, 2000, p. 248).
19. SOUTH AFRICA. CONSTITUTIONAL COURT. *AD and Another v DW and Others*. CCT 48/07. Sentence. 7 dec. 2007b.
20. SOUTH AFRICA. CONSTITUTIONAL COURT. *AD and Another v DW and Others*. CCT 48/07. Sentence. 7 dec. 2007b, § 48.
21. SOUTH AFRICA. CONSTITUTIONAL COURT. *AD and Another v DW and Others*. CCT 48/07. Sentence. 7 dec. 2007b, § 49-50.
22. See section on "International legal framework" above.
23. It is to be noted that it is usually residential care institutions for young children that are also often referred to as "orphanages."
24. By definition, group homes are small, residential facilities located within a community, and designed to serve children.
25. MALAWI. HIGH COURT, 2009a, p. 6.
26. MALAWI. HIGH COURT, 2009a, p. 6.
27. MALAWI. HIGH COURT. 2009b, p. 18.
28. MALAWI. HIGH COURT. 2009b, p. 18.
29. MALAWI. HIGH COURT. 2009b, p. 18.
30. And yet, research conducted in 2006 has found that, in Africa, there is growing concern about the burgeoning number of orphanages being established in order to respond to the perceived needs of children affected by HIV and AIDS (UNITED NATIONS, 2006).
31. See introduction section above.
32. Under General Comment n. 9, § 47, it is stated that the CRC Committee "urges States parties to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child" (CRC COMMITTEE, 2007b).
33. "Generally," because it is the conventional (non-exceptional) cases that are being taken into account when determining the general preference to be adopted in making decisions between alternative care options.

34. According to Liefhard, it is imperative that competent authorities exercise some level of discretion in assessing different options, and finally deciding which of these options is likely to have the intended effect. The intended effect is a result that can be considered as an appropriate and adequate response to the child's criminal behaviour (LIEFFHARD, 2008, p. 195).

35. For a discussion of poverty in the context of intercountry adoption, see SMOLIN (2007).

36. For instance, under Article 31 of the 1990 Children's Code of Brazil, international adoption is an exceptional measure after all attempts at adoption in the country of origin have been exhausted and thereby guaranteeing the right of the child to live in his own country.

37. See section on "Understanding 'last resort': Any lessons from the principles of juvenile justice?" above.

## RESUMO

A crescente popularidade das adoções internacionais não é algo recente. Recente, entretanto, é a crescente atração que crianças africanas têm despertado em potenciais pais adotivos que vivem em outras partes do mundo, como exemplificado pelas adoções de Angelina Jolie e Madonna. As opiniões sobre a adoção internacional estão divididas entre a necessidade e conveniência desta prática, mas a visão que a considera uma panacéia para crianças sem pais e pais sem filhos prevalece. Por outro lado, alguns países têm se mostrado resistentes à retirada de crianças do Terceiro Mundo de seus ambientes familiares para serem alocadas em casas fora de seu país natal – prática entendida como “imperialista”. Atualmente, a idéia a qual a adoção internacional esta ligada é a de que esta seria uma medida de último recurso, mas pesquisas sobre qual o seu verdadeiro significado (ou qual deveria sê-lo), e quais as suas implicações para a política de bem-estar da criança e para a legislação africana são difíceis de encontrar. Este artigo pretende contribuir para o preenchimento desta lacuna.

## PALAVRAS-CHAVE

Adoção internacional – Princípio da Subsidiariedade – Medidas de Último Recurso – Direito da Criança – África.

## RESUMEN

La mayor popularidad de la adopción internacional no es nada nuevo. Pero sí lo es el mayor interés que están despertando los niños africanos en los potenciales padres adoptivos de otras partes del mundo, como es el caso de las adopciones realizadas por Angelina Jolie y Madonna. Las opiniones acerca de si la adopción internacional es necesaria y correcta están divididas, pero predomina la idea de que este tipo de adopción es la panacea para los niños sin padres y para los padres sin hijos. Por otra parte, algunos estados de origen se han resistido a colocar niños del Tercer Mundo privados de su medio familiar en hogares fuera de su país natal, por considerar que ésta es una práctica supuestamente “imperialista”. En los últimos tiempos, se ha dispuesto que la adopción internacional debería utilizarse como medida de último recurso; sin embargo, prácticamente no existen investigaciones sobre qué significa (o qué debería significar) esto en realidad, y cuáles son sus consecuencias para el derecho y la política de bienestar infantil en África. La finalidad de este artículo es contribuir a llenar este vacío.

## PALABRAS CLAVE

Adopción internacional – Principio de subsidiariedad – Medida de último recurso – Derechos de los niños – África.

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## ABSTRACT

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Médecins Sans Frontières' (MSF) worldwide work with refugees reveals a transition toward ever more mixed forms of migration of both political and economic backgrounds. This evolving nature of migration and displacement, in particular refugee flows, and the government response to it, represents a new dilemma to humanitarian assistance. In this article, MSF documents the concrete impact of these changes and our operational approach in response. We argue that these developments represent a fundamental challenge to humanitarian aid actors in terms of accessing and assisting people fleeing violence to seek refuge, assistance and protection in other countries. In contexts of violence and displacement, MSF has long advocated for a preservation of humanitarian space states' and other actors' recognition and respect for humanitarians' independent action to assess needs and assist the most vulnerable. The ever more restrictive legal and practical barriers facing refugees and migrants confront us to find ways both to reach them where they are, but also to find language and means to advocate toward states for greater responsibility to assist and protect refugees and to ensure humanitarian actors have space to access and assist them where gaps remain.

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## KEYWORDS

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Migrants. Refugees – Displacement – Health care – Médecins Sans Frontières.



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## RESPONDING TO “MIXED” MIGRATION FLOWS: A HUMANITARIAN PERSPECTIVE

Katharine Derderian and  
Liesbeth Schockaert

Médecins Sans Frontières’ (MSF) worldwide work with refugees reveals a transition toward ever more mixed forms of migration of both political and economic backgrounds. “Mixed flows” of displaced people might suggest population movements including both people fleeing political persecution or violence and people migrating for economic reasons. Yet in many cases, these distinctions remain blurred as people seeking refuge from conflict and oppressive regimes likewise seek jobs and economic opportunities in order to survive.<sup>1</sup> The terminology and the distinction between “political” refugees and “economic” migrants remain fundamentally artificial constructs.

At the same time, MSF witnesses the weakening and/or lack of direct applicability of refugee law to those fleeing persecution and violence but unseen or intentionally ignored, within such mixed flows – leading to real and worrying impact on their lives and health.

The changing nature of government response to migration and displacement, in particular refugee flows, represents a fundamental new challenge to humanitarian assistance. In this article, MSF documents the concrete impact of these changes and our evolving operational approach in response.

We argue that these profound changes represent a fundamental challenge to humanitarian aid actors in terms of accessing and assisting people fleeing violence to seek refuge, assistance and protection in other countries. It is paramount for humanitarian actors to re-consider the governments’ changing responses to population movements today in order to re-define and re-gain humanitarian space to independently access and assist those fleeing from violence.

*Notes to this text start on page 114.*

## 1. Background: MSF response to refugees in changing contexts

Founded in 1971, MSF has a long history of assistance to refugees, with or without legally recognised refugee status. Starting with some of its first large-scale projects assisting Cambodian refugees in Thailand in 1975 and Salvadoran refugees in Honduras in 1980 (MSF, 2003a), MSF responded in many of the major refugee crises worldwide in the following decades, including assistance to Rwandan refugees in camps in Zaire, Somalis in camps in Kenya, Afghans in Pakistan and Iran, Darfur refugees in Chad, to name a few. In addition to its operations, MSF also continuously informed public opinion about the precarious situation of refugees and its own humanitarian work in refugee camps.<sup>2</sup>

Today, *de facto*, authorities in host countries as well as some international agencies and donors frown on the development of new refugee camps due to misplaced concern about potentially protracted refugee situations (UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR], 2006; PONT, 2006)<sup>3</sup> with camps acting as a pull factor for additional influxes and about refugee “dependency” on relief in such settings where local integration may remain impossible.<sup>4</sup> In reality, protracted refugee situations are more the combined result of the prevailing situations in the country of origin, the policy responses of the country of asylum and the lack of sufficient donor government engagement in these situations (LOESCHER; MILNER, 2006).

As a result of these ground-level political realities, refugees often no longer receive assistance in camps, but have to move on to urban settings where they live in hiding and try to survive in the informal sector. Urban refugees experience the same protracted refugee situations – just not in camps. As a result, they remain more vulnerable both in terms of mental health, due to stress and continuous fear of deportation and in terms of physical health provoked by poor living conditions and a lack of access to basic services including health care.

Unrecognised refugees and undocumented migrants in urban settings often lack protection and become targets for xenophobic and other violence, as we have recently witnessed on a large scale in South Africa (MSF, 2008d) and in specific incidents in other contexts. In Malaysia, of 248 incidents of violence recorded by MSF, 26% were committed by ordinary Malaysians against undocumented migrants and refugees living in their midst. These abuses were met with impunity because refugees and undocumented migrants were too scared to assert their basic rights or to pursue legal action. Reporting incidents to the Malaysian police would not have benefited refugees and migrants as they would face charges of being “illegal” (MSF, 2007d).

The last ten years have seen ever more restrictive refugee policies in host countries worldwide, as well as at the regional level of neighbouring countries where refugees might seek protection. Refugees enjoy several far-reaching rights enshrined in the 1951 Refugee Convention and elsewhere in international law (the definition of a refugee itself was enlarged on a regional basis by the 1969 Convention of the Organization of African Unity [OAU] and the 1984 Cartagena Declaration). These rights include the right to cross borders to seek asylum in other countries; the right to apply for asylum and to enjoy at least temporary protection if return to the country of origin involves danger

to life and limb; and the right to be free of forcible repatriation (*refoulement*). Yet, these rights have been interpreted in ever more restrictive ways, including by closure of borders by states and belligerents and politically targeted use of in-country humanitarian aid.

These policies and practices have resulted in a change in patterns of flight from violence and conflict – ever more internally displaced people (IDPs), urban refugees, “mixed” flows of refugees, migrants and *sans papiers*.

The past years have seen an overall increase in internally displaced people to 24.5 million people worldwide at the beginning of 2007. Even with the looser legal and operational framework to assist IDPs in their own country (not to mention often absent measures toward protection), MSF has been able to be present to assist and advocate in the interest of the displaced in many of the large-scale IDP crises including in Angola, Sudan, Afghanistan, Colombia, DRC, and Liberia.

As a result of ever more restricted policies and gaps in assistance towards asylum seekers and undocumented migrants, MSF increasingly launched operations in host countries since the late 1990s, in parallel with assistance to refugees and displaced in their own regions. Initially, these efforts focused on European settings (Belgium, France, Spain, Italy, Sweden, Greece etc.), but have more recently been enlarged to recognize analogous situations in prosperous countries of the South, including South Africa, Malaysia, Thailand and transit countries such as Morocco and Yemen (MSF, 2005a; 2008a; 2007d).

These relatively new MSF operations treat a symptom of globalisation, which enables increasing international flows of goods, capital and services, but not always of persons – especially not refugees. Ever stricter legal interpretations in the status definition of refugees,<sup>5</sup> as well as concrete obstacles blocking their access to legal status and basic services – such as medical care – render refugees and migrants vulnerable at every step of their journey.

As a humanitarian organization, MSF provides medical care to these mixed migrant and refugee populations without regard to patients’ legal status, as for MSF there is no concept of “illegal people” or “illegal patients”. MSF interventions are a response to human beings in need of assistance. While MSF teams generally treat newly arriving refugees and migrants, rejected asylum seekers and *sans-papiers* (undocumented migrants), the primary criterion for MSF is humanitarian need – responding to a lack of access to basic medical care, as well as to often appalling living conditions and abuses impacting on people’s physical and mental health. In an approach often not unlike those found in refugees’ regions of origin, MSF teams in such project provide first aid and medical screening, facilitate access to national health care services and tackle psychological consequences related to their flight and situation of distress in the receiving country. MSF also denounces and points out to the host governments the gaps in assistance for asylum seekers and undocumented migrants and the inhumane manner in which many are treated in order to improve their situation.

In Malta<sup>6</sup> and the Italian island of Lampedusa,<sup>7</sup> Somalis, Ethiopians, Nigerians and others wash ashore in unsafe boats. They cross the Mediterranean Sea in dangerous conditions, in overcrowded, flimsy dinghies and boats, with little food on board. They stay at sea for many days and nights, exposed to extreme conditions and at the mercy of the wind and waves. The often life-threatening conditions of the journey are a traumatic experience in themselves. New arrivals often require immediate care for shock, dehydration,

hypothermia, skin burns or other physical injuries sustained during their travels. Due to the lack of adequate assistance by the local authorities, humanitarian presence is needed on Europe's shores. MSF provides access to health care and emergency medical assistance at landing points, while also advocating for increased government involvement to assist and protect new arrivals by guaranteeing access to asylum procedures.

In Yemen, Somalis and Ethiopians arrive after risking their lives to escape from conflict and extreme poverty. Both the sea crossing from the Horn of Africa and the landing on the Yemeni coast itself are very dangerous. To avoid being caught by the Yemeni military, many boats arrive at night and smugglers force passengers to jump into deep water far from the shore. As a result, many people drown as they cannot swim and/or can not move because of numbness in their limbs. Many of these people told MSF that they were aware of the risks, but had no choice other than this survival strategy to escape from violence and destitution.

In Mytilini, Greece, MSF visits to the local detention centres revealed the desperate living conditions of refugees and migrants, many of whom had fled war, persecution, hunger and extreme hardship in Afghanistan, Somalia or Palestine. MSF's emergency intervention focuses on improving the living conditions and infrastructure at these centers and providing primary health care and psychological support.

In Musina, South Africa (MSF, 2008b; 2008c), MSF medical activities centre on a community of Zimbabweans who fled desperate conditions in their home country only to face a lack of assistance, along with the threats and violence connected with the border crossing, police raids in areas where Zimbabweans seek refuge, and the constant menace of arrest and deportation. MSF has documented similar situations in Yemen, Morocco, and elsewhere (MSF, 2005b; 2008e).

In Thailand, Rohingyas arrive weak and traumatised. Persecuted in Burma and often fleeing horrible camp conditions in Bangladesh, they seek a safe heaven in Malaysia after transiting through Thailand. Those who make the journey to Thailand find their suffering far from over, as detention, deportation or life in overcrowded and unsanitary refugee camps awaits them. MSF monitors their situation and assists them in their access to health care, in both detention centres and open settings.

Where does the problem lie? For those refugees who do knock on the doors of states, the reaction is alarming. In response to worldwide movements of refugees and migrants, states have increasingly advanced and implemented a wide range of restrictive policies. Recent policies include stricter border controls and interception measures preventing irregular entries,<sup>8</sup> restrictive interpretations of refugee law, and deterrence measures like the use of detention centres and limits in access to basic services including health care. The real consequences of these policies cannot be understated. They have a direct impact on the health of new arrivals and people who become destitute during their stay.

## **2. Concrete impact of restrictive refugee and migration policies**

Restrictive interpretations of refugee law leave people in a legal limbo resulting in a constant fear of deportation. Not only can States argue to return refugees to "safe third

countries” through which they have transited, or argue that their country of origin is either entirely safe, or that refugees might enjoy an “internal flight alternative” to seek safety elsewhere inside their own country rather than refugee status abroad. As a result of these strict interpretations, only 0.03% of the asylum seekers in Greece are being granted protection (HUMAN RIGHTS WATCH [HRW], 2008). In South Africa, during the first quarter of 2008, more than 10,000 Zimbabweans applied for asylum, of which only 19 were granted refugee status.

This in itself then directly leads to barriers to access medical care: either people are not legally entitled to full access to health care or fear deportation when seeking medical care. Zimbabweans in South Africa live in a constant state of fear that they will be deported. Although the South African constitution theoretically guarantees access to health care and other essential services to all those who live in the country, this policy is not always respected, and the fear for deportation – and more recently xenophobic violence – keeps many Zimbabweans from accessing health care.

Such restrictive readings of international law, combined with legal migration stops have also contributed to ever more mixed migration flows. Diverse migrants -- voluntary or forced migrants – and refugees may all find themselves forced to flee and stay in other countries outside any legal framework, as opportunities for regular migration are limited or even non-existent in host countries.

Refugees may lack information, legal aid or other assistance to enable their access to asylum procedures and so end up without legal status and the rights connected with it. In Italy, MSF witnessed the expulsion of 300 people to Libya who had not been informed and/or had not had the chance to request asylum. MSF has witnessed similar situations with Zimbabweans in South Africa, Rohingyas in Thailand and sub-Saharan African refugees in Morocco. At the same time, *in situ* or diplomatic asylum is often refused, as MSF witnessed in Zimbabwe in 2008, as hundreds of people were denied asylum and ejected from the South African Embassy in Harare, into the hands of the national authorities.

Such situations are in clear violation of international legal obligations to provide access to legal procedures, including asylum for refugees. These situations could also constitute a breach of the key principle of *non-refoulement*,<sup>9</sup> which represents the practical defence of an individual’s right not to be forcibly returned to a country where s/he is in danger. The principle of *non-refoulement* establishes that any individual who enters another state’s territory, even illegally, has the right to submit a request for asylum and have his/her case heard. It is of primordial importance that people have access to asylum procedures upon arrival.

Despite the lack of options at home and abroad, virtually every major humanitarian crisis in sub-Saharan Africa has sent people fleeing to Europe from violence-affected regions, as seen in specific influxes through our projects around the Mediterranean Sea. As a result of conflict in regions of origin, MSF teams witnessed Liberians arriving in 2003 and South Sudanese in 2004 and 2005 (MSF, 2003b) while in 2008, 30% of MSF consultations in our project in Italy were sought by people who had fled from the Horn of Africa as fighting in the region intensified.

Often repeated border controls and deportations – at times involving violence

or the threat of violence – result in physical trauma, stress and anxiety. In Morocco, injuries caused by violence at the hands of the police, other authorities and smugglers are one of the most frequent reasons for migrants to seek medical treatment from MSF.

These non-arrival policies also force refugees to take higher risks to reach a safe haven – resulting not in fewer new arrivals, but ever more deaths and risks to the health of those seeking refuge. In Yemen, over 1400 persons were reported dead and missing trying to cross the Gulf of Aden in 2007 alone. In Morocco, MSF teams have noticed that the increase in border controls between the coasts of Morocco and Spain has had a marked impact on the routes taken by migrants. People used to try to cross the razor wire fence at Ceuta and Mellilla, the two Spanish enclaves bordering Moroccan territory, or sail over the narrow strait of Gibraltar with “*pateras*” (small boats). Now, they increasingly travel with bigger ships from southern Mauritania and Senegal toward the Canary Islands – making their journey longer and more dangerous. At the same time, despite increasingly strict counter-measures, 2008 saw a dramatic increase in the number of boats landing on Lampedusa, Italy. By August 2008, 17,340 persons had landed – compared to 11,889 people in total throughout the previous year.

Not only did these refugees face additional and greater risks to reach safety, but restrictive policies also culminated in a failure to distinguish people seeking protection from other migrants arriving with the help of smugglers. Indeed, by forcing people to flee with the help of smugglers in order to reach safety, such restrictions also expose refugees both to the criminal violence of smugglers (e.g. *gumaguma* gangs in South Africa, mafia in Malaysia and Yemen), as well as to a public and political perception of refugees and migrants less as victims of smuggling than as criminals by their association with smugglers.

In recent years, MSF has also seen states intensifying their use of detention as a deterrent measure toward asylum seekers and undocumented migrants. As seen in most of MSF projects, detention often involves harsh living conditions – sometimes in the longer term – in which people’s health is unnecessarily put at risk. In Malta, MSF medical figures confirm that over 30% of new arrivals are in good health. Yet, follow-up consultations reveal a different pattern of morbidity, much of which is directly linked to living conditions in detention centres. Among refugees and migrants in these detention settings, MSF finds widespread skin diseases, diarrhoea, respiratory tract infections and mental health needs, all mainly connected with overcrowding and poor hygiene conditions. While most refugees and migrants have survived traumatic life events and developed effective coping mechanisms and strategies, further stress related to detention, such as overcrowding, lack of privacy, harsh conditions and uncertainty regarding their future can impact profoundly on individuals’ mental health, well being and ability to function. The longer people stay in detention, the higher the incidence of mental health disorders such as anxiety and depression. Inside detention centres, MSF supports health authorities to ensure medical care for people temporarily held there, while monitoring the living conditions affecting the health of the detainees. Finally, MSF works to ensure specific attention and/or release to more open settings for particularly vulnerable individuals in the centres – the sick, minors and pregnant women.

By opening more projects in detention centres, MSF finds itself walking the fine

line between providing much-needed care and becoming a service provider on behalf of states. Documenting and going public about the conditions in these centres and their impact is therefore an integral part of these MSF projects.<sup>10</sup>

From initial non-arrival policies and the lack of status determination frameworks to detention and deportation, such policies have direct and serious consequences on the health, well-being and dignity of people on the move, necessitating a humanitarian response where state responsibility has failed.

### 3. Barriers to Accessing Health Care

Complicating an already precarious situation, numerous legal and practical barriers block refugees and migrants from accessing basic health care. In some countries, access to health care for undocumented migrants is explicitly restricted by law to emergency health care. In others, undocumented migrants have full access to health care, but even then, in practice this access remains complex due to costs, administrative obstacles and the global lack of available legal and practical information for both migrants and those assisting them. In addition, undocumented migrants may face language or cultural barriers, fear of being reported and facing deportation and/or the need to navigate complicated and changing procedures. If refugees and migrants arrive in an already weakened state, these barriers only further contribute to the deterioration of their health. Some states also impose fines or other sanctions against people, including doctors, who give assistance to undocumented migrants without denouncing their legal status to the authorities.

In Thailand, where MSF has assisted Burmese refugees and migrants since March 2005, Burmese face a complicated registration process together with barriers of discrimination, language and transport costs when seeking medical care. The complex and expensive procedure for legal registration in Thailand is complicated by almost annual changes in regulations for immigration and refugee status determination. In some cases, migrants turn to paid brokers to help with the necessary paperwork and contacts with the authorities. Without legal status and a health card, migrant workers must pay the full and usually unaffordable cost of medical treatment. For example, a caesarean delivery in the hospital could cost over 10,000 baht (US\$300 or 200) – the equivalent of over three months' wages for an average migrant. Seeking medical care also exposes migrants to possible detection while travelling to health care structures and to being reported by hospital staff, both of which could result in detention and deportation.

Besides registration, many other barriers prevent Burmese refugees and migrants from seeking medical care: language differences, costs of travel and care and a lack of confidence in the public health system due to language differences and compounded by the unwelcoming attitude of some medical staff. All these factors come together to prevent many migrants from seeking treatment until their condition is very serious. Burmese refugees and migrants in Thailand are just one example, MSF has witnessed similar problems in South Africa, Belgium and other contexts.

As a humanitarian organization, MSF responds to the lack of access to care, providing medical and other basic needs of refugees and migrants, without regard to their legal status.

Many of those seeking care with MSF have fled war and violence, arriving in a vulnerable state from their countries of origin where MSF also works to address the impact of violence. Yet, at the level of host countries, the concrete result of legal, policy and practical barriers facing migrants leave MSF with multiple barriers to access and assist them.

#### 4. In conclusion: "mixed" flows and the challenge to humanitarians

With the current pressures, refugees and migrants – arriving in mixed flows – remain hidden in urban settings and are practically impossible to openly and safely target for assistance. By contrast to classic refugee camp settings, few legal frameworks outline this population's rights to assistance, state obligations to grant access to humanitarian actors or general guidelines for the negotiation of humanitarian access. Also by contrast to typical refugee camp settings of the past, many host countries are headed by stronger governments that may resist recognition of refugees or humanitarian needs within their borders.

In contexts of violence and displacement, MSF has long advocated for a preservation of humanitarian space – states' and other actors' recognition and respect for humanitarians' independent action to assess needs and assist the most vulnerable. The ever more restrictive legal and practical barriers facing refugees and migrants challenge us to find ways both to reach them where they are – but also to find language and means to advocate toward states for greater responsibility to assist and protect refugees and to ensure that humanitarian actors have space to access and assist them where gaps remain.

Providing medical care and advocating for access to health for migrants in mixed flows is one starting point, but we and other humanitarian actors are challenged to remain vigilant and responsive to the needs of populations on the move, who remain vulnerable and too often hidden from view.

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## NOTES

1. E.g. Refugee from Burma – patient at an MSF project in Malaysia: "Life back home was impossible. We had virtually no income. We would only have meat once a month. My father had a small plot of land and grew food. But when he died, the government took our land away. If I wanted to use my father's land, I would need to rent it. I could not afford this. I left because I had to survive." E.g. People leaving Zimbabwe often recount to MSF staff stories of flight, which include both political persecution and flight for economic survival.

2. For more information on MSF public campaigns on refugees, see MSF (En.d.); 2002).

3. UNHCR defines a protracted refugee situation as: "one in which refugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance" (UNHCR, 2004, p.1).

4. For a critical review on the question of aid dependency (frequently with a view toward refugee situations), arguing that transparent and reliable assistance to needs should be the focus of aid rather than avoidance of dependency, see Harvey and Lind (2005).

5. For instance, in 2007 Greece alone received more than 112,000 migrants. However, from a total of approximately 25,000 registered asylum claims, only eight persons were granted refugee status – the main nationalities in MSF consultations were people originating from Iraq, Afghanistan, Somalia and Pakistan.

6. MSF has been active in Malta since August 2008.

7. MSF worked on the southernmost island of Italy, Lampedusa, from 2002 to 2008 (MSF, 2007a).

8. For instance, within the European Union there are now common visa policies, carrier sanctions on carriers carrying undocumented migrants, and extra-territorial controls conducted by airline staff and immigration officers stationed abroad to hinder unwanted arrivals. An EU agency, Frontex, was created to increasingly cooperate on border control. For more info on Frontex, see European Union (En.d.).

9. Art. 33 of the 1951 Refugee Convention and considered to be customary law.

10. See, e.g. MSF (2007c), together with a more in-depth documentation report MSF (2007b). Similar work in detention centres was carried out in Malaysia (see above).

## RESUMO

A atuação internacional de Médicos sem Fronteiras (MSF) com refugiados revela uma transição que cada vez mais entrelaça as diversas formas de migração de origem política e econômica. A evolução da natureza das migrações e dos deslocamentos, em particular os fluxos de refugiados, e as respostas dos governos a essas movimentações, representam um novo dilema para a assistência humanitária. Nesse artigo, MSF documenta o impacto concreto dessas transformações e a reação de nossa abordagem operacional. Argumentamos que essas transformações representam um desafio às organizações humanitárias com relação ao acesso e à assistência prestada às pessoas fugindo da violência e em busca de refúgio, assistência e proteção em outros países. Em contextos de violência e deslocamento, MSF há tempos defende a preservação de espaços humanitários, o reconhecimento e o respeito por parte dos Estados e de outros atores pelas ações humanitárias independentes, para que avaliem as necessidades e assistam os mais vulneráveis. As barreiras legais e operacionais cada vez mais restritivas enfrentadas pelos migrantes e refugiados nos confronta a encontrar meios para alcançá-los onde estiverem, como também a encontrar uma linguagem e caminhos que nos possibilitem advogar junto aos Estados a ampliação de suas responsabilidades na promoção de assistência e proteção aos refugiados, garantindo que os agentes humanitários tenham espaço para acessar e assistí-los onde ainda seja necessário.

## PALAVRAS-CHAVE

Migrantes – Refugiados – Deslocamentos – Direito à saúde – Acesso a cuidados médicos – Médicos sem Fronteiras.

## RESUMEN

El trabajo mundial de Médecins Sans Frontières (MSF) revela una transición hacia formas mucho más mixtas de migración tanto política como económica. La naturaleza cambiante de la migración y el desplazamiento, en particular del flujo de refugiados, y la respuesta gubernamental a éste, representa un nuevo dilema para la asistencia humanitaria. En este artículo, MSF documenta el impacto concreto de este desafío y nuestro abordaje operacional en respuesta. Argumentamos que este desarrollo representa un desafío fundamental para los actores de ayuda humanitaria en términos de acceso y asistencia de personas huyendo de violencia y en búsqueda de refugio, asistencia y protección en otros países. En el contexto de violencia y desplazamiento, MSF tienen un largo pasado de defensa de la preservación de espacios-estado humanitarios y otros actores de reconocimiento y respeto por las acciones humanitarias independientes para evaluar las necesidades y asistir a los más vulnerables. Las barreras legales y prácticas más restrictivas afrontadas por refugiados y migrantes nos confrontan a encontrar maneras para localizarlos y contactarlos, pero también a elaborar un lenguaje y hallar medios para abogar para que los Estados con mayor responsabilidad asistan y protejan a los refugiados y garanticen que actores humanitarios tengan espacio para acceder y ayudar donde permanezcan espacios vacíos.

## PALABRAS CLAVE

Migrantes – Refugiados – Desplazamientos – Asistencia médica – Médecins Sans Frontières.



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in this document are the author's and do not necessarily reflect those of the UNHCR or those of the United Nations.

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#### ABSTRACT

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After the tragic events of September 11, 2001, there has been a strong interest amongst States in matters relating to national security. While every State has a right to ensure security and control borders, it is also necessary to ensure that the legitimate security interests of States are consistent with their international human rights obligations and that immigration controls do not indiscriminately affect those refugees in need of international protection, so as not to undermine the international regime for protection of refugees. This article explores the links between the security of States and the international protection of refugees, focusing on the compatibility of both themes. Security is both a right of refugees and a legitimate interest of States. It is therefore important to understand that the security of States and the protection of refugees are complementary and mutually reinforcing. In this sense, legislation regarding refugees and fair and effective operational procedures for the determination of refugee status can be utilized by States as useful tools to solidify and strengthen their security.

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#### KEYWORDS

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Security – Human rights – International refugee protection.



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# THE LEGITIMATE SECURITY INTERESTS OF THE STATE AND INTERNATIONAL REFUGEE PROTECTION

Juan Carlos Murillo

## I. Introduction

In recent years, particularly after the tragic events of September 11, 2001, there has been a strong interest amongst States in matters relating to national security. The United Nations High Commissioner for Refugees (UNHCR) recognizes the right of States to ensure security and control borders. However, it is necessary to ensure that the legitimate security interests of States are consistent with their international human rights obligations and that immigration controls do not indiscriminately affect those refugees in need of international protection.

Indeed, the growing security concerns of States have affected refugees and could undermine the international regime for protection. Security concerns and the fight against terrorism have exacerbated restrictive asylum policies, which have been implemented by many countries in different parts of the world. Similarly, in some cases refugees have been perceived as threats to the security of states and even as potential terrorists based on their nationality, religion or country of origin. Some mass media have presented to the public a picture in which the issues of security and the fight against terrorism are seen as incompatible with international obligations of States on human rights and the international protection of refugees. All this explains why security is seen today as one of the major challenges for the international protection of refugees, on par with the challenges of mixed migration, racism, intolerance and xenophobia<sup>1</sup>.

Security is certainly a legitimate interest of States. The State has a right to protect itself and to adopt policies and measures to protect its population, including all residents under its jurisdiction, whether nationals or non-nationals. States, in good faith, have also undertaken international obligations in human rights, including the international protection of refugees. The Universal Declaration of

*Notes to this text start on page 130.*

Human Rights of 1948 states that every person has the right to seek and enjoy asylum protection in cases of persecution. On the American continent, this basic human right is enshrined in most generous terms, in both the American Declaration of the Rights and Duties of Man of 1948 and the American Convention on Human Rights 1969, which state that **every person has the right to seek and receive asylum abroad in case of persecution**, in accordance with international agreements and national legislation.

However, it is important to note that the legitimate interest of security is compatible with the international protection of refugees, and must be executed with respect for human rights. Indeed, security and the fight against terrorism are human rights issues equal to the international protection of refugees, and should not be viewed as antithetical or in conflict with one another. Refugees are often the first victims of a lack of security and terrorism. It is therefore important to discuss how the two rights complement each other and how the adoption of public policies, regulatory and institutional frameworks for the international protection of refugees can reaffirm and strengthen the security of States.

This article explores the links between the security of States and the international protection of refugees, focusing on the compatibility of both themes.

As outlined below, when adopting the Convention Relating to the Status of Refugees of 1951, States balanced their legitimate security concerns with the humanitarian needs of refugees who require and deserve international protection. Legitimate interests in security were also safeguarded by States in Latin America when they adopted regional instruments concerning the protection of refugees, such as the Cartagena Declaration on Refugees of 1984, the San José Declaration on Refugees and Displaced Persons of 1994, and the Declaration and Plan of Action of Mexico to Strengthen International Protection of Refugees in Latin America of 2004.

The humanitarian needs of those requiring international protection, who continue to suffer from persecution, intolerance, massive human rights violations, widespread violence and internal conflicts, are not unrelated to the legitimate national and regional security concerns of States. However, it is important to raise awareness of the fact that refugees are victims of insecurity and terrorism, not their causes<sup>2</sup>, and that States can count on an international regime of refugee protection that takes into account their legitimate security concerns.

## II. Security as a Fundamental Right for Refugees and States

To begin, it must be said that security is vital both for the respect and enjoyment of other human rights and for strengthening the rule of law. Security is an individual right as well of a right of the State itself. Security makes it possible to preserve the human right to seek asylum and protects the very integrity of institutions that protect victims of persecution. Indeed, refugees seek the security and protection that is not present or cannot be accessed in their countries of nationality or habitual residence. The State has an obligation to protect its citizens and all persons under its jurisdiction.

Security as a fundamental right of asylum seekers and refugees influences and is

present throughout the **cycle of forced displacement**. In this regard, it is important to emphasize how the enjoyment of this right may be a factor in the **prevention** of forced displacement, while its absence is one of the root causes of refugee flows. Accordingly, in certain situations, there may be a **causal link** between the absence or lack of security as a fundamental right of all individuals, and the subsequent threat to or actual persecution of such individuals, and the need for international protection. Thus, impunity and insecurity are factors destabilizing the Rule of Law, and can contribute to forced displacement.

Furthermore, asylum seekers and refugees, as human beings under the jurisdiction of a State, are entitled to enjoy security, as it is a human right of every individual. Refugees are also **holders** of fundamental rights, and hence have access to the basic rights established in the Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol, as well as to the human rights enshrined by other international instruments, both universal and regional. In this sense, it can be argued that security as an inherent right of human beings directly affects the **quality of asylum** granted to refugees. Certainly, if they do not enjoy security in the country of asylum, it is questionable to speak of effective protection of refugees, and these refugees may need to seek protection in another country.

Finally, security plays a role in the search for **lasting solutions** for refugees. The restoration and strengthening of this right may encourage voluntary repatriation<sup>3</sup>. Similarly, the validity of this right allows and promotes respect for local integration, giving refugees the opportunity to start a new life in host communities in countries of asylum. In the alternative, the lack of security for refugees in countries of asylum can give rise to a need to be relocated or to seek protection in a third country.

In a world in which security, as an expression of the legitimate interests of States, influences the definition and adoption of public policies, it is necessary for States to fairly balance their legitimate national security interests and their international obligations for the protection of human rights<sup>4</sup>. Presently, States invoke national security interests in adopting restrictive policies on asylum, giving precedence to immigration controls, without establishing sufficient safeguards to identify and ensure protection to asylum seekers and refugees.

Personal safety is a fundamental right of individuals, recognized by the various human rights instruments, but in certain circumstances, the State may validly suspend the exercise of certain rights and guarantees in the interests of national security.

The American Declaration of the Rights and Duties of Man provides in Article XXVIII that individual rights are limited by the rights of others, **by the security of all**, and by the just demands of general welfare and democratic development. Consequently, personal security is subject to the safety of other individuals.

The American Convention on Human Rights also allows the suspension of rights in the event of war, public danger or other emergency that threatens the independence or **security** of the State, provided that the extent and length of time that rights are suspended are strictly tailored to the exigencies of the situation. The Convention also requires that the suspension of rights in this context be consistent with other obligations under international law, and that there be no discrimination in its application (Article 27, American Convention on Human Rights, 1969 and Inter-American Court of

Human Rights, 1987). However, the American Convention sets out a series of rights that are not subject to derogation (Article 27.2), including the judicial guarantees for the protection of these rights.

In this respect, the Inter-American Court has stated that:

*a State “has the right and duty to ensure its own safety” (footnote omitted), but this right must be exercised within the limits and under the procedures which preserve both public safety and the fundamental rights of the individual (Inter-American Court of Human Rights, 1999).*

Finally, it is important to note that the American Convention on Human Rights also establishes the possibility of restricting the enjoyment and exercise of rights and liberties recognized therein, provided that said restrictions are based on laws that address the common good, and that the restrictions are based on the same (Article 30, Inter-American Court of Human Rights, 1986).

While it is possible to suspend or restrict the enjoyment and exercise of certain rights and freedoms, such measures are limited by human rights instruments. In the same vein, the Inter-American Court has indicated that it is a sovereign right of States to make their own immigration policies, but that such policies should be compatible with the standards of human rights protection in the American Convention (Inter-American Court of Human Rights, 2000). According to the UNHCR, these limits on the sovereign power of States to adopt immigration policies are also present in other human rights instruments, among them the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol.

### III. Security Implications in the International Protection of Refugees

The growing concern amongst States concerning security issues and the fight against terrorism has exacerbated restrictive policies on asylum and refugee protection. Such policies had already been implemented in many countries, including many in the years before the tragic events of September 11, 2001. The perverse act of equating refugees to terrorists arises from a lack of knowledge concerning the criteria used to determine refugee status, as well as from ignorance to the fact that terrorism and violence create refugee outflows. Refugees do not cause terrorism, but they are its victims.

Security concerns amongst states have affected the protection of refugees<sup>5</sup>, particularly in three specific areas:

1. Access to national territory,
2. The process for determining refugee status,
3. The exercise of rights and the search for durable solutions.

With respect to access to national territory, people in need of protection are now subject to the indiscriminate application of stricter immigration controls, which are increasingly applied in countries of origin, transit countries, and on the high seas. Persons are subject



to scrutiny based on their nationality, religion, or country or region of origin. These situations represent additional limitations on a refugee's ability to enter a territory in search of protection.

Additionally, administrative detention is used with increasing frequency with those seeking asylum, including, in some countries, the application of automatic detention provisions based on the nationality, origin, or religion of the applicant, which violates the requirement that detention be exceptional in nature, the principle of non-discrimination (Article 3, Convention Relating to the Status of Refugees of 1951), and the requirement that no sanction be applied for illegal entry (Article 31 of the Convention Relating to the Status of Refugees of 1951).

Security considerations are also negatively impacting the interpretation and the definition of refugee status through the use of increasingly restrictive criteria of Inclusion Clauses. Refugees have not been defined by virtue of their nationality since the adoption of the Refugee Convention of 1951, which defines the key element to justify a person seeking refugee status as a "well-founded fear of persecution", in connection with one of the "protected grounds"<sup>6</sup>. However, some countries now take the refugee's manner of entry into the country, nationality, ethnic origin, and region of origin into account when determining refugee status.

The Refugee Convention of 1951 establishes that some refugees may not benefit from international protection, because they either do not need it or do not deserve it (Exclusion Clauses). However, the UNHCR has observed that, in some countries, Inclusion Clauses have been applied in a manner so restrictive so as to render the application of Exclusion Clauses unnecessary.

It is troubling that, in the interest of security, Exclusion Clauses are actually being applied before determining whether applicants meet the definitional requirements set forth in the Convention Relating to the Status of Refugees of 1951. Accordingly, UNHCR reiterates that, in order to safeguard the right of asylum and the international protection regime for refugees, it is necessary to apply the Inclusion Clauses first and only afterwards analyze the possible application of the Exclusion Clauses. It is first necessary to establish whether a person meets all the elements set forth in the refugee definition, then to analyze **whether the person needs or deserves international protection**.

Notwithstanding the limited and restrictive nature of the Exclusion Clauses in the refugee definition, some countries have introduced lax terms and new motivations for their implementation. Thus, it is a cause for concern that some countries intend to use the concept of "national security" as if it were a new exclusion clause and a new cause for denying refugee status, in contravention of Article 1.F of the Convention Relating to the Status of Refugees of 1951.

The legitimate security concerns of States were not alien to the framers of the Convention Relating to the Status of Refugees of 1951, which is precisely why they established that, in certain circumstances, some people **do not need or deserve international protection**. While the Exclusion Clauses are absolute and restrictive in their interpretation, States that invoke "national security" to deny refugee status, as if it were a new "Exclusion Clause," are in fact violating the spirit and the provisions of the 1951 Convention.

In the same vein, the UNHCR reiterates that the security exception to the prohibition of expulsion or return (principle of *non-refoulement*), set forth in the second paragraph of Article 33 of the Convention Relating to the Status of Refugees of 1951, is not an additional ground for exclusion, but rather an exception only to be invoked by the State in exceptional circumstances.

Finally, it is clear that security considerations may affect the exercise of fundamental rights of refugees, such as the search for lasting solutions to their problems. Indeed, an uninformed public opinion, or manipulation of information for populist ends, can generate xenophobia and discrimination against refugees from a certain nationality, a particular ethnicity or a specific religion. Security considerations also affect the local integration of refugees and the quotas established by States that regulate the number of resettled refugees they will accept.

#### IV. Legitimate Security Interests and the Convention Relating to the Status of Refugees of 1951

Since security is a right of both the State and the refugees seeking protection therein, it is important to consider how this mutual linkage is reflected in the Convention Relating to the Status of Refugees of 1951.

As outlined above, the legitimate security concerns of States are not inconsistent with the international protection of refugees, but are adequately covered in several specific provisions of the Convention Relating to the Status of Refugees of 1951<sup>7</sup>, namely:

*The definition of a refugee  
(art. 1 of the Convention Relating to the Status of refugees).*

The Convention Relating to the Status of Refugees of 1951 establishes the definition of a refugee, the rights and obligations of refugees, and the general framework for their treatment and protection. By identifying the elements or criteria of the refugee definition, Article 1 of the 1951 Convention reminds us that refugees **must not only be in need of international protection, but must also be deserving of it**. Article 1.F. safeguards the legitimate security concerns of the State by establishing who, despite having met the definitional requirements for refugee status, nevertheless does not deserve international protection. In this regard, Article 1.f. of the Convention Relating to the Status of Refugees of 1951, states:

*The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that<sup>8</sup>:*

- (a) He/she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
- (b) He/she has committed a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee;*
- (c) He/she has been guilty of acts contrary to the purposes and principles of the United Nations.*

Accordingly, a State has every right to ensure that those who meet the Inclusion Elements of the refugee definition are not involved in any of the grounds for exclusion. Stated differently, States can ensure that those with the profile of a refugee also deserve international protection. It is precisely for this reason that, to ensure State security and full respect for the right of asylum, **it is in a State's best interest to utilize fair and efficient refugee status determination mechanisms to identify those who need and deserve international protection.**

In order to safeguard the integrity of asylum and the peaceful, apolitical and humanitarian character of this institution for international protection, States may, under certain circumstances, **cancel or revoke refugee status.** It may be that the States erred or were misled when making the refugee status determination. Similarly, a refugee may commit certain acts in the country of asylum, or in a third country, whose gravity could give States good reasons to withdraw his or her refugee status, even if said status was validly issued. Legitimate **cancellation** of refugee status arises when the State is satisfied that the refugee committed fraud or lied when presenting the facts on which his or her application was based, or when an Exclusion Clause would have been applied had all the relevant facts of his case been known. Similarly, a State may validly **revoke** refugee status in cases where the person, having received said status, commits a crime against peace, a war crime or a crime against humanity, or when he or she is guilty of acts contrary to the purposes and principles of the United Nations<sup>9</sup>.

Also, the State has every right to punish a refugee who commits a crime on its territory. **Refugee status does not imply immunity, nor can it encourage impunity.** If a refugee does not respect or violates the laws in the country of asylum, he or she is subject to the application of the same measures and sanctions as nationals or any other foreigner living under the jurisdiction of the State.

Consequently, a coherent and consistent interpretation of the refugee definition allows a balance between the legitimate security interests and the humanitarian needs of those who require and deserve international protection. The rigorous application of inclusion and exclusion clauses of the refugee definition safeguards the legitimate interests of States and allows them to identify those who need and deserve international protection and those who do not. Accordingly, it is in the best interest of States to have domestic legislation concerning refugees, as well as operational procedures for the fair and efficient determination of refugee status.

### *Provisional Measures*

*(art. 9 of the Convention Relating to the Status of Refugees of 1951).*

Article 9 of the 1951 Convention Relating to the Status of Refugees allows States, in times of war or other **grave and exceptional circumstances**, to apply those provisional measures they deem essential for national security in the process of determining refugee status. States may continue to apply such measures even to a previously recognized refugee, when necessary for national security.

Administrative detention of an asylum seeker or refugee should always be

the exception, not the rule. The exceptional character of detention is reaffirmed in Article 9, noted above. However, the legitimate interests of States have been properly safeguarded in times of war or grave and exceptional circumstances, in the interests of national security, since this article permits the arrest and detention of a person when determining his or her refugee status, or even after having given that status, provided that the measures taken are necessary for national security.

Accordingly, in valid circumstances, the State may invoke reasons of national security with respect to an asylum seeker or refugee and effectuate his or her arrest and detention. It bears repeating that this is an exceptional measure and should not be used as an excuse or legal justification for the detention of asylum seekers and refugees<sup>10</sup>.

### *Travel Documents*

*(art. 28 of the Convention Relating to the Status of Refugees of 1951).*

Article 28 of the Convention Relating to the Status of Refugees of 1951, allows State parties to deny issuance of travel documents to refugees wishing to move outside their territory for compelling reasons of national security or public order.

Again, it bears repeating that this is an exceptional measure, as it is clear that the issuance of personal documentation, including the refugee travel document, is in the self-interest of the State and promotes its security by allowing it to know and clearly identify those who have said status within its territory.

### *Expulsion of Refugees*

*(art. 32 of the Convention Relating to the Status of Refugees of 1951).*

In accordance with the 1951 Convention Relating to the Status of Refugees and the International Covenant on Civil and Political Rights (art. 13), a State may lawfully expel a refugee from his or her territory in the interests of national security, when the decision conforms with due process requirements. The same Article 32 of the 1951 Convention, as well as the International Covenant on Civil and Political Rights (art. 13), provide for exceptions to the guarantees of due process in deportation proceedings where compelling reasons of national security exist<sup>11</sup>. However, the refugee should be guaranteed a reasonable opportunity to arrange for legal entry to a third country.

In contrast, the American Convention on Human Rights does not establish national security as grounds for the deportation of aliens who are lawfully within the territory of a State, nor does it provide exceptions to the guarantees of due process in deportation proceedings<sup>12</sup>.

### *Prohibition on Expulsion or Return*

*(art. 33 of the Convention Relating to the Status of Refugees of 1951).*

The principle of *non-refoulement* is the cornerstone of international refugee law

and is based on the idea that a State should always refrain from placing a refugee, by expulsion or return, at the frontiers of a territory where his or her life or freedom would be at risk because of his or her race, religion, nationality, membership of a particular social group or political opinion.

However, the principle of *non-refoulement* allows for exceptions under the Convention Regarding the Status of Refugees of 1951 where there are reasonable grounds to believe that the refugee in question may be regarded as a danger to the security of the host country.

It is important to reiterate that this is an exceptional measure applied only in grave situations, and is never to be considered as an additional Exclusion Clause. Even if the State can validly apply the exception to the principle of *non-refoulement* contemplated in the second paragraph of Article 33 of the Convention Relating to the Status of Refugees of 1951, provisions of other human rights instruments could also be relevant and applicable<sup>13</sup>.

The Convention Relating to the Status of Refugees of 1951 fairly balances the legitimate security interests of states and the humanitarian considerations relating to refugee protection. As we strengthen the effective implementation of this instrument through the adoption of national legislation on refugees and the establishment of just, fair, and efficient operational mechanisms for the determination of refugee status, States will have better tools to ensure their safety while maintaining full compliance with their international obligations regarding the protection of refugees.

## V. Security and Regional Instruments

Security issues and refugee protection are not mutually exclusive; rather, they are complementary and mutually reinforcing. The links between the legitimate security interests of States and humanitarian needs of refugee protection have been reinforced through the various resolutions of the General Assembly and Security Council of the United Nations concerning the fight against terrorism. In effect, these decisions highlight the fact that the fight against terrorism must take place within the framework of international law, and in particular, international refugee law, international humanitarian law and international human rights law. The same happens at the regional level, and, consequently, the OAS General Assembly has highlighted in its resolutions the need for the fight against terrorism to be effectuated with respect for international law and human rights.

In this sense, it is important to note that the Inter-American Convention against Terrorism provides important safeguards for the international protection of refugees. Article 12 provides:

*Each State party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that refugee status is not granted to any person in respect of whom there are serious reasons for considering that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention (emphasis added).*

Article 15 also states that:

1. *The measures carried out by the States parties under this Convention shall take place with full respect for the rule of law, human rights, and fundamental freedoms.*
2. *Nothing in this Convention shall be interpreted as affecting other rights and obligations of States and individuals under international law, in particular the Charter of the United Nations, the Charter of the Organization of American States, international humanitarian law, international human rights law, and international refugee law.*
3. *Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and **applicable provisions of international law.** (emphasis added).*

Regional instruments for the protection of refugees in Latin America have also safeguarded the legitimate security interests of States. In this regard, it is interesting to note that the Cartagena Declaration on Refugees of 1984, based on specific provisions of the American Convention on Human Rights, constitutes a practical and flexible tool that articulates the **legitimate concerns of national security and regional stability, and humanitarian needs of individual protection. Its focus is the protection and search for lasting solutions, recognizing that there are people who need and deserve international protection.**

It is precisely those legitimate concerns for national security and regional stability, in a context where there were various peace efforts leading to the need to provide protection for a growing number of refugees with new characteristics, that spurred dialogue, political will, consultation, and support of the international community towards the adoption of the Cartagena Declaration on Refugees of 1984.

The Cartagena Declaration reaffirms the civilian, non-political and strictly humanitarian grant of asylum and the recognition of refugee status, which should not be considered an unfriendly act between States. It also stresses the importance of respect for the principle of *non-refoulement* and the principle of *jus cogens*. It also includes a regional refugee definition, which incorporates the element of security as a protected right. In this regard, it recommends that

*[...] the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order<sup>14</sup>.*

The San Jose Declaration on Refugees and Displaced Persons of 1994, adopted to commemorate the tenth anniversary of the Cartagena Declaration on Refugees of

1984, reiterates the importance of security to enable refugees to enjoy and exercise their fundamental rights, as well as the importance of the **issues relating to refugees being discussed in regional fora on security**. It recommends that issues of international refugee protection be on the agenda of regional security fora, like the other issues related to forced displacement and migration<sup>15</sup>.

Finally, the legitimate security concerns of States were contemplated in the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees of 2004, adopted to commemorate the twentieth anniversary of the Cartagena Declaration on Refugees of 1984.

In this sense, the Mexico Declaration and Plan of 2004 reiterated the importance of security as a fundamental right of those who need and deserve international protection as refugees, also reaffirming that “national security policies and the fight against terrorism should be framed by respect for domestic law and international instruments for the protection of refugees and for human rights in general”<sup>16</sup>.

The Declaration also stresses the need to “take into account the legitimate security interests of States” to foster a broad and open dialogue with the States for the regulation of State practice and doctrine regarding the application of the regional refugee definition, and in particular the application of the Exclusion Clauses.

Accordingly, it is clear that regional instruments for the protection of refugees in Latin America have fairly balanced the legitimate security concerns of States with the humanitarian needs of those refugees who require and deserve international protection.

## VI. Final Considerations

The phenomenon of forced displacement in Latin America has changed, but survives as a contemporary phenomenon. Currently in the region, it is estimated that there are more than three million people who need and deserve international protection. New trends in forced displacement reflect new forms of persecution, particularly those resulting from the activities of non-state actors in situations where national protection is unavailable or ineffective. Similarly, as the UNHCR has recognized, the context in which international protection is provided has changed in the face of increasing concerns regarding security and terrorism, the management of migration flows, and racism, racial discrimination, xenophobia and intolerance.

Security is both a right of refugees and a legitimate interest of States. It is therefore important to understand that the security of States and the protection of refugees are complementary and mutually reinforcing. In this sense, legislation regarding refugees and fair and effective operational procedures for the determination of refugee status can be utilized by States as useful tools to solidify and strengthen their own security. Coherent and consistent implementation of the refugee definition allows States to identify those who need and deserve international protection and those who do not. This is precisely why immigration controls should not be applied indiscriminately, but must have specific safeguards to permit the identification of those who need international protection as refugees.

The UNHCR understands the legitimate security concerns of States, supports

the fight against terrorism, and reiterates the importance of preserving the integrity of asylum as an instrument of protection for the persecuted. Terrorists and criminals should not and do not benefit from the recognition of the refugee status, by virtue of application of the Exclusion Clauses. However, preserving the integrity of asylum as an instrument of protection presupposes a correct interpretation of the refugee definition in a procedure that meets all the guarantees of due process and respect for basic human rights.

As outlined above, the legitimate security interests of States and the protection of refugee are not antagonistic or mutually exclusive. The Convention Relating to the Status of Refugees of 1951 includes among its provisions specific measures to safeguard national security and the legitimate interests of States. Similarly, the regional instruments for the protection of refugees have fairly balanced legitimate security concerns of States with the humanitarian needs of those requiring and deserving international protection.

Notwithstanding the above, it is of concern to the UNHCR that security measures and the fight against terrorism could further restrict asylum policies on the continent, as well as the coherent and consistent interpretation of the refugee definition. Therefore, States must be supported in fulfilling their international obligations so that security and refugee protection are complementary and mutually reinforcing.

Finally, let us conclude with the words of our former Secretary General of the United Nations: “No person, no region and no religion should be condemned because of the heinous acts of some individuals” (ANNAN, 2001).

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## NOTES

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1. As stated in recent years by the High Commissioner, Mr. António Guterres, in his inaugural address to the Executive Committee of the UNHCR Program.
2. As High Commissioner, António Guterres stated: "Preserving asylum means changing the notion that refugees and asylum seekers are among the causes of insecurity or terrorism, rather than victims thereof. Unfortunately, at present, there are many situations in which the concept of asylum is misunderstood, even equated to terrorism. It is true that terrorism must be fought with determination, but asylum is, and must remain, a central tenet of democracy" (GUTERRES, 2005).
3. The importance of security as a key element in facilitating and promoting voluntary repatriation has been highlighted by each of the UNHCR Executive Committees in Conclusion No. 18 (XXXI) of 1980 (UNHCR, 1980), and Conclusion No. 40 (XXXVI) of 1985 (UNHCR, 1985).
4. Regarding the balance between: maintaining internal security, fighting terrorism and respecting human rights, including the right of asylum; and the need to establish specific safeguards, see IACHR (2002). Also, the Inter-American Convention against Terrorism, adopted in Barbados in June 2002, provides specific safeguards for human rights and international refugee law.
5. The protection of refugees is not incompatible with the legitimate security interests of States. For more on this, see UNHCR (2001). On how terrorism has affected the international protection of refugees, see the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr. Martin Scheinin (SCHEININ, 2007).
6. The protected grounds enumerated by Article 1 of the Convention Relating to the Status of Refugees of 1951 are: race, religion, nationality, and membership of a particular social group or political opinion.
7. See the following provisions of the Convention Relating to the Status of Refugees of 1951: Article 9 regarding provisional measures, Article 28 regarding the issuance of travel documents, Article 32 on expulsion of refugees and Article 33 relating to the *non-refoulement* principle. (1951).
8. It is important to note that the parameter "reason to believe" in article 1F of the Convention on the Status of Refugees has been included in the Inter-American Convention against Terrorism (Approved

at the plenary session of the General Assembly of the Organization of American States on June 3, 2002, AG/RES. 1840 (XXXII-O/02). The Inter-American Convention Against Terrorism provides specific safeguards for the protection of refugees in Articles 12 and 15.

9. For more on exclusion, cancellation and revocation, see UNHCR (2003).
10. Regarding the detention of asylum seekers and refugees, see UNHCR (1998).
11. However, the Human Rights Commission has reiterated that the review of the deportation order is an integral part of this right. In this way, it has indicated in its final observations in respect of several countries, including: **Belgium** 08/12/2004 CCPR/CO/81/BEL (paragraphs 23-25), **Lithuania** 05/04/2004 CCPR/CO/80/LTU (paragraph 7), **Yemen** 08/12/2002 CCPR/CO/75/YEM (paragraph 18), and **New Zealand** 08/07/2002 CCPR/CO/75/NZL (paragraph 11). The excerpts of the final observations of the Human Rights Commission are available by theme and in Spanish at the ACNUR website, at the following address: <http://www.acnur.org/secciones/index.php?viewCat=222>.
12. On the basis of Article 22.6 of the American Convention on Human Rights, an alien who is lawfully in the territory of a State may be expelled only pursuant to a decision reached in accordance with the law and in no case can be expelled to a country, regardless of whether or not it is the country of origin, where his or her life or personal liberty is at risk of violation because of race, nationality, religion, social status or political opinion.
13. The provision in Article 22.8 of the American Convention on Human Rights is more broad than the wording of Article 33 of the Convention Relating to the Status of Refugees of 1951 and does not allow for exceptions. For this reason, refugees in the Americas enjoy the right to not be returned. See UNHCR (2001, p. 5).
14. See the third recommendation in the Cartagena Declaration on Refugees, in the UNHCR legal database.
15. See the related recommendation in the San Jose Declaration on Refugees and Displaced People (1994), in the UNCHR legal database.
16. For more, see the Inter-American Commission on Human Rights (2002), which includes a chapter on asylum and the protection of refugees.

## RESUMO

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Após os trágicos acontecimentos do 11 de setembro de 2001, observa-se um forte interesse por parte dos Estados por questões relativas à segurança nacional. Mesmo que todo o Estado tenha o direito de garantir sua segurança e de monitorar suas fronteiras, é também necessário garantir que os interesses legítimos do Estado em segurança sejam compatíveis com suas obrigações internacionais em direitos humanos e que o controle migratório não afete indiscriminadamente os refugiados que necessitam de proteção internacional, respeitado, assim, o regime internacional de proteção dos refugiados. Este artigo explora a ligação entre segurança estatal e proteção internacional de refugiados, expondo a compatibilidade entre os dois temas. Segurança é tanto um direito dos refugiados quanto um interesse legítimo do Estado. Consequentemente, é importante ressaltar que a segurança do Estado e a proteção dos refugiados são temas que se complementam e reforçam mutuamente. Nesse sentido, uma legislação concernente a refugiados e medidas justas e efetivas que determinem o status de refugiado podem ser utilizadas como ferramentas a favor do Estado para solidificar e fortalecer sua segurança.

## PALAVRAS-CHAVE

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Segurança – Direitos Humanos – Proteção internacional dos refugiados.

## RESUMEN

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Tras los trágicos acontecimientos del 11 de septiembre de 2001, se ha generado un gran interés entre los países en materia de seguridad nacional. Mientras que todo Estado tiene derecho a promover su seguridad y el control de sus fronteras, también es necesario asegurarse de que los intereses de seguridad legítimos de los Estados sean consistentes con sus obligaciones de derechos humanos y que los controles de inmigración no afecten indiscriminadamente a los refugiados necesitados de protección internacional, para no perjudicar el régimen internacional de protección de refugiados. Este artículo explora las relaciones entre la seguridad de los Estados y la protección internacional de los refugiados, centrándose en la compatibilidad de ambos temas. La seguridad es tanto un derecho de los refugiados como un interés legítimo de los Estados. Es por lo tanto importante que entendamos que la seguridad de los Estados y la protección de los refugiados son complementarias y se refuerzan mutuamente. En este sentido, la legislación en lo concerniente a los refugiados y unos procedimientos operacionales justos y eficientes para la determinación de estatus de refugiado pueden ser utilizados por los Estados como herramientas útiles para consolidar y reforzar su seguridad.

## PALABRAS CLAVE

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Seguridad – Derechos humanos – Protección internacional de refugiados.

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#### ABSTRACT

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The objective of this article is to understand the interaction between the United Nations High Commissioner for Refugees (UNHCR) and the Colombian government in their attempts to mitigate forced internal displacement, as well as the main challenges faced in addressing this problem. This article focuses on the interpretation adopted by the forementioned actors, who link this displacement to the armed conflict the country that has endured for more than forty years. Although this issue has been discussed for decades, the formulation of national policies intended to mitigate its effects came late, in the mid-1990s. Similarly, the UNHCR began paying more attention only in the late 1990s. The article concludes that there is a significant disparity between the development of norms regarding the internally displaced and the execution of such norms. For example, there needs to be greater coordination between national and local organizations, and national and international organizations. With respect to the prevention of internal displacement and the evaluation of the impact of these policies, the challenge is even greater; as such efforts are in the beginning stages. The UNHCR has used the same criteria as the Colombian government in executing its tasks; these criteria should be rethought and redefined in light of the High Commissioner's experience.

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#### KEYWORDS

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Internally displaced persons – Colombia – UNHCR – Armed conflict – Humanitarian crisis.



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# INTERNATIONAL COOPERATION AND INTERNAL DISPLACEMENT IN COLOMBIA: FACING THE CHALLENGES OF THE LARGEST HUMANITARIAN CRISIS IN SOUTH AMERICA

Manuela Trindade Viana

## 1. A long-standing humanitarian crisis and late-arriving solutions

There are approximately 13.5 million internally displaced persons in the world today (UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES [UNHCR], 2007). Of these, three million reside in Colombia. Even though opinions diverge as to the number of displaced Colombians, there is agreement about the growing and alarming nature of the problem. In addition to having their political, economic, social and civil rights violated, internally displaced persons suffer the disruption of their social networks, and they consequently have a reduced capacity to build and sustain a life in the community.

There are several explanations for internal displacement in Colombia. For some authors, the violence caused by the armed conflict – understood as a clash between guerrillas and the paramilitary, and between guerrillas and the national government – only partially explains this migration. Indeed, this displacement began in the 19<sup>th</sup> century, when the independence wars, the struggle for power between the two traditional Colombian political parties and the colonization of newly discovered lands were largely responsible for the massive displacement of individuals.

While recognizing the relevance of several explanations for forced internal displacement in Colombia, this article will focus on the interpretation that *directly* links the evolution of forced internal displacement to the armed conflict that has beset Colombia. This is the perspective applied in the policies aimed at the displaced populations implemented by the national government and international agencies, actors who will constitute the focus of the present article.

It is worth emphasizing that the massive displacement of individuals only became a political priority late in the country's history, which resulted in the

*Notes to this text start on page 151.*

long duration of the problem over several decades and a significant increase in the number of people affected. The first normative outlines about this topic took place beginning only in 1997, the year in which Law 387, a reference on the subject, was promulgated. The contours of the debate about forced displacement in Colombia are defined by the delayed response by the government, which allowed this problem to reach alarming heights.

The deterioration of the humanitarian situation in Colombia, by the end of the 1990s, captured the attention of the United Nations High Commissioner for Refugees (UNHCR), which, at the request of the Colombian government, set up a satellite office in Bogotá. UNHCR's work takes place on two fronts: on the one hand, the training of government agencies; on the other, working with the victims of forced displacement.

This article seeks to analyze the main national and international initiatives – focusing on those of the UNHCR – regarding the population of displaced persons. As a result, a brief analysis will be presented about the characteristics of internal displacement in Colombia, where I will identify, in the section on government and UNHCR policies, whether the challenges related to this problem have been incorporated in the efforts to overcome it. I hope to offer an instrument capable of facilitating critical reflection in regard to the development of policies to overcome this problem and prevent it from recurring.

## 2. Conditions and characteristics of forced displacement in Colombia

The study of internal displacement in Colombia has focused on the approach that links it directly to the hostilities, threats and human rights violations arising from the armed conflict. This theoretical framework is questioned by authors who consider this interpretation remote from the complexity of the issue, as the variables affecting the issue shift throughout Colombian territory. These authors point instead to four factors responsible for internal displacement in Colombia: the armed conflict; the struggle to control territory of geostrategic importance; competition for land, resulting in a rearrangement of land ownership; and social motivations.

Above all else, it is important to highlight that no argument is being made asserting that the armed conflict does not reflect the complexity of the internal displacement phenomenon. Far from being a mere clash of ideology or of policy conflicts between the guerrillas and the national government, the conflict also shows a complex interaction between social, political, and economic variables, and has a significant impact on agrarian issues. In other words, the dynamic of the Colombian armed conflict encompasses many of the factors considered individually by the forementioned authors, such as the struggle to control territory of geostrategic importance and social motivations.

Although it has a strong empirical foundation, the critique of the direct and unilateral relationship between internal displacement and armed conflict ignores the fact that when it comes to *forced* displacement, the use of violence plays a significant role. The data compiled by the Consultancy for Human Rights and Displacement (CODHES,

acronym in Spanish) corroborate this argument: in the period from 2002-2003, threats accounted for 47.5% of the reasons cited for the occurrence of displacement; armed confrontations, 19.9%; and murders and massacres, 13%.

Defending a broader analytical approach to internal displacement calls attention, however, to some interesting points. The first concerns the participation of the state and economic groups in the dynamic of displacement. Indeed, academic studies and debates have evolved in that they explore the state's responsibility in the trajectory of the armed conflict, whether through a lack of planning in its operations, where bombings often strike non-combatants<sup>1</sup>; or in its failure to guarantee the displaced physical and institutional protection.

The involvement of the state in causing internal displacement is even more notorious and direct in the case of fumigation. Indeed, in the first semester of 2008, the massive displacement of 13, 134 individuals was registered due to fumigations in the departments of Antioquia and Vichada (CODHES, 2008). Since the César Turbay Ayala administration (1978-1982), the government has used fumigations as the primary means of combating illicit crops. This strategy was adopted despite research studies showing the toxic effects of chemicals used in the fumigations (*paraquat* and *glifosato*) on human health and the environment. It is important to note, furthermore, that the fumigations continued to be carried out even in the absence of lasting results in reducing the area used for the cultivation of the coca leaf. If, in 1995, the cultivation of this raw material took up little more than 50,000 hectares, between 1997 and 2008, the smallest area recorded for such cultivation was 78,000 hectares<sup>2</sup> (UNITED NATIONS OFFICE ON DRUG AND CRIME [UNODC], 2009a, 2009b). The increase in militarization and fumigation has contributed to a situation of increasing insecurity and, consequently, to the displacement of populations in several of the country's regions.

The displacement can also occur through the influence of economic groups. At the same time there is a need for planning and an analysis of their impact on the local population and environment, interests tied to commercial agriculture and the implementation of mega-projects contribute to massive population displacement. The case of pipelines built in Antioquia, Urabá chochoano, Nariño, Cundinamarca, Norte de Santander and Arauca are emblematic examples of this practice. Internal displacement is, thus, aggravated by the logic by which economic interests tied to extensive livestock farming, agribusiness, the exploitation of natural resources and drug trafficking cooperate with or finance paramilitary groups who see forced displacement as the cheapest and most efficient method of gaining control of new territory.

In addition, the latifundio regions are attractive to drug trafficking groups that want to expand their crops, set up laboratories, build runways or develop further channels of trade. Other armed groups also have interest in occupying certain territories, for the continuation and strengthening of their armed initiatives, since control over territory implies control over important geostrategic resources that help finance the war.

The department<sup>3</sup> of Chocó, where one could observe a high level of displacement in recent years, constitutes an emblematic example: although it is one of the poorest regions in the country, its strategic position for drugs and arms trafficking – close to both the Pacific Ocean and the Caribbean Sea – and its richness of mineral resources,

appealed to the economic interests of armed actors. The same phenomenon occurred in the region of Bajo Putumayo (near the border with Ecuador), scene of clashes between the Revolutionary Armed Forces of Colombia (FARC) and paramilitary groups, as they competed for resources for the development of their illicit activities.

Generally speaking, the populations that have most been affected by internal displacement are peasants; according to the Ombudsman's Office of Colombia, the expulsion of individuals who inhabit rural areas of the country accounts for 63% of individual displacement (OMBUDSMAN'S OFFICE OF COLOMBIA, 2003, pp. 25-6). However, within this vulnerable population, there are two groups that are particularly vulnerable to being displaced: the Afro-Colombian and indigenous communities<sup>4</sup>. Between January 2000 and June 2002, 17.72% of the displaced population was black (OMBUDSMAN'S OFFICE OF COLOMBIA, 2003, p. 26) and 3.75% was indigenous. When viewed proportionally<sup>5</sup>, the rate of forced displacement is ten times greater amongst these populations than in other populations.

The means of expulsion within these communities involves murdering their leaders and forcibly recruiting young persons and is directly related to the existence of strategic resources in their territories<sup>6</sup>. It is important to highlight that, "due to their particular worldview and their daily practices in regard to land, [...] displacement generates loss and absence with respect to place, autonomy within their territory and food, as well as identity, history, spirituality and its forms of social organization as peoples, etc." (JACANAMIJOY, 2004, p.206)<sup>7</sup>. Land constitutes the *locus* of the social and religious rituals of the community, so that the dispersion arising from forced displacement affects the group's ability to pass on customs and traditions. Because of the motives explained above, these groups often choose to resist displacement, rather than abandon their lands.

Interestingly, although one might assume that cities would afford displaced families greater protection or, at least, anonymity – which would make them feel safe from threats – in addition to more information and social services in comparison with the areas from which they were expelled, the displaced are unfamiliar with the services offered and are unable to access the opportunities for individual progress offered by these cities. Still, while 20% of the displaced population fits into what could be considered "massive displacement" – more than ten households<sup>8</sup> or fifty persons – 80% fall into the category of individual displacement and arrive in these cities with little or no social support network. In other words, although the data show that the internally displaced migrate from rural areas to the cities, and specifically, from regions that are less developed to big cities, this change does not manifest itself as an improvement in the lives of the displaced.

Moreover, there are two characteristics worth paying attention to: the large number of municipalities affected by forced displacement and the decreasing rates of return. In 2008, 785 of the 1,140 municipalities in Colombian territory (that is, 68.86%) were affected by the expulsion or receipt of the internally displaced (CODHES, 2008), a number considerably higher than the 480 municipalities affected in 2000 (OMBUDSMAN'S OFFICE OF COLOMBIA, 2003, p.36).

With respect to the rate of return, in 2000, it was 37%; in 2002, in contrast,



it fell to 11% of the total displaced population. Given that returning to one's place of origin depends fundamentally on the guarantees offered by the state for the permanent protection of populations threatened by different armed groups, the decreasing rate of return, coupled with the territorial expansion of internal displacement, can contribute, first, to overcrowding in the cities, the primary destination of these populations; and, second, to the deterioration of the humanitarian situation – already assessed as quite grave – in Colombia.

It is interesting to observe that the same threat manifests itself in different ways depending on the territory in which it takes place. In other words, the same threat can produce different quantities of displaced persons. This difference can be attributed, amongst other factors, to the distance between the municipality where the threat was issued to the capital of the department; to the level of poverty in the rural zone of the municipality where the threat took place, relative to the level of poverty of that department's capital, one of the more common destinations; differences in the quality of life between the municipalities from which the populations depart and those to which they travel; the level of institutional presence<sup>9</sup> (the municipalities that are responsible for approximately 97% of the displaced have a level of institutional presence lower than or close to the national average; in contrast, the 20 municipalities that receive 66% of the displaced individuals have a level of institutional presence far higher than the national average); social capital<sup>10</sup> lost and sought after by the displaced.

In these places where the state's presence is weaker, one's needs are managed in a pre-institutional manner, normally some form of informal association, as the displaced make use of the few available resources (labor, fallow land, wooded areas, etc.) By being forcibly displaced, these communities lose the ties of interdependence that were so critically linked to their opportunities for progress, a process that scholars call “the tearing of the social fabric.”

As has already been stated, a large part of the discussion will take place in terms of the interpretations offered by governmental and international agencies, which links *forced* displacement to the *violence* of the armed conflict. It is not the aim of this article, however, to close the door on a broader approach to the problem. After all, “the mismatch between social and political relations in the recent past was too pronounced to believe that violence could disappear simply based on the decision of the organized actors (PÉCAUT, 2006).” On the contrary: based on the issues raised here, there is a need to develop a body of norms that adopts a more comprehensive approach when trying to understand internal displacement, taking into consideration economic and human development policies in the regions that are characterized as “expellers” of Colombians to the cities.

### 3. Domestic Policies Concerning the Displaced Population

Internal displacement has grown acutely in Colombia: in 2002, due to the resurgence of armed conflict, 411,779 people were affected by displacement, 20% more than in 2001. Although there were no numbers of this magnitude in subsequent years, they increased between 2003 and 2007, as the number of affected individuals grew from 207,607 to

305,966 (CODHES, 2003; 2007). This situation, considered grave by many national and international agencies, represents violations of fundamental social, economic, and cultural rights enshrined in the Colombian Constitution. One of the most important rights being violated is the right to physical protection, which the State must enforce indiscriminately for every citizen (Article 13)<sup>11</sup>.

Although internal displacement spurred by the violence of the armed conflict has been considered a systematic problem since the 1980s, it was only in the 1990s that the Colombian state started to develop a body of norms dedicated to solving the problem<sup>12</sup>.

CONPES 2804<sup>13</sup>, approved in 1995, sought to define those internally displaced with whom the state would work, as well as to outline strategies of prevention, protection, humanitarian and emergency aid, and access to government programs. In 1997, the government approved CONPES 2924, which defined a new institutional structure integrating all public and private organizations charged with serving populations displaced by violence. In addition, this document proposed the creation of a National System of Integrated Support for Persons Displaced by Violence (SNAIPDV, its acronym in Spanish), a National Plan, a National Assistance Fund for Displaced People, and a National Information Network.

In the same year, the government approved Law 387, a normative instrument frequently referred to when discussing displacement in Colombia. Its importance is derived from the fact that it is largely responsible for inserting the subject of internal displacement into the Colombian regulatory framework. According to Law 387, the Colombian state defines the *internally displaced* as “all people forced to migrate within the national territory, abandoning their place of residence or habitual economic activities because their lives, physical integrity, security, or personal liberty were made vulnerable or were directly threatened due to any of the following situations: internal armed conflict, internal disturbances and tensions, generalized violence, massive human rights violations, infractions of international humanitarian law, or other circumstances emanating from the abovementioned situations that cause potential or actual drastic alterations in public order.” (Law 387, Article 1).

Law 387, approved in 1997, expressly recognizes the rights of the internally displaced and, for the first time, makes the State responsible for formulating policies and adopting measures for displacement prevention<sup>14</sup>, as well as for providing for the care, protection, consolidation and socio-economic stabilization of the displaced population. Since the promulgation of the law, the internally displaced are protected by the rights enumerated in Article 2, including: the right to access a definitive solution to their situation; the right of return to their place of origin; the right to not be subjected to forced displacement and to not have their freedom of movement unlawfully restricted.

To achieve these ends in a manner consistent with the recommendations of CONPES 2824, the government created SNAIPDV (National System of Integrated Support for Persons Displaced by Violence) and the National Council for Integral Support for Persons Displaced by Violence (CNAIPDV, its acronym in Spanish). Created by Law 387 (Article 6), the Council emerged as the institution responsible for policy formulation and budgeting for programs serving the displaced population. These programs, in turn, are implemented by SNAIPDV (created by Article 5 of the

same law), the institution responsible for the *execution* of policies meant to serve the displaced population.

On December 12, 2000, the Colombian government issued Decree 2569, which consists of regulations related to Law 387. The Decree also named the Social Solidarity Network (RSS, its acronym in Spanish) as the agency responsible for national, departmental, and municipal coordination of SNAIPDV programs. The Social Solidarity Network is an agency within the Colombian social welfare system for which the President of the Republic has direct responsibility. The RSS has the capacity for action on the national level and coordinates the social, economic, judicial, political, and security measures adopted by the government in its efforts to overcome and prevent internal displacement. It should be noted that the Decree also created a Unified Registration System for Displaced People (SUR, its acronym in Spanish), which will be discussed in more detail below.

Decree 2569 also specifies the criteria that constitute an end to the condition of displacement. According to Article 3, the Colombian state will no longer recognize an individual as displaced once he or she complies with one of the following conditions: return<sup>15</sup>, resettlement, or relocation, accompanied by access to economic activity (“socio-economic stabilization,” under Law 387); exclusion from the Unified Registration System for Displaced People (SUR), in conformity with the conditions listed in Article 14, or by request of the interested party.

There is a specific policy formulated by the Colombian government that merits special attention. It concerns emergency humanitarian aid: temporary and immediate assistance aimed at the rescue, care, and support of the displaced population through the provision of food, healthcare, psychological care, housing and emergency transport. The displaced have the right to emergency humanitarian aid for a maximum of three months, which can be renewed for the same length of time. The value of transitional housing, food assistance, and personal hygiene items is limited to 1.5 times the minimum wage (Articles 20 to 24).

One institution that has played a relevant role in defending the rights of internally displaced people is the Ombudsman’s Office of Colombia, which has an office dedicated exclusively to the displaced population. With the help of the UNHCR, the Ombudsman’s Office implemented the “Community Defense” project, which is especially active in areas with a high concentration of indigenous people (such as Bajo Atrato, Medio Atrato, the Cacarica Coast, Costa Vallecana, Costa Nariñense, Tierralta, Sierra Nevada de Santa Marta, Catatumbo and Northeast Antioqueño). The objective of the project is to strengthen the presence of the Ombudsman in these areas and, through such presence, prevent forced displacement with an *in locus* implementation of prevention policies.

The Attorney General’s Office, the body with the greatest control over the exercise of public power, has also acted to safeguard human rights and intervene in defense of the public interest. The Attorney General’s Representative for Prevention in the fields of human rights and ethnic affairs, through the coordinating body for forced displacement services, has created a Monitoring and Evaluation Model for the agencies and service providers that form part of SNAIPDV. The prosecutor has developed software that is

used to assist in the prevention and monitoring of the activities of those directly involved in policies meant to assist the displaced population.

According to evaluations by the Ombudsman's Office and the UNHCR, the laws aimed at mitigation and prevention of forced displacement that were implemented during the 1990s in Colombia were comprehensive. The adopted legislation conforms with the principles of international humanitarian law and refugee law, promoted by entities like the UNHCR and the International Committee of the Red Cross (ICRC). However, there were fundamental structural flaws in the implementation process<sup>16</sup>. Particularly, institutional design and execution were evaluated as poor by the Ombudsman and by the UNHCR. It is precisely this asymmetry between advances in the body of norms and the deficiencies observed in the implementation of the policies serving the displaced population that led the Constitutional Court to vigorously assert its position on January 22, 2004. In its T-025 judgment, the Court held that several inconsistencies observed in the policies serving the displaced population constituted what the Court called "an unconstitutional state of things" (COLOMBIA, 2004).

Between 1997 and 2004, the Constitutional Court issued 17 judgments with orders directed to the entities responsible for implementing the policies serving the displaced population, orders that did not help the displaced population<sup>17</sup> to become less vulnerable and more easily vindicate their legal rights. The Court grounded its reasoning in the insufficient protection given to the displaced, due to: i) the extreme vulnerability of the displaced population and, specifically, the grave deterioration of the situation in regard to food and health care; ii) the failure of the responsible authorities to protect the displaced population in an effective and timely manner<sup>18</sup>; and iii) the lack of results with respect to the health care policies of the displaced population as well as to access to education for displaced youth (COLOMBIA, 2004, pp. 24-6). In the Court's understanding, this situation was the result, primarily, of insufficient resources, which did not increase as the phenomenon became worse, and of the Colombian state's institutional inability to respond efficiently to the needs of the displaced population, factors which incur the Court's demands in the face of responsible authorities. Accordingly, the Court ordered the national and local authorities in charge of serving the displaced population to ensure consistency between their obligation and the amount of resources allocated to the protection of the rights of the displaced (COLOMBIA, 2004, p.89).

In August 2006, the Constitutional Court concluded that:

*"despite the fact that important advances have been communicated to the Court in areas critical to the well-being of the displaced population, it has not been demonstrated that the unconstitutional state of things – declared in Judgment T/025 of 2004 – has been overcome, and neither have the advances been moving quickly enough and in a sustainable manner in that direction" (COLOMBIA, 2006, p. 3).*

This position is maintained in File 008 of January 26, 2009 (COLOMBIA, 2009). In addition to vehemently criticizing the content of the reports<sup>19</sup> sent to the Constitutional Court by the entities in charge, in response to Judgment T-025,

the Court identified ten areas in which the state failed to adequately protect the displaced, including: i) the lack of planning in the system meant to assist the displaced; ii) problems in the proper recording and classification of the displaced population; iii) an insufficient budget to implement policies to assist the displaced population; iv) the lack of specificity in the policies designed to assist the displaced population, in its different manifestations; v) the lack of protection of indigenous and Afro-Colombian groups, which have been particularly affected by internal displacements in recent months; vi) little security provided to displaced persons as they return to and settle on their original lands; and vii) the absence of a focus on prevention in policies to assist displaced persons, particularly in the security operations conducted by the state. Below, we will direct our attention to some of these points in particular.

Decentralization – certainly one of the central pillars in the policies to assist the displaced population – is directly linked to many of the items above. This is because decentralization improves the state's ability to respond to the complex situation of forced displacement, which has manifested itself differently throughout communities across Colombian territory. In addition, the decentralization of the public policies in question would permit the local authorities and departments to collaborate with the national government to offer greater protection to the populations most affected by forced displacement, by sharing and utilizing technical information of great precision.

However, as noted by the Constitutional Court, the disorderly way in which decentralization has been executed results in a situation of political fragmentation, which impedes its consistent implementation and the evaluation of the results of such policies, thus preventing further development thereof. In large part, this is due to: (i) a lack of political will on the part of local administrators and departments in assisting the displaced population, whose situation becomes even more grave given the emergency nature of the problem; (ii) a shortage of resources on the sub-national level for specific programs dedicated to assisting displaced persons, as well as a general lack of resources to overcome the problem; (iii) the hierarchical nature of decentralized national entities, whose actions are determined more by agency mandates and the actions of the central government than by regional needs; (iv) the exclusion of civil society from policy formulation and evaluation; and (v) a lack of technical knowledge concerning the problem, as well as a lack of clarity regarding the function of each entity, amongst local committees and departments (OMBUDSMAN'S OFFICE OF COLOMBIA, 2003, p. 112-3).

One of the effects of the weakness inherent in policy decentralization is a lack of programs aimed at strengthening communities' self-sufficiency. The shortcomings mentioned above weaken programs dedicated to building social capital, which increases these communities' dependence on state-sponsored social programs.

Law 387, as well as many decisions of the Constitutional Court, recognizes the exceptional vulnerability of the displaced population. Even though the Court recommended special policies and dedicated resources toward assisting displaced people, the government has remained reticent toward the idea. According to the Ombudsman's Office, the Special Program is limited to humanitarian assistance coordinated by

the Social Solidarity Network and to the regulation of the homes and lands of the displaced – neither of which is being implemented (OMBUDSMAN'S OFFICE OF COLOMBIA, 2003, p. 104).

This conduct only exacerbates the problem by incorporating the internally displaced into existing government-sponsored social service programs. As mentioned in the previous section, those internally displaced persons who arrive in cities (about 80%, according to the Ombudsman's Office) – some of whom lack documentation – are isolated from the social support networks available to them in their places of origin, are unfamiliar with information and service systems that operate in the urban centers and cannot compete with the local poor for resources.

Reintegration into a productive life -- one of the basic conditions for return or resettlement of the displaced – becomes increasingly more difficult as a person remains displaced for long periods of time, far from his or her place of origin. More importantly, a displaced person has the right to choose where he or she wishes to live. In the case where the person would like to return to his or her place of origin, the state is obligated to offer information about the security situation there and offer protection to the displaced person in question.

Although there are legal provisions that assign responsibility to national and local entities in the resettlement of the displaced population<sup>20</sup>, there are still no regular and clearly-defined programs within their institutions dedicated to solving the problem.

A clear example of this is the lack of regulations to address compensation for human rights violations, a point directly related to the conditions and possibilities for return of internally displaced populations. In Colombia, there are no laws punishing those responsible for forced displacement, nor is there jurisprudence related to material and moral<sup>21</sup> reparations for those displaced by violence.

In addition to the faults mentioned above, there are no mechanisms in place to evaluate the programs currently serving displaced populations. In the words of the Ombudsman, "they are very worried about the products, but not worried about the impact" (2003, p. 113). On this point, the Constitutional Court expresses a concern about the existence of several sets of indicators in each of the entities that are part of the SNAIPDV. It is believed that such a deficiency can be overcome through greater participation of local agencies and departments in its development, which relates to the deficiencies in the decentralization of policies that assist the displaced population.

It is equally worrisome to note the lack of political attention paid to the development of programs to prevent displacement, which would guarantee both its mitigation and of the suffering and trauma that result from displacement. The Constitutional Court emphasizes that even the security operations or fumigation undertaken by the Colombian government is accompanied by preliminary analyses about its possible impacts on the local population. Until recently, the Early Warning System, a project of the Ombudsman's Office of Colombia that allows the government to detect early on potential cases of displacement, was also not functioning adequately, in large part because of its dependence on the successful decentralization and coordination of policies assisting the displaced population. According to the Ombudsman's Office of Colombia, the country needs a group with

technical expertise in crisis management, capable of assessing and evaluating on a daily basis, the implications of armed operations – including those of the Armed Forces – involving the civilian population.

In regard to the registry of the displaced population, there are presently two separate systems that organize information within the National Information Network: the SUR and the System for Estimation through Alternative Sources (SEFC, its acronym in Spanish). The SUR quantifies the *demand* for Colombian government programs aimed at displaced peoples in terms of territory and population. Only those who register within one year of the event that forced their relocation are counted as *internally* displaced within the SUR. The SUR is the *only* channel through which displaced people have access to government-sponsored programs.

On the other hand, the SEFC is a global model of displacement that registers information at the national level according to events of expulsion, arrival, return, and resettlement in the 35 territorial units delineated by the RSS. The SEFC seeks to record the *total* number of people displaced by violence, regardless of whether they request assistance from the state.

The figures released by these governmental systems – according to which 2,649,139 Colombians had been displaced through August 2008 – differ greatly from those released by the UNHCR, which reported that three million Colombians had been displaced through December 2007, and those released by non-governmental organizations such as CODHES, which reported 4,361,355 displaced Colombians through June 2008. Amongst the factors explaining this difference, it is noteworthy that the figures released by the government are cumulative since 1999 – in contrast to the CODHES figures, which are cumulative since 1985 – and that intra-urban displacement and displacement resulting from fumigations were not included. Still, since the displaced have one year after their displacement to register, this period constitutes a gap in the government's data. More than fundamental divergences in how the calculations are made, it is particularly problematic that there are systems of registry in non-governmental organizations where the statistics about the internally displaced are greater than those released by the government by hundreds of thousands of individuals. It is thus evident that the SUR underestimates the size of the humanitarian crisis in Colombia, which directly affects the formulation of national policies about the issue. The Constitutional Court affirms this point: “As a consequence, the public policies formulated to assist the internally displaced are based on assumptions that do not correspond to the actual size of the problem to be addressed” (COLOMBIA, 2006, p.9).

#### 4. Cooperation with international agencies

Protecting the victims of armed international conflicts has been a concern of International Humanitarian Law since the decade of 1970, when Protocol II to the Geneva Conventions (1977) was adopted. With the aim of protecting non-combatant populations, Article 13 sets forth that “the civilian population as such, as well as individual civilians, shall not be the object of attack” and that “acts or threats of violence the primary purpose of which is to spread terror among the civilian population

are prohibited.” It is evident that the forced displacement of populations in Colombia violates this and other principles of International Humanitarian Law.

Although during this time the gravity of the problem of internal displacement was already known, it occurred in the absence of a human rights treaty or convention that *explicitly* guaranteed the rights of the internally displaced. As Kalin highlights, “naturally, as human beings, the internally displaced do not lose their rights when they are displaced, but it was not clear what these rights would mean specifically in the context of displacement” (REVISTA MIGRACIONES FORZADAS, 2005, p.4).

At the beginning of the 1990s, this concern brought about a more targeted approach. In 1992, the Commission on Human Rights of the United Nations created a position known as the Representative of the Secretary General on Internally Displaced Persons<sup>22</sup> and appointed Francis Deng to the post. One of his first tasks was to design a study on the causes and consequences of internal displacement in the world, a statute for internally displaced persons in accordance with international law, the institutional arrangements aimed at dealing with the problem and the best mechanisms to protect and offer assistance to these populations.

From this analysis, Deng sought to develop appropriate institutional and regulatory frameworks for the protection and assistance of the internally displaced. The result was a document entitled *Guiding Principles on Internal Displacement*, which constitutes “a tool of persuasive force that provides practical guidance and is, at the same time, an instrument of political education and awareness”<sup>23</sup>.

A first look reveals that the promotion of *Guiding Principles on Internal Displacement* finds one of its first examples of success in Colombia. The dissemination of *Principles* occurred not only between organs of the national government, but also between local governmental bodies, in addition to non-governmental organizations, some of which were managed by the displaced population. The impact of this can be seen in some recent cases before the Constitutional Court of Colombia, which considers such principles to be part of the body of norms that gives a constitutional dimension to the case of the internally displaced. Decision T-327 from 2001, for example, is clear in this respect:

*The interpretation that is the most favorable to the protection of human rights renders necessary the application of the Guiding Principles on Internal Displacement (...), which are a part of the supranational body of norms that is integrated into the constitutional law of this case. Consequently, all of the parties involved in dealing with the displaced (...) should alter their conduct to conform to, in addition to the constitutional norms, that which is set forth in the forementioned Principles. (COLOMBIA, 2001, p.17).*

It is relevant to note, however, that the success of the implementation of such norms depends on the state’s organizational structures. Frequently, these problems emerge due to the state’s institutional fragility, as we saw in the case of Colombia. In addition, the Colombian state plays a critical role – in some cases, by asserting itself; in others, due to its absence – in the development and aggravation of this situation. Therefore, in addition to formulating such principles, in many cases it is patently clear that there is a need



for international cooperation in the attempt to combat forced internal displacement.

In light of this, the Colombian state sought, in 1997, the technical and humanitarian assistance of the UNHCR. With the consent of the Secretary General of the UN, a UNHCR office was set up in Bogotá in June 1998<sup>24</sup> that became responsible for the training of state agencies and non-governmental organizations and for technical assistance related to all phases of displacement, including prevention policies. Furthermore, in accordance with the UNHCR's mandate, the office "will provide the government with experience and knowledge in regard to protection, humanitarian resources and long-lasting solutions that have proven themselves to be effective in other forced displacement contexts" (UNHCR, 1999, p.2).

More specifically, the UNHCR works in four areas: (i) the dissemination and updating of the legal standard for protection; (ii) the promotion of strong institutions and sound public policies; (iii) the promotion of social organization, training and the participation of displaced populations in defending their rights; and (iv) the promotion of strong national oversight mechanisms. Recently, the UNHCR developed a "cluster approach" that involves coordinating the efforts of several agencies specializing in areas such as water, food, health, and logistics<sup>25</sup>.

The activities designed in the areas outlined above are undertaken in conjunction with national and international actors. On the national level, the UNHCR's principal partners are: the Presidential Agency for International Cooperation (Social Action), the Ombudsman's Office of Colombia, and the federal Attorney General's Office. In general terms, the coordination of activities between the UNHCR and these partners takes place through the Joint Technical Unit (JTU), created in 1999, in the Memorandum of Understanding signed by the UNHCR and Social Action. The primary function of the JTU is to provide support to these governmental entities in the systematization, analysis, monitoring and dissemination of public policies concerning the displaced population. Moreover, it is expected that the JTU will work together with organizations comprised of displaced individuals to strengthen their participation at the CNAIPDV and to formulate systems of representation at the local level.

In regard to the cooperation between ACNUR and Social Action, it is worth highlighting the project "The Protection of Land and National Heritage," financed by the Post-Conflict Fund of the World Bank, the Swedish International Development Cooperation Agency, the International Organization for Migration and the governments of the departments of Norte de Santander, Bolívar, Antioquia and Valle. This project seeks to promote the protection of peasant and settlers' land rights, as well as the territories of ethnic populations at risk of being displaced, with the goal of effectively implementing the protection measures outlined in Decrees 2007/01 and 250/05.

The UNHCR has an interesting project, entitled "Implementation," aimed at training the Ombudsman's Office in the defense of the rights of those at risk of being displaced, on the national, regional and local levels. In this project, there are systems and tools to measure, monitor and evaluate the workshops conducted by the Ombudsman's Office, with the objective of evaluating how effective it is in promoting and protecting the rights of vulnerable populations or those excluded from programs aimed at the displaced population, including women, children, the indigenous and Afro-Colombians.

In addition, the UNHCR assists the Attorney General's Office in disseminating the software that implements the Models of Monitoring and Evaluation, which are presently being implemented in the ten departments with the highest rates of expulsion and receipt of the displaced population. This monitoring program permits the development of analyses regarding the evolution of prevention policies and the attention given these populations.

The constant transformations undergone by the displaced populations show the critical importance of an ongoing monitoring mechanism so that the policies produce positive results. Some new characteristics of forced displacement, however, deserve greater attention. One emblematic example is the temporary crossing of borders in search of protection. Recently, it was observed that many Colombians who live near the Venezuelan border work during the day on a plantation in Colombia and, at night, cross the border in search of greater tranquility. What legal status do we assign to these individuals? The most appropriate response, which combines policies protecting displaced populations with international principles relating to refugees, appears to reside in the so-called "tri-partite conventions," established by the countries involved in the flux of these populations and by the UNHCR. According to the Ombudsman's Office, "although the consolidation and development of this mechanism has undergone many highs and lows [...], it constitutes the ideal instrument – and perhaps the only one – capable of dealing with the reality of the movement of these border populations" (OMBUDSMAN'S OFFICE OF COLOMBIA, 2003, pp.40-41). The UNHCR's work in Colombia focuses on the weaknesses of the national policies aimed at the internally displaced population. The support given to the Ombudsman's Office and local and regional offices on the level of the SNAIPDV, for example, aims to decentralize these policies. With a greater presence in Colombia, the UNHCR looks to facilitate the inclusion of the displaced populations by consulting them in the formulation of policies meant to prevent internal displacement.

The UNHCR has shared its know-how for the purpose of developing, in partnership with governmental and non-governmental organizations, monitoring mechanisms for use by the Colombian government. As we have seen, this has been a central aspect of the criticism directed towards the formulation and implementation of policies aimed at the displaced population. The Ombudsman's Office has been the most vocal in making these critiques.

In response to Judgment T-025 of 2004, the UNHCR identified budget constraints as the primary reason for the difficulties encountered by the High Commissioner and the federal government in the execution of public policies to assist the displaced population (UNHCR, 2005). In its Review of the Public Policy of Prevention, Protection, and Care of the Forcibly Displaced in Colombia (August 2002 to August 2004), the UNHCR declares that the jurisprudential advances developed by the Constitutional Court and, in particular, by Judgment T-025 of 2004, were critical to the development of parameters to evaluate the results of public policies (UNHCR, 2005, p.2). In addition, according to the UNHCR, Judgment T-025 produced a number of positive impacts on the policies protecting the displaced population. Judgment T-025 caused the government to, among such impacts, make the issue of displacement a priority

and commit itself further to managing the humanitarian crisis, aside from instigating initial advancements with local authorities (UNHCR, 2005, pp. 3-13).

Because the presence of the UNHCR in Colombia is recent, it is difficult to critically assess the impact of its work. At any rate, the lack of an evaluation policy is a *structural* flaw in the way the government designed its policies, which has been treated without due urgency. Logically, the gravity of the humanitarian situation in Colombia demands efficient responses, which leads us to believe that the challenges related to internal displacement are necessarily tied to questions of *coordination*.

## 5. Final considerations

Coordination, decentralization, monitoring, prevention, procurement and allocation of resources are the themes that permeate the discourse surrounding the development and review of policies meant to address internal displacement in Colombia.

Although the debate on displacement is just over ten years old in the country, consistent evaluation, monitoring and review of programs are still important practices. As this article has shown, the phenomenon of displacement is a result of long-term historical processes. More recently, the lack of responsiveness by the Colombian government has led displaced persons to increasingly seek their own solutions. Consequently, there is a constant transformation in the characteristics, destinations, and victims of migratory flows.

In addition, many of the Colombian government's approaches to resolve the armed conflict are problematic, as they have exacerbated the problem of internal displacement. Increased militarization and disproportionate fumigation, often associated with a lack of strategic planning, have relegated what is conveniently referred to as *human security* to the background. As a result, the State's actions often violate the non-combatant population's right of neutrality. This occurs far from any possibility that the state will offer physical or institutional protection to these individuals, even though it is understood that the state should guarantee fundamental rights and access to the basic services guaranteed by the Constitution.

This article's analysis of internal displacement concentrates on interpreting national policies addressing the phenomenon of *forced* displacement *resulting from violence*. The limited focus of this analysis implies that a broader approach to the problem is unnecessary. On the contrary, this article promotes the development of policies that recognizes the complex issues presented by internal displacement.

It is not difficult to conclude that the actual state of internal displacement in Colombia and the ways in which the government has tried to address it fall far short of the integrated approach promoted by the *Guiding Principles* and the cooperative approach promoted by the UNHCR. While national and international actors have praised the development of the normative framework meant to address the problem, implementation and evaluation of policies assisting the displaced population have not evoked the same response.

On the one hand, the formulation and implementation of programs assisting the internally displaced, as well as cooperation with the UNHCR, are a relatively

recent phenomenon. On the other hand, there are various structural weaknesses that may threaten the overall development of policies addressing this issue. This is the case with the weakness of decentralization, which has been an issue for the UNHCR. Decentralization is an essential characteristic in the treatment of forced displacement, given how the armed conflict manifests itself heterogeneously in different regions of the country. Decentralization was also considered a tool in helping the state better respond to the needs of vulnerable populations, such as indigenous and Afro-Colombian people, both of whom are especially vulnerable to the humanitarian crisis. If a mechanism existed that provided for effective consultation with these communities, policies could better reflect and meet their specific needs. While the UNHCR and the Ombudsman's Office of Colombia have dedicated themselves to strengthening decentralization over the past few years, it is still too early to critically evaluate whether their efforts have been successful.

Certainly, the participation and assistance of international agencies in addressing the problem of internal displacement has been of fundamental importance in that it has complemented the efforts of the Colombian government with expertise and resources. According to the Ombudsman's Office, however, the UNHCR has employed the same criteria as the state in implementing its tasks, while these criteria could be reassessed and redefined in light of the High Commissioner's experience.

In this sense, the technical and humanitarian assistance provided by the UNHCR could be better utilized by the Colombian government in certain areas, such as in designing a mechanism to evaluate the efficacy of policies addressing internally displaced people. As discussed in the previous sections, the UNHCR is developing such a mechanism in conjunction with the Ombudsman's Office and the Attorney General's Office. However, it is important that similar evaluation mechanisms are also utilized by agencies working under SNAIPDV.

Decentralization must also be incorporated into the process of creating efficient evaluation mechanisms, in that closer observation of and consultation with local populations can help determine the broader impact of policies. In addition, it is necessary that the principal actors involved in formulating and implementing internal displacement policies make an effort to improve and strengthen the channels of communication and coordination.

Prevention policies are in their beginning stages, so any evaluation of them would be premature. It is important to emphasize, however, that prevention is an urgent necessity, as the phenomenon of forced displacement, far from being mitigated, has shown itself to be worsening, and as there were a growing number of internally displaced persons between 2003 and 2007. Developing a policy of prevention is directly dependent on Colombian politicians' broadening their analysis of the problem of internal displacement. As soon as politicians recognize displacement as the result of complex and variable factors – not only those derived from the armed conflict – then human security can become a fundamental part of policy formulation.

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## NOTES

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1. In the period between 1984 and 1994, the Armed Forces (including the police) were responsible for 25% of those who were internally displaced. For more information, see Prada (2007, p.131).
2. In light of these observations, it is worth noting two important moments. First, the period between 1999 and 2001 was critical, when the area used for cultivation of the coca leaf was about 150,000 hectares. The second moment relates to the report published by the United Nations Office on Drugs and Crime (UNODC, abbreviation in English) in 2009, which, for the first time, reports that, in 2008, the total area in the world used for the cultivation of the coca leaf diminished by 8% due to a significant reduction in Colombia of 18%. For more information, see UNODC (2009).
3. The departments constitute federal units analogous to the states in Brazil.
4. From 2002 to 2008, the displacement of 52,000 indigenous persons was recorded. In July 2008, the National Indigenous Organization of Colombia (NIOC) warned about the possibility of the extinction of 32 indigenous communities due to armed conflict (CODHES, 2008, p.3).
5. According to the 1993 Census, these groups represented 3.34% of the Colombian population.
6. To cite a few examples: corebajú (Caquetá), puinaves (Guaviare), emberás (Alto Sinú, Chocó and Antioquia), paeces, yanacunas, guambianos, amongst others in Cauca, tules (Chocó), kankuamos (Sierra Nevada), different peoples in Putumayo, awás (Nariño).
7. In the case of indigenous communities, this excerpt also reveals some of the rights guaranteed not only by the Colombian Constitution, but also by the Universal Declaration of Human Rights. Forced displacement of indigenous communities thus directly involves the violation of collective, nationally and internationally recognized rights, for example: (i) the right to territory; (ii) the right to autonomy; (iii) the right to cultural identity; and (iv) the right to security and the protection of the state (JACANAMIJOY, 2004, p.206).
8. Article 12 of Decree 2569 of 2000 defines "household" as a group of persons (not necessarily related) who live under the same roof, share food and are forcibly displaced by violent means. The concept is, therefore, intimately linked to the individual's "social support network."
9. More than the absence of the state, it is the failure of state institutions that allows space for private agents to defend their interests without encountering resistance from the institutions that are known to represent the collective interests of the region. It is important to note the relationship between institutional presence and rates of impunity: the municipalities to which the displaced individuals travel have, on average, 59% more institutional presence than the municipalities from which these same individuals leave. In addition, the latter have an average rate of impunity of approximately 33%. See Murcia (2003, p.71).
10. Social capital can be roughly defined as one's subjective disposition to relate to others in a productive manner.
11. To name a few: Article 24, concerning freedom of movement; Article 40, concerning the right of political participation, which is affected when identity documents are abandoned by those fleeing; Article 44, concerning the rights of the child (48% of those displaced are minors); Article 49, concerning the state's obligation to provide access to health care and sanitation; Article 51, concerning the right to decent housing; Articles 58 and 59, which guarantee the right to private property; and Article 64, concerning the ownership of land (these last three will be discussed in greater detail below).
12. It is interesting to note that, even in academia, a focus on internal displacement only came about relatively recently. The first national seminar on the subject occurred in 1991. This initiative allowed participants to identify the principal theories and analytical positions describing the origins and patterns of displacement. Only in a 1997 seminar did academics make a significant breakthrough in building the theoretical framework around internal displacement. According to Murcia, "[a]fter this and other efforts, such as the meeting organized by CISP in Antioquia, the Seminar on Displacement, Internal Migration, and Territorial Restructuring (1999), and the International Seminar on Displacement, Conflict, Peace and Development, held in Bogotá in May of 2000, a hypothesis began to emerge that recognized displacement as part of a battle strategy effectuated by armed actors contained political and economic elements" (MURCIA, 2003, p. 29).
13. CONPES is the abbreviation given to the documents produced by institution of the same name: the National Political, Social, and Economic Council.
14. For more details concerning the required elements of prevention programs, see Articles 20 to 24 of Decree 2569/2000.
15. Articles 25, 27 and 28 define the terms with which policies are developed regarding the return of the displaced population.
16. This is a partial explanation, as the armed conflict intensified during the latter part of the 1990s, which directly impacted the problem of forced displacement.
17. In particular, the National Council for the CNAIPDV – composed, amongst others, of the President of the Republic, the Ministry of Finance

and the Social Solidarity Network – and municipal and departmental governments.

18. According to the reports attached to the decision, 57% of the individuals deemed displaced did not receive humanitarian emergency aid; and 80.5% had no access to income-generation programs that would allow them to subsist with dignity and autonomy.

19. Regarding the reports, the Constitutional Court's principal critique is that the entities in charge claim as progression the implementation of policies that, in reality, are ideas, plans and programs that have not yet been developed, in addition to being only partial fulfillments of the legal and constitutional obligations set forth in Judgment T-025.

20. See Law 387, Decree 2569 and some decisions relating to guardianship, such as SU-1150/00, T-1635/00, ACU-1662/01, AC-4279/01.

21. Another weakness in the policies designed to help displaced peoples is the lack of psycho-social treatment offered to the population.

22. Walter Kälin replaced Deng in September 2004. At that time, the name of the position had been changed to Representative of the Secretary General on the Human Rights of the Internally Displaced. In an interview for *Revista Migraciones*

*Forzadas*, Kälin affirms that "the change in the name of my position suggests that the idea of the human rights of the internally displaced is, at least in principle, accepted by the international community and suggests a certain change in direction in the focus of my mandate, since it places a greater emphasis in the protection of the human rights of this group." See *Revistas Migraciones Forzadas* (2005, p.4).

23. It is important to highlight that the document does not have a binding effect, so that each state must decide whether to adopt its recommendations. See United Nations Economic and Social Council (1998).

24. As it favors a territorial decentralization of the policies and the inclusion of vulnerable populations in the formulation of policies regarding the displaced, the UNHCR opened satellite offices as well in Apartadó, Barrancabermeja, Barranquilla, Bucaramanga, Cúcuta, Quibdó, Mocoa, Pasto and Soacha.

25. Along these lines, the Thematic Group on Dislocation (TGD) was reactivated, which, under the leadership of the UNHCR, seeks to coordinate the efforts of UN agencies to offer approaches to the theme of internal displacement that are more in touch with the needs of this population.



## RESUMO

O objetivo deste conflito armado vivenciado pelo país há mais de quarenta anos. Embora trate de um problema observado há décadas, as formulações políticas nacionais com vistas a abrandar esta prática surgiram tardiamente, em meados da década de 1990. Da mesma forma, a atenção do ACNUR para o problema foi intensificada somente em finais da mesma década. O artigo conclui que existe uma grande assimetria entre o desenvolvimento normativo dado aos deslocados na Colômbia e a execução de tais normas. Falta coordenação entre entidades nacionais e sub-nacionais, assim como entre as nacionais e as internacionais. No que diz respeito à prevenção do deslocamento interno e avaliação do impacto das políticas para a migração é compreender a interação entre o Alto Comissariado das Nações Unidas para Refugiados (ACNUR) e o governo colombiano nos esforços de mitigação do deslocamento interno forçado, bem como os principais desafios enfrentados na abordagem do problema. Este artigo privilegia a leitura adotada pelos atores mencionados acima, a qual vincula o deslocamento interno forçado ao desafio de sua prática o desafio é ainda maior, uma vez que são embrionários os esforços neste sentido. Sustenta-se, ainda, que o ACNUR tem empregado os mesmos critérios que o governo colombiano na execução dessas tarefas, quando poderia repensá-los e redefini-los à luz da experiência do Alto Comissariado.

## PALAVRAS-CHAVE

Deslocados Internos – Colômbia – ACNUR – Conflito Armado – Crise Humanitária.

## RESUMEN

El objetivo de este artículo es comprender la interacción entre el Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR) y el gobierno colombiano en los esfuerzos de mitigación del desplazamiento interno forzado, así como también los principales desafíos enfrentados en el enfoque del problema. Este artículo privilegia la lectura adoptada por los actores antes mencionaría entre el desarrollo normativo de atención a los desplazados observado en Colombia y la ejecución de tales normas. Por ejemplo, falta coordinación entre entidades nacionales y subnacionales, la cual vincula el desplazamiento al conflicto armado por el que atraviesa el país hace más de cuarenta años. Aunque se trate de un problema observado hace décadas, las formulaciones políticas nacionales con miras a su mitigación surgieron tardíamente, más precisamente, a mediados de la década de 1990. De la misma forma, la atención del ACNUR al problema no se intensificó hasta fines de esa misma década. El artículo concluye que existe una gran asimetria, así como también entre las nacionales y las internacionales. En lo que atañe a la prevención del desplazamiento interno y a la evaluación del impacto de las políticas, el desafío es todavía mayor en la medida en que son embrionarios los esfuerzos en este sentido. Se sostiene que el ACNUR ha empleado los mismos criterios que el gobierno en la ejecución de sus tareas, cuando estos podrían ser repensados y redefinidos a la luz de la experiencia del Alto Comisionado.

## PALABRAS CLAVE

Desplazados internos – Colombia – ACNUR – Conflicto armado – Crisis humanitaria.



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## ABSTRACT

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While international human rights law establishes the right to health and non-discrimination, few countries have realized their obligations to provide HIV treatment to non-citizens—including refugees, long-term migrants with irregular status, and short-term migrants. Two countries, South Africa and Thailand, provide useful illustrations of how government policies and practices discriminate against non-citizens and deny them care. In South Africa, although individuals with irregular status are afforded a right to free health care including antiretroviral therapy (ART), non-South African citizens are frequently denied ART at public health care institutions. In Thailand, even among registered migrants, only pregnant women are entitled to ART. In order to meet international human rights law—which requires the provision of a core minimum of health services without discrimination—states in the Global South and worldwide must make essential ART drugs available and accessible to migrants on the same terms as citizens.

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## KEYWORDS

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Migrant – HIV/AIDS – Antiretroviral therapy – Human rights – Right to health.



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# ACCESS TO ANTIRETROVIRAL TREATMENT FOR MIGRANT POPULATIONS IN THE GLOBAL SOUTH

Joseph Amon and Katherine Todrys

## 1. Introduction

The scale of global migration, defined by the World Health Organization (WHO) (2003) as the movement of people from one area to another for varying periods of time,<sup>1</sup> is vast and growing. The International Organization for Migration (IOM) (200-) has estimated that 192 million people worldwide, or 3 percent of the world's population, live outside of their place of birth.

In 2008, the Joint United Nations Programme on HIV/AIDS (UNAIDS) (2008a) estimated that 33 million people worldwide were living with HIV. According to the WHO, migration can often have serious health consequences for migrants because of challenges involving “discrimination, language and cultural barriers, legal status and other economic and social difficulties” (WHO, 2003, p. 4). Indeed, since the emergence of the HIV epidemic in the 1980s, public health officials have recognized that migrant populations face special risk of HIV infection (WOLFFERS; VERGHIS; MARIN, 2003, p. 2019-2020).

UNAIDS, IOM, and the International Labour Organization (ILO) (2008, p. 1) have together noted that social, economic, and political factors affecting international labor migrants in origin and destination countries—including separation from spouses and unfamiliar cultural norms, substandard living and working conditions, and language unfamiliarity, compounded by lack of access to HIV-related information and services—can increase the risk of HIV infection. Public health research has repeatedly shown the vulnerability of migrants and their families to HIV (HERNÁNDEZ-ROSETE et al, 2008; WELZ et al, 2007; FORD; CHAMRATHRITHIRONG, 2007, BANDYOPADHYAY; THOMAS, 2002; BROCKERHOFF; BIDDLECOM, 1999), and recent studies have further demonstrated the unique health needs of

*Notes to this text start on page 176.*

mobile populations and the impact of changes in social and cultural practices on health (BANATI, 2007, p. 210-214). The 2001 Declaration of Commitment on HIV/AIDS explicitly commits governments of the world to “develop and begin to implement national, regional and international strategies that facilitate access to HIV/AIDS prevention programmes for migrants and mobile workers” (para. 50).

Transit routes have long been recognized as facilitating both population and disease spread. National highways such as the Golden Quadrilateral in India have been called a “conduit of the virus” (WALDMAN, 2005) and since early in the epidemic, the M1 highway running from Egypt to South Africa has been called the “AIDS Highway.” Billboards along major transit routes and at borders throughout southern Africa carry AIDS-related messages and caution individuals on the move to use condoms. The main highway linking Abidjan, Côte d'Ivoire to Lagos, Nigeria, travelled by 47 million people a year, also includes AIDS awareness messages and is the focus of a travelling HIV/AIDS awareness campaign (IRIN PLUS NEWS, 2008b).

However, despite the longtime recognition of the relationship between migration and vulnerability to HIV infection, donors and states have largely failed to ensure that migrants have access to HIV treatment. Although governments have committed themselves to provide “universal access” (UN POLITICAL DECLARATION ON HIV/AIDS, 2006, para. 20) to HIV treatment and have specific obligations under international human rights law to ensure that HIV treatment (specifically, antiretroviral therapy or ART) is provided to migrants as part of their duty to realize the right to health without discrimination, access to ART for migrants remains largely unrealized.

The World Health Assembly (WHO, 2008) has called on member states to promote migrant-sensitive health policies, promote equitable access to disease prevention and care for migrants, document and share information on best practices for meeting migrants' health needs, train health professionals to deal with mobility-related health issues, and cooperate with other countries involved in the migratory process on migrants' health issues. However, few states have explicitly recognized antiretroviral therapy as part of the core minimum of health services to be provided without discrimination as to citizenship for migrants within their borders.

The development of HIV treatment systems for migrants is necessary to achieve universal access to HIV treatment and to meet the needs of the world's significant and growing population of migrants, particularly in the Global South. The expansion of HIV treatment in the Global South has been uneven; while previously, HIV positive migrants were unable to access care both in low and middle income countries of origin and destination, in recent years national governments in some countries of the Global South, with the assistance of international donors, have been for the first time able to provide such treatment at low cost or free of charge (GARRET, 2007).

In addition to unequal resources between various countries in the Global South, unequal access to and utilization of donor resources has created a vast disparity amongst low and middle income countries in their ability to provide ART, a disparity that may persist. Currently, 15 countries worldwide enjoy the status and special aid directed at HIV treatment as “focus countries” of the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) program (THE UNITED STATES, 200-). Money from the Global

Fund to Fight AIDS, Tuberculosis and Malaria is also unevenly distributed (more than 1/5 of monies expended by 2007 had been given to only four countries) (GARRET, 2007). Further complicating matters, in some low and middle income countries corruption is common and significant portions of donor funding never reach their intended health targets; war, poor leadership, and lack of health infrastructure hamper access to drugs in others.

Given the global scale and frequency of migration worldwide, a rational public health strategy toward HIV/AIDS prevention and treatment cannot include discrimination against non-citizens in provision of ART. From a prevention standpoint, denying such treatment to migrants will only serve to perpetuate transmission and frustrate efforts toward controlling the HIV/AIDS epidemic. From the perspective of adequately caring for those already infected, interruptions in HIV treatment can lead to illness, development of drug resistance, and death, which ultimately may present public health programs with greater social welfare costs (BURNS; FENTON, 2006).

It should be noted that such poor access to care and discrimination also exists for migrants to high income countries. Human Rights Watch has examined instances of South-to-North migration, and consequent challenges facing migrants in accessing ART in their new homes, elsewhere (HUMAN RIGHTS WATCH [HRW], 2009). This article will examine migrants' access to ART in two middle income countries—South Africa and Thailand—in the context of relevant international law, and provide general recommendations for realizing the goal of universal access to HIV treatment for all.

## 2. Populations

Three broad categories of migrants may be defined for the purposes of this article: refugees, long-term migrants with irregular status, and short-term migrants.

### 2.1 Refugees

A refugee is defined as a person who,

*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (UN CONVENTION RELATING TO THE STATUS OF REFUGEES, 1954, art. 1(A)(2); UN PROTOCOL RELATING TO THE STATUS OF REFUGEES, 1967).*

Refugees are granted special protection under international law. According to the 1951 Convention relating to the Status of Refugees and its 1966 Protocol, refugees are afforded treatment at least as favorable as that of a host country's nationals with respect to a variety of rights, including public relief and assistance and social security (which includes sickness, maternity, or other contingencies covered by social security

under national law or regulation) (UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS [UNHCHR], 2006, p. 28-29). With the exception of the right to public education, the rights in this Convention are limited to those refugees lawfully resident in the host country, a provision which has occasioned disagreement as to whether asylum seekers are or are not covered (CHOLEWINSKI, 2000, p. 710-712). Individuals who have an application for refugee status pending - asylum seekers - do have some special protections under international law as well (UNHCHR, 2006, p. 28-29), though these protections do not specifically address the right to health care.

Affording refugees access to ART is supported by UN agencies. The UN High Commissioner for Refugees (UNHCR) (2008, p. 5) considers it a strategic objective to ensure that “access to timely, quality and effective care, support and treatment services including access to antiretroviral therapy [is provided to refugees] at a level similar to that of the surrounding host populations.” Indeed, among the groups discussed in this article, refugees are provided with the broadest access to free ART.

## *2.2 Long-Term Migrants with Irregular Status*

A long-term migrant has been unofficially defined as “[a] person who moves to a country other than that of his or her usual residence for a period of at least a year (12 months), so that the country of destination effectively becomes his or her new country of usual residence” (HEALTH PROTECTION AGENCY, 2006, p. 5). This group could include individuals who have been unsuccessful in an application for asylum but have chosen to remain in the country nonetheless, individuals who entered the country on a visa and have overstayed that visa without obtaining an extension, or individuals who have entered a country without legal status and have remained without status. Government laws and policies on providing health care—especially ART—to long-term migrants with irregular status are often very restrictive.

## *2.3 Short-Term Migrant Populations*

A short-term migrant has been defined as a “person who moves to a country other than that of his or her usual residence for a period of at least 3 months but less than a year” (HEALTH PROTECTION AGENCY, 2006, p. 5). These mobile populations - also defined as “people who move from one place to another temporarily, seasonally or permanently for a host of voluntary and/or involuntary reasons” (UNAIDS, 2001, p. 3) - face particular challenges in accessing care. UNAIDS and IOM (2001, p. 10) have noted that increasingly individuals are bi- or multi-local.

Migration may take a circular path, or individuals may use certain countries as “stepping stones” in the migration process (JACOBSEN, 2007, p. 206-208). Short-term migrant populations face many of the same challenges as long-term migrants with irregular status, including lack of access to free or low-cost medications, but also face particular challenges—including differing treatment regimens in various locations, differential prescription systems across borders, lack of continuity of care, and lack of conformity to ART guidelines that are designed for stationary populations.

### 3. Case Studies from Two Countries in the Global South

Despite international recognition of the vulnerability of migrant populations and specific human rights protections, the experience of migrants in accessing HIV treatment varies widely. South Africa and Thailand provide two instructive and differing examples of migrants' legal rights and reality of access to ART in the Global South.

#### *3.1 South Africa*

South Africa is home to the largest number of individuals infected with HIV in the world, an estimated 5.7 million people in 2007 (UNAIDS, 2008a, p. 40). Providing antiretroviral treatment to individuals who require it is a central and pressing issue of national concern.

Between member states of the Southern African Development Community (SADC), migration is frequent, and 46 percent of South Africans live in rural communities where employment-based circular migration is common (WELZ et al, 2007, p. 1471). HIV prevalence throughout the region is high, and one study of HIV prevalence in KwaZulu-Natal, South Africa, where migration is common found that HIV prevalence among migrant women aged 25-29 years old was 63 percent (WELZ. et al, 2007, p. 1469).

Identifying the number of migrants in South Africa, though, is itself controversial. Estimates vary widely, and rise as high as six million non-citizen migrants in the country in 2008 (SOUTH AFRICA, 2008?, p. 1), compared with an overall population of 47 million (FEDERATION INTERNATIONALE DES DROITS DE L'HOMME [FIDH], 2008, p. 8). Most of these migrants come from other countries in the Southern African Development Community, especially from Zimbabwe, Mozambique, and Lesotho. As a result of the political and economic crisis in neighboring Zimbabwe, especially, migrants have come to South Africa in large numbers: at least one to 1.5 million Zimbabweans are estimated to have fled to South Africa since 2005 (HRW, 2008, p. 23), leaving a country with vastly inadequate access to ART and health care generally (HRW, 2006). Increasingly, migrants are coming to South Africa from across the continent and the world (FIDH, 2008, p. 11).

Under the South African Constitution, individuals with irregular legal status are accorded a wide range of human rights, including the rights to access to emergency and basic health care, and ART (SOUTH AFRICA, 2007). Asylum seekers and refugees are accorded free care if they are indigent and are assessed according to the same means test used to evaluate South African citizens if they are not. The Department of Health has issued memoranda clarifying that these rights apply equally whether the patient has documentation or not.

However, Human Rights Watch research (2008, p. 43), as well as NGO and media reports, has described a striking gap between South Africa's inclusive policies and the reality of access to health care for refugees, asylum seekers, and especially undocumented migrants. Some public clinics demand a South African identification document before offering health care, denying treatment for those without

identification papers (IRIN PLUS NEWS, 2008a). Asylum seekers have experienced continuing difficulties accessing ART (CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA, 2008; AIDS LAW PROJECT et al, 2008). Human rights organizations and journalists have documented verbal abuse, sub-standard treatment, insensitivity by providers, unusually long wait times, and outright denial of services facing migrants seeking health care (FIDH, 2008, p. 31). Other migrants are illegally charged prohibitive fees for treatment or medication, or told they must carry a green South African citizenship card in order to receive basic services. Undocumented Zimbabweans in need of health care have overwhelmed South African charities and churches (HRW, 2008, p. 36), and been turned away from government clinics when unable to present citizenship papers. Basotho mineworkers, infected with HIV and multi-drug resistant tuberculosis (MDR-TB) have faced deportation and been left at the border of their home country without any treatment or referral to local health services for treatment (SMART, 2008).

Spokespeople for the Office of the UNHCR and Médecins Sans Frontières (MSF) confirmed in July 2008 that they had observed cases of foreign nationals discriminated against and refused HIV treatment by health workers unaware of the law (PALITZA, 2008). In recent research from the University of Witwatersrand, non-citizens in need of ART reported more challenges accessing the drug than did South African citizens. Individual hospital staff who discriminate against migrants, either through verbal or physical abuse or through denial of care, are rarely held accountable. The victims of such abuses frequently do not know their rights with regard to healthcare, since public hospitals do not employ translators or provide linguistically appropriate educational material, and rarely lodge formal complaints. This research further suggests that National Department of Health policies are not uniformly applied in public institutions, and that while citizens are referred to government ART sites, non-citizens are routinely referred by local clinics out of the public sector to NGOs to receive ART. This practice has led to the creation of a “dual-health care system, public and non-governmental, providing ART through separate routes” to citizens and non-citizens (VEAREY, 2008b).

NGOs in South Africa have spent many hours advocating for individual refugees and asylum seekers who are denied care in the public sector, writing letters and accompanying patients to make sure they are treated in accordance with the law. Even where these patients are eventually able to obtain diagnosis and treatment for HIV, they may suffer late diagnosis and treatment from earlier unsuccessful attempts and the time it takes to arrange advocacy. Migrants coming from countries with a lower incidence of HIV than South Africa, such as Somalia, may lack information about HIV and linguistically appropriate resources are rare. Furthermore, researchers have pointed out that South African doctors are not trained to treat migrants who have been on a different ART regime in their home country, and many erroneously believe that changing regimes will cause drug resistance or treatment failure.

Poor living conditions and frequent forced internal displacement further challenge migrants in South Africa from accessing HIV testing and treatment. Thousands of undocumented Zimbabweans live in the open near the border, without access to shelter, food, clean water and sanitation facilities. Thousands more sleep in cramped shelters and



on church floors in city centers. Food insecurity and hunger make compliance with ART challenging. Frequent arrests, detention and deportation create a climate of fear in which many migrants, especially near the Zimbabwean border, refuse to seek health care for fear of being arrested there. For people seeking HIV diagnosis and prophylaxis after sexual assault, public hospitals pose a particular risk, as many have a policy of calling police before offering treatment. Together with high rates of xenophobic violence against foreigners, these factors seriously limit South Africa's realization of its progressive policy toward ART provision to migrants. The example of South Africa highlights the importance of general human rights compliance for migrants in order for HIV treatment regimes to function as de

### *3.2 Thailand*

In 2004, Thailand was home to 1.25 million registered migrants and at least again as many unregistered ones (IOM, 2007?). A large percentage of these migrants are Burmese. Indeed, estimates of the number of Burmese migrants in Thailand have ranged from 2 to 6 million (YANG, 2007, p. 488-489). Migrants arriving in Thailand from Burma come for reasons associated with the economic devastation in their home country, economic opportunities in Thailand, and conflict and persecution by the ruling military junta. The Burmese health care system is also broadly insufficient to meet the needs of the population, and decades of repressive military rule, civil war, corruption, lack of investment, isolation, and widespread violations of human rights and international humanitarian law have rendered Burma's health care system incapable of responding effectively to endemic and emerging infectious diseases (STOVER et al, 2007, p. 1).

The Thai government has developed a program to register migrants and regularize their status. In 2004, the Thai Ministry of Labor registered 1,280,000 migrants, 814,000 of whom also applied for work permits (YANG, 2007, p. 506). Registration allows migrants access to basic health care services through the national health plan (YANG, 2007, p. 507). Indeed, the Ministry of Public Health has noted that where migrants are registered and hold work permits, they are entitled to access health services including treatment, disease control, health promotion, and rehabilitation, to obtain regular health check-ups, and to enroll in the national health scheme, which involves a fixed co-pay and the government paying the remainder of the cost of services (YANG, 2007, p. 520-521).

However, ART is not generally considered part of the package of public health care involved in registration, except for in the case of pregnant women (IRIN PLUSNEWS, 2007, PHYSICIANS FOR HUMAN RIGHTS [PHR], 2004, p. 45). Antiretrovirals are distributed to Thais through a separate scheme than registered migrants' health coverage, effectively barring non-Thais (PHR, 2004, p. 45-46).

Additionally, registration is problematic for migrants because of steep registration fees and the fact that migrants cannot change employers once registered, nor move outside the province in which they are registered (YANG, 2007, p. 507-511). Registration eligibility changes annually and restrictions stemming from a lack of coverage of typical migrant job categories, and linkage of registration to specific places of employment keep many from accessing the registration program (PHR, 2004, p. 2). Further, while

migrants themselves are entitled to have possession of their registration, work permit, and health insurance documents, employers often hold these documents and migrants find copies of the documents insufficient for actually obtaining care (SAETHER et al, 2007, p. 1004-1005). Most Thai health care facilities do not provide any services to unregistered migrants (YANG, 2007, p. 522).

A 2004 Physicians for Human Rights Report dealing with Burmese migrants in Thailand expressed concern about the government's "commitment to human rights protection and HIV/AIDS prevention, care, and treatment for migrant and hill tribe populations" (PHR, 2004, p. 1). The group called for HIV care and treatment for migrants on equal terms as Thai citizens, as, among other barriers

*access to health care for Burmese and hill tribe populations is critically limited because of the threat of arrest and deportation, forced confinement, confiscated legal documents, discrimination, lack of financial resources, lack of information, and/or language barriers. (PHR, 2004, p. 3).*

Indeed, this population is essentially forced to live with and soon die of AIDS as a result of discriminatory denial of treatment (PHR, 2004, p. 4). MSF (2007) has also asked the Thai government to improve migrant workers' access to health services, noting the gap between the government's broad health care policies and the practice in some provinces where few migrants have basic healthcare.

In addition to the legal barriers to free care discussed above, practical challenges inhibit the treatment of HIV positive migrants in Thailand. Awareness of and utilization of all health care rights is low even among registered migrants (YANG, 2007, p. 521). Furthermore, interviews with migrants have found that severe financial challenges (which, in addition to cost of treatment, included cost of transportation to health facilities and cost of missing work for medical appointments), fear of police, difficult work and communication challenges all factor into ART treatment access (SAETHER et al, 2007, p. 1004-1005). Studies have also concluded that "[t]he cost of medication and health care services pose a major obstacle in attempting to adhere to ART" long-term, as the medicine is lifelong and the cost would prohibit migrants from affording other necessities such as food (SAETHER et al, 2007, p. 1004-1005).<sup>2</sup> Furthermore, studies have shown that migrants in Thailand have experienced discrimination in seeking treatment, ranging from rudeness, to denial of access to treatment, to substandard care (SAETHER et al, 2007, p. 1004-1005).

Drug adherence guidelines may also be detrimental to access by migrants. The ART regimen most commonly used in Thailand must be taken every 12 hours, which is difficult for migrants working long hours who would find it impossible to stop work to take medicines and who might be fired if their HIV status were discovered (SAETHER et al, 2007, p. 1004-1005). A doctor at one Thai hospital said that even while migrants are not denied ART unilaterally, many do not fit the inclusion criteria, including anticipated adherence to ART (SAETHER et al, 2007, p. 1004-1005). Non-medical criteria for ART access such as "anticipated adherence" have been used to restrict access to migrants as well as other "non-desirable" patient populations, including drug users.<sup>3</sup>

## 4. International Law

International law provides for the basic right to the highest attainable standard of health. This right, along with the right to non-discrimination, implies a right to access a core minimum set of health care services, including ART, without citizenship-based discrimination.<sup>4</sup>

### 4.1 Right to *Highest Attainable Standard of Health*

All individuals have the right to enjoy the highest attainable standard of health, a right which has been enshrined in international and regional treaties.

According to the Universal Declaration of Human Rights (UDHR), “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services” (art. XXV(1)). The International Covenant on Economic, Social and Cultural Rights (ICESCR) also guarantees the right of everyone to the highest attainable standard of health, and requires States parties to take steps individually and through international cooperation to progressively realize this right via the prevention, treatment, and control of epidemic diseases and the creation of conditions to assure medical service and attention to all (art. 12). “Progressive realization” demands of States parties a “specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of [the right]” (UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS [UNCESCR], 2000, paras. 30-31). According to the WHO and the Office of the UNHCR,

*[w]hen considering the level of implementation of this right in a particular State, the availability of resources at that time and the development context are taken into account. Nonetheless, no State can justify a failure to respect its obligations because of a lack of resources. States must guarantee the right to health to the maximum of their available resources, even if these are tight. (UNHCHR; WHO, 2008, p. 5).*

The concept of available resources is intended to include available assistance from the international community (CHOLEWINSKI, 2000, p. 714-719).

The right to health is further guaranteed by a number of other international human rights treaties and commitments. The Convention on the Rights of the Child (CRC, 1980) binds states to

*recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. (Article 24:1).*

In fact, States parties shall take appropriate measures, among other things, “[t]o ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care (CRC, 1989, art. 24:2(b)).” The right to

health is also protected under the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and the Convention on the Rights of Persons with Disabilities. The right to health has been proclaimed by the Commission on Human Rights, the Vienna Declaration and Programme of Action of 1993 and other international instruments (UNCESCR, 2000, para. 2). Additionally, governments committed in the 2001 Declaration of Commitment on HIV/AIDS to “promote and protect all human rights and fundamental freedoms, including the right to the highest attainable standard of physical and mental health” (para. 37) and

*in an urgent manner make every effort to: provide progressively and in a sustainable manner, the highest attainable standard of treatment for HIV/AIDS, including the prevention and treatment of opportunistic infections, and effective use of quality-controlled antiretroviral therapy in a careful and monitored manner to improve adherence and effectiveness and reduce the risk of developing resistance. (para. 55).*

Regional treaties also speak to the right to health. The African [Banjul] Charter on Human and Peoples’ Rights ensures the right to health and binds States parties to “take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick (art. 16).” Furthermore, the African Charter on the Rights of the Child provides for the right of every child to the best attainable health, and binds States parties to move toward implementing this right, including the provision of “necessary medical assistance and health care to all children with emphasis on the development of primary health care” (art. 14:2(b)). Article 10 of the European Social Charter of 1961 also recognizes the right to health, as does Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988.

#### *4.2 Principles of Equality and Non-Discrimination*

International law also establishes the basic principles of non-discrimination and equality. The Universal Declaration of Human Rights proclaims that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (art. 2). Additionally, under that Declaration, “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law” (art. 7). The International Covenant on Civil and Political Rights (ICCPR) echoes the UDHR’s proclamations against discrimination, binding States parties to recognize the rights it guarantees without distinction of any kind, including based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art. 2(1)). The ICCPR also notes the equality of all persons before the law and requires that the law prohibit discrimination and guarantee equal protection against discrimination on any ground, including the

above-noted ones (art. 26). The Human Rights Committee (UNHRC) (1994b, para. 1), the ICCPR's monitoring body, has determined non-discrimination, equality before the law, and equal protection, to be basic principles in the protection of human rights.

Furthermore, following this principle, that Committee (1994b, para. 1) has noted that, in general, the rights guaranteed in the Covenant apply to all people, regardless of an individual's nationality or statelessness. Indeed,

*the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. (UNHRC, 1994a, para. 2).*

With few exceptions, and including the non-discrimination clause, the rights in the ICCPR apply to both nationals and non-nationals (CHOLEWINSKI, 2000, p. 714-719). The Committee has noted that the ICCPR permits states to distinguish between citizens and non-citizens with respect to political rights explicitly granted to citizens (such as voting) and freedom of movement (that is, there is no general right of non-citizens to enter a country, though they must be granted the rights in the ICCPR once permitted to enter the country) (UNHCHR, 2006, p. 9). The general principle of non-discrimination has also been proclaimed by international documents including the CRC (art. 2:1) and the Convention on the Elimination of Racial Discrimination, though this Convention itself by its terms does not apply to non-citizens.

Regional treaties confirm the basic international principle of non-discrimination. The African Charter on Human and Peoples Rights guarantees the right to equality before the law and equal protection of the law (art. 3), and the African Charter on the Rights and Welfare of the Child prohibits discrimination (art. 3). The European Convention on Human Rights and Fundamental Freedoms provides that the rights and freedoms guaranteed in the Convention be secured without discrimination on any ground including sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status (art. 14).

Opinions differ as to whether the broad non-discrimination provision in ICESCR Article 2(2) may apply to non-nationals. Article 26 of the ICCPR creating substantive equality certainly provides non-nationals with some socioeconomic rights, and the Human Rights Committee has deemed unjustified discrimination against non-nationals in pension rights to be an infringement of this provision (UNHCHR, 2006, p. 9). But non-citizens nevertheless are guaranteed a minimum core of economic and social rights under the Convention on Economic, Social and Cultural Rights, discussed in detail below.

In addition, it should be noted that distinction between groups is not in itself prohibited by non-discrimination provisions. Indeed, distinctions between groups have been interpreted as permissible under the ECHR if dictated by law and strictly proportionate to the pursuance of a legitimate aim, and under the ICCPR if based on reasonable and objective criteria (CHOLEWINSKI, 2000, p. 714-19). The UNHCHR (2006, p. 7) has further noted that when considering discrimination against non-citizens, one must take into account the interest of the state in certain rights, the different types of

non-citizens and their relationship to the State, and finally whether the State's reason for distinguishing between citizens and non-citizens (or between non-citizens themselves) is legitimate and proportionate. UNHCHR has also noted that “[a]ll persons should, by virtue of their essential humanity, enjoy all human rights. Exceptional distinctions, for example between citizens and non-citizens, can be made only if they serve a legitimate State objective and are proportional to the achievement of that objective” (2006, p. 5).

#### *4.3 Non-Discrimination in Health*

Numerous international and regional bodies, considering the abovementioned right to the highest attainable standard of health and principle of non-discrimination, have addressed specifically the prohibition of discrimination in offering health services.

According to the Economic, Social and Cultural Rights Committee (UNESCR) (2000), the Convention on Economic, Social and Cultural Rights' monitoring body, States must guarantee certain core obligations as part of the right to health, including ensuring non-discriminatory access to health facilities, particularly for vulnerable or marginalized groups; providing essential drugs; ensuring equitable distribution of all health facilities, goods and services; adopting and implementing a national public health strategy and plan of action with clear benchmarks and deadlines; and taking measures to prevent, treat and control epidemic and endemic diseases. While the Committee (2000, para. 30), in its General Comment 14, notes the progressive nature of the right to health, it also points to the fact that states must immediately take steps to realize the right to health, and must immediately guarantee the exercise of the right without discrimination of any kind. The right to health is thus centrally linked to the right to non-discrimination. Indeed, the Committee has stated that

*the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status [...] With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health [...]. (UNCESCR, 2000, paras. 18-19).*

More specifically with respect to migrants, the Committee notes that “States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services” (2000, para. 34). Thus, a prohibition against discrimination against non-citizens in receiving health care, and an immediate call to eliminate discrimination, emerge from the Committee's findings.

Other bodies have spoken to the obligation not to discriminate against non-citizens

in providing core health care services. While the anti-discrimination provisions in the Convention on the Elimination of Racial Discrimination do not generally apply to non-citizens, the Committee on the Elimination of Racial Discrimination (UNCERD) (2004) - the oversight body under the treaty—in 2004 reminded states of their obligations to non-citizens. The Committee noted that no distinctions permitted on grounds of citizenship should “detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights” (UNCERD, 2004, para. 2). They recalled that while some right

*such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law. (UNCERD, 2004, para. 3).*

To this end, the Committee called on all States parties to adopt measures including: those that would remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health (UNCERD, 2004, para. 29); and those that would ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services (UNCERD, 2004, para. 36).

The Committee on the Rights of the Child (UNCRC) has spoken specifically to the relationship between HIV/AIDS and the rights outlined in the Convention, determining that the right to non-discrimination should be one of “the guiding themes in the consideration of HIV/AIDS at all levels of prevention, treatment, care and support” (UNCRC, 2003, para. 5). The Committee (2003, paras. 7/ 9) has noted with concern the role that discrimination plays both in fueling the HIV/AIDS epidemic and in targeting the victims of it. And, with respect to HIV-related services, the Committee mandates that

*States parties must ensure that services are provided to the maximum extent possible to all children living within their borders, without discrimination, and that they sufficiently take into account differences in gender, age and the social, economic, cultural and political context in which children live (UNCRC, 2003, para. 21).*

While states have an obligation under the Convention to ensure children’s equal access to treatment and care without discrimination, including antiretrovirals, states are also directed to pay special attention to factors within their societies limiting equal access for all children to treatment, care, and support (UNCRC, 2003, para. 28).

Governments have committed in the 2001 Declaration of Commitment to enact and enforce legislation eliminating discrimination against persons living with HIV/AIDS and members of vulnerable groups in their access to health care services, including treatment and support for HIV/AIDS (para. 58). The United Nations High Commissioner for Human Rights has further noted that

*States must avoid different standards of treatment with regard to citizens and non-citizens that might lead to the unequal enjoyment of economic, social and cultural rights. Governments shall take progressive measures to the extent of their available resources to protect the rights of everyone—regardless of citizenship—to: social security; an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions; the enjoyment of the highest attainable standard of physical and mental health; and education. (UNHCHR, 2006, p. 25-26).*

Furthermore, the International Convention on the Rights of Migrant Workers, which recently entered into force, explicitly guarantees the rights of migrant workers and their families to emergency medical care, providing them with medical care “urgently required for the preservation of their life or the avoidance of irreparable harm to their health” on an equal basis as a state’s nationals, without regard to irregularity of status (art. 28). With respect to additional health services, the Convention guarantees migrant workers equality of treatment with nationals in access to social and health services if requirements for participation in those schemes have been met (art. 43(1)(6)).

## 5. Looking Forward

Providing ART to migrants requires a two-fold effort on the part of states in the Global South and among international donors and NGOs: citizenship-based discrimination in the provision of ART must be eliminated, and cross-border and migrant-friendly treatment mechanisms must be created.

### *5.1 Citizenship-Based Discrimination in the Provision of ART*

As noted above, the Economic, Social and Cultural Rights Committee has mandated that states have an obligation to provide a certain “core” minimum of rights, including: ensuring non-discriminatory access to health facilities, particularly for vulnerable or marginalized groups; providing essential drugs; ensuring equitable distribution of health facilities, goods and services; adopting and implementing a national public health strategy and plan of action with clear benchmarks and deadlines; and taking measures to prevent, treat and control epidemic and endemic diseases (UNCESCR, 2000). Further, according to the Committee, states have an *immediate obligation* to eliminate discrimination in access to health care, and to take concrete steps toward the full realization of the right to health.

The core minimum obligation to provide health care, which the Committee has explicitly noted, includes access to ART treatment drugs included on the WHO List of Essential Medicines.<sup>5</sup> Some sources have argued that essential medicines, as part of the core of the right to health, are even subject to immediate rather than progressive realization. The UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health has noted that access to essential medicines is a “fundamental” part of the right to health (HUNT, 2006, p. 10-11). States have a duty to make existing medicines available within their borders



and to make sure that they are accessible, meaning that the medicines are available in all parts of the country, economically affordable for all and available without discrimination on any prohibited grounds, and that reliable information on the medicines must be available to patients and health professionals. States must also ensure that they are culturally acceptable (HUNT, 2006, p. 13). Indeed, according to the Special Rapporteur,

*States have an immediate obligation to avoid discrimination and also to make certain pharmaceuticals — known as “essential medicines” — available and accessible throughout their jurisdictions. These core obligations of immediate effect are not subject to progressive realization. (HUNT, 2006, p. 14).*

Thus,

*[i]n summary, the right to health encompasses access to non-essential and essential medicines. While a State is required to progressively realise access to nonessential medicines, it has a core obligation of immediate effect to make essential medicines available and accessible throughout its jurisdiction. (HUNT, 2006, p. 15).*

National governments, such as those of South Africa and Thailand, need to make essential ART treatments available to non-citizens and citizens alike in order to honor their commitment to non-discrimination in core health care services, which include the provision of essential medicines. These treatments need to be provided on the same terms without discrimination as to citizenship or residency status. Included in States obligation to provide free or low-cost ART irrespective of citizenship is, crucially, the duty to offer ART for Prevention of Mother-to-Child Transmission (PMTCT) for migrant HIV-positive pregnant women.

Furthermore, international donors position as dispensers of the funding for ART programs places them in a position of some authority when it comes to influencing state policy on the dispensation of funded drugs. International donors should exert their influence on national policymakers to ensure that national eligibility criteria are not discriminatory and that donor contributions are not used in a discriminatory manner. International donors should condition funding for ART drugs for the general population on the equal availability of these drugs to both citizens and non-citizens, including non-citizens with irregular and undocumented status. Adequate funding of ART for non-citizens is also essential to the success of any official policy granting access.

## *5.2 Cross-Border and Migrant-Friendly Treatment Mechanisms*

Migrants, especially short-term, mobile ones, require additional attention from national governments and the international community in creating mechanisms to adequately provide continuity of care. Individuals who move frequently requiring ART are faced by multiple treatment challenges, as noted above. Cross-border tuberculosis (TB) treatment systems developed between the United States and Mexico may serve as an example for enabling care for mobile individuals (HARLOW, 1999, p. 1581). In the context of

HIV, neighboring states could work together to standardize health passports or health information cards used by individuals on both sides of the border so that consistent information is provided and health providers in multiple locations will be able to recognize a patient's health information, treatment stage, and required next steps. Next, states could discuss recommended treatment regimens with neighboring states with common migration routes so as to standardize drug regimens and ensure that patients can seamlessly switch treatment at a clinic from one side of the border to another. Further, while challenging, states could consider working across borders to provide an international registry or statistical database for collecting patient data in an accessible, confidential format. Additionally, states could provide translators in clinics along common border routes who speak the languages commonly spoken by migrants to the area.

International organizations and donors could aid states in creating each element of the cross-border treatment scheme. UNAIDS has called for “regional protocol for the standardization of HIV treatment, as well as a regional system and means to secure such treatment by affected individual[s]” (2008a, p. 6). Together with state governments, international organizations and donors could play a role in making sure that health passports, treatment regimens, and ART guidelines already implemented by governments are adjusted so show uniformity across borders. These actors could also crucially take part in establishing an international registry or database for collecting confidential patient data in an accessible format.

Additionally, international sources could be instrumental in hiring translators for clinics to aid in counseling migrants, in providing transport from migrant settlements or refugee camps to clinics, and in providing nutritional assistance and other supplementation to ART regimens to improve the health of migrants. Offering information in a format that is most accessible to the migrants—whether through a hotline, pamphlets, or verbal counseling—on locations of other clinics along common migrant routes and at the migrant's next destination could serve to help mobile populations access services. UNAIDS (2008a, p. 6) has also recommended the development of reception centers in each country providing information for migrants to access information and services, including referrals for health care.

## 6. Conclusion

UNAIDS has called for measures ensuring that

*sending, transit and receiving countries have joint/tripartite health access programmes in place to address all possible time and place points on the moving continuum for citizens/migrant workers, including pre-departure, the migration itself, the initial period of adaptation, successful adaptation, return migration, and reintegration into the original community. (UNAIDS; IOM, 2001, p. v and 39).*

The right to health care and to equality and non-discrimination create a commitment by states to provide a core of health care on the same terms as citizens even for non-citizens of irregular status. This statement of best practice and this requirement of international law,

have not, in practice, been met. The result is that millions of individuals fail to access the HIV treatment they need and risk needless health complications and premature death.

The benefits of allowing migrants to seek care early and to obtain medication for treatable disease, and the consequences of failing to provide this care, are considerable. Studies have documented that immigrants tend to be in better health upon arrival than native born individuals (McDONALD; KENNEDY, 2004, p. 1613-1627). Yet, lack of legal status, fear of detection, and legal restrictions on care lead to a lack of utilization of health services and delays in seeking care. This article provides suggestions for a way forward with the aim of increasing access to ART for non-citizens in countries of the Global South, including long-term and short-term migrants, and refugees. Only with concerted global effort on the part of states, international organizations, and donors, will migrants' right to health care, and particularly to ART, be fully realized. Legislative and programmatic action to eliminate citizenship-based discrimination and improve migrants' access to ART is not only dictated by public health considerations, but immediately required by international law.

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## NOTES

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1. Note, however, that there is no internationally agreed-upon definition of "migrant" (Joint United Nations Programme on HIV/AIDS [UNAIDS]; International Organization for Migration [IOM], 2001, p. 1).
2. Indeed, free access to HIV/AIDS treatment at point of service delivery has been determined by the WHO to be a component of universal access (SOUTEYRAND et al, 2008).
3. For a discussion of the barriers in Thailand facing drug users in accessing HIV testing, support, and treatment, see Human Rights Watch (2007).
4. Under international law, states have the right to control their borders and decide whom to admit or deport, following appropriate procedures and limited

by considerations of non-discrimination, prohibition of inhuman treatment, respect for family life, and other human rights and refugee law protections (UNhrc Human Rights Committee [unhrc], 1994a, para. 5). Non-citizens' rights to non-discrimination in core rights—such as health care—discussed in this document do not interfere with a nation's basic right to control its borders where otherwise condoned by international law.

5. The WHO List of Essential Medicines includes antiretrovirals in three classes—nucleoside/nucleotide reverse transcriptase inhibitors, non-nucleoside reverse transcriptase inhibitors, and protease inhibitors—as essential drugs for the treatment and prevention of HIV (WHO, 2007).



## RESUMO

Embora o direito internacional dos direitos humanos estabeleça o direito à saúde e à não discriminação, poucos países cumpriram com sua obrigação de oferecer tratamento de HIV para não cidadãos – incluindo refugiados, migrantes permanentes em situação irregular e migrantes transitórios. Dois países, África do Sul e Tailândia, ilustram como políticas e práticas governamentais discriminam não cidadãos negando-lhes o tratamento. Na África do Sul, ainda que indivíduos em situação irregular tenham direito a tratamento de saúde gratuito, incluindo a terapia antiretroviral, as instituições públicas de saúde frequentemente negam o tratamento antiretroviral àqueles que não são cidadãos sul-africanos. Na Tailândia, até mesmo entre migrantes regularizados, somente as mulheres grávidas têm direito à terapia antiretroviral. A fim de atender o direito internacional dos direitos humanos - que garante o fornecimento de um conjunto mínimo de serviços de saúde sem discriminação – os Estados do Sul Global e de todo o mundo devem disponibilizar drogas antiretrovirais e torná-las acessíveis aos migrantes nas mesmas condições que a seus cidadãos.

## PALAVRAS-CHAVE

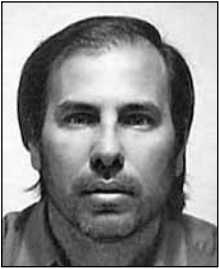
Migrante – HIV/AIDS – Terapia antiretroviral – Direitos humanos – Direito à saúde.

## RESUMEN

Mientras que el derecho internacional de los derechos humanos establece el derecho a la salud y a la no discriminación, pocos países dan cumplimiento con sus obligaciones de proporcionar tratamiento contra el VIH a los no ciudadanos, incluyendo a los refugiados, los migrantes permanentes en situación irregular y migrantes temporarios. Dos países, Sudáfrica y Tailandia, dan ejemplos útiles de cómo las políticas públicas y sus prácticas discriminan a los no ciudadanos y se les niega atención médica. Aunque en Sudáfrica los individuos con estatus migratorio irregular gozan del derecho a la asistencia sanitaria gratuita, incluyendo el tratamiento antirretroviral (TAR), a los no ciudadanos sudafricanos se les niega frecuentemente el TAR en las instituciones de salud pública. En Tailandia, incluso entre los migrantes regulares, sólo las mujeres embarazadas tienen derecho al TAR. A fin de cumplir con las obligaciones internacionales de derechos humanos -que requieren de la provisión de un mínimo básico de servicios de salud sin discriminación- los estados en el sur global y en todo el mundo deben garantizar la disponibilidad y accesibilidad de los medicamentos esenciales para el TAR para los migrantes en las mismas condiciones que para los ciudadanos.

## PALABRAS CLAVE

Migrantes – VIH/SIDA – Terapia antirretroviral – Derechos humanos. – Derecho a la salud.



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## ABSTRACT

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The legal instruments adopted by the European Union (EU) to ensure free movement within the territory of the Member States are closely linked to the control of the external borders. Over the past ten years, EU member states have created various mechanisms to prevent, control, and punish irregular immigration to the European community, whose migration model is characterized by an instrumental vision that cheapens the value of fundamental rights and reduces the low-skilled labor migration needed by the labor market. From there, EU states derive laws that recognize rights according to the person's nationality and immigration status. In this context, this paper will analyze, with a focus on human rights and from physical, symbolic, political, and legal points of view, what is supposedly a radical "advance" of this process of externalization: the operations created to impede migration of people in "canoes" or "boats" to Europe from the coasts of countries like Morocco, Algeria, Senegal or Mauritania.

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## KEYWORDS

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Migration Control – European Union – Human Rights – Extraterritoriality – Africa.



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# EUROPEAN MIGRATION CONTROL IN THE AFRICAN TERRITORY: THE OMISSION OF THE EXTRATERRITORIAL CHARACTER OF HUMAN RIGHTS OBLIGATIONS

Pablo Ceriani Cernadas

## 1. Introduction

The Schengen Agreement and other legal instruments adopted by the European Union (EU) to ensure free movement within the territory of the Member States are closely linked to the other side of this process: the control of external borders. In the last ten years, EU member states have developed various means to prevent, control and punish illegal immigration into the European community. The rules relating to visas, carrier liability, and joint return operations of migrants (UE. EUROPEAN COUNCIL, Regulation No. 574/1999, Directive No. 51/2001 and Decision No. 573/2004a) or information systems and surveillance at borders (the Schengen Information System - SIS, and the European Agency for the Management of Operational Cooperation at the External Borders - FRONTEX<sup>1</sup>), are some of those devices. The priorities of the Hague Program for 2005-2010 included the strengthening of border control policy and the “fight against illegal immigration”<sup>2</sup>.

According to a logic of control, security, and fear (GIL ARAUJO, 2002; SOLANES, 2005), the migratory model of the EU is characterized by an instrumental vision: a unilateral and limited view that cheapens the value of fundamental rights and reduces low-skilled labor migration needed by the labor market (DE LUCAS, 2002, p. 32). From there, EU member states derive laws that recognize rights according to the person’s nationality and immigration status. This inequality assumes an exclusion of such magnitude that it has been associated with a system of apartheid (BALIBAR, 2003, p. 191-192). The directive on family reunification is a prime example of this inequality of rights – fixed in a double standard – with respect to the right to family life for immigrants from outside of the EU (EU. EUROPEAN COUNSEL, Directive No.

*Notes to this text start on page 200.*

86/2003)<sup>3</sup>. More recently, the directive relating to the return of persons who migrated through irregular channels (EU EUROPEAN PARLIAMENT AND EUROPEAN COUNSEL, Directive No. 115/2008) is a clear setback for human rights standards, especially on issues such as deportation, deprivation of freedom, the detention of children, and the guarantees of due process (DE LUCAS, 2009).

Through monitoring mechanisms, visa issues, and the FRONTEX agency, countries have designed new instruments to increase the efficiency of migratory controls: bilateral readmission agreements between Spain and Italy with African countries; Euro-African initiatives regarding migration and development; the European neighborhood policy (PEV); the EURODAC fingerprint identification system; strengthening land borders (Ceuta and Melilla); the actions of the European Patrol Network (EPN) in the Mediterranean and the Atlantic since 2007; the Rapid Border Intervention Teams (RABIT); etc.<sup>4</sup>. Some of these programs have shaped the process of externalization of migration control<sup>5</sup>.

In this context, this paper will analyze, with a focus on human rights and from physical, symbolic, political, and legal points of view, what is supposedly a radical “advance” in this process of externalization. The paper concerns the operations created to impede migration of people in “canoes” or “boats” to Europe from the coasts of countries like Morocco, Algeria, Senegal, and Mauritania<sup>6</sup>. These actions consist of intercepting boats and “returning” migrants to the place from which they exited, or to some other country that will admit them, according to the agreements that exist with the European authorities<sup>7</sup>. Of the many levels impacted by these initiatives, this paper will focus on their legal implications, concretely in terms of the rights of the people who are captured on these boats and the obligations of the states that engage in such actions.

To this end, it is necessary to identify why the European authorities that create and execute these initiatives must assume the responsibility that every State has with respect to any person “under its jurisdiction,” an obligation that goes beyond the physical territory of the State. That is to say, the extraterritorial application of human rights obligations. Later, the paper will examine which rights come into play – or are threatened – when these interception and return measures are taken within the African territory. The rights to life, physical integrity, asylum, and freedom of movement, like the guarantees of due process, are not properly considered during these operations. The final reflections of this paper will address how these control mechanisms represent a new challenge for an overdue debate on: the scope and importance of the right to freedom of movement, which includes the right to leave one’s country (of origin) and the right to enter into another.

## **2. The concept of “persons under the jurisdiction” of a state**

Before analyzing the rights at stake in the migration control measures introduced above, it is appropriate to comment on a legal principle: the notion of state “jurisdiction” under human rights treaties. As many already know, the obligations assumed by States in these agreements must ensure respect for all people found “under their jurisdiction.”

In this regard, it should first be noted that the term “jurisdiction” is not

synonymous with the “territory” of a State. As such, human rights obligations do not refer only to actions taken by the State within its own territory, but rather include the responsibility of the State in question to ensure the rights of a person with regard to any conduct its agents effectuate in exercise of their functions, without prejudice to the place where the conduct takes place. In this sense, the – now extinct – European Commission for Human Rights stated that the duty of ensuring all rights contained in the European Convention, to any person under the jurisdiction of a member State is not limited to the territory of the member State, but extends to all people under the State’s authority and responsibility, whether such authority is being exercised within the State’s territory or beyond. Therefore, not only is the concept of jurisdiction meant for authorized agents performing functions abroad, but it also extends to the people over which these functions are exercised. If an agent’s acts or omissions infringe on the rights of these people, then the responsibility of the State has been compromised<sup>8</sup>.

By the same token, for the United Nations Human Rights Council (UNHRC), the term “individuals subject to its jurisdiction” does not refer to the State where the violation of rights occurs, but rather to the relationship between the person and the State. A State may be responsible for violations committed by its agents in the territory of another State, independent of whether such violation occurred with the acquiescence of the host State’s government. For the Council, pursuant to Article 5.1 of the ICCPR, no element of an agreement can be understood to allow a State to commit acts that would be prohibited on the State’s own soil, in the territory of another State (UNHRC, 1981, § 12.2, 12.3). A similar conclusion was reached by the Committee on Economic, Social and Cultural Rights (UNCESCR) (2003, § 31) and the International Court of Justice (ICJ)<sup>9</sup>. These standards are evidence that the link established between State jurisdiction (in regards to human rights) is not territorial, but rather relates to the relationship between an individual and the representatives of said State (GIL-BAZO, 2006, p. 593-595). The concept of “jurisdiction” highlights the effective control that state authority has over a person, without prejudice to whether such a person is located within the territory of the State (UN-HRC, 2004a, § 10; De Schutter, 2005, p. 10; RIJPMMA, Cremona, 2007, p. 17).

In applying the standards to the case under analysis, it is noted that there is no doubt about the control exercised by the European representatives in their operations in African territory. The presence of one or more persons from the government of Senegal or Mauritania in the European patrol boats does not constitute the replacement of authority. In any such case, the jurisdiction (and responsibility) will be shared, according to the authorities involved in each action, but there is no denying the decisive role of the European authorities in monitoring and locating the canoes and providing for their subsequent interception and return.

Existing data supports this assertion. At least based on the data available, researchers have found that certain bilateral agreements remain secret (CARRERA, 2007, p. 22; MIR, 2007, p. 4), contrary to the principles of legality and in regards to the universal application and publication of laws. The case of measures developed by Spain provides a good example of this. The resources destined for these operations

implicate Spain's formal, material, human, and, ultimately, political involvement, in these operations. As indicated by the Pro-Rights Association of Andalusia (APDH),

*Spain has sent four Civil Guard ships... to monitor the waters of Mauritania and Senegal... In only three African countries (Mauritania, Senegal and Cape Verde), there are a total of 64 officers, 14 boats, two aircraft and two helicopters [...]there is African police oversight for the Spanish ships that are traveling in Mauritania and Senegal, but only in a purely testimonial sense[...] In fact, each patrol boat carries eight Civil Guard officers and two Mauritanian and Senegalese police guards. (APDHA, 2008, p. 40-41).*

Additionally, jurisdiction can also be verified in these cases according to the flag flown by the boat effectuating the interception of the canoes (WEINZIERL, 2007, p. 40-42).

This circumstance is further evidenced by the measures taken by Spain itself. With the government decision creating an administrative authority charged with centralizing the initiatives meant to control migration to the Canary Islands<sup>10</sup>, it can be noted that actions in African waters constitute the application of Spanish (as well as European) public policy, as stated:

*the actions initiated by the Government in countries where migratory flows originate, such as joint land, air, and naval police operations... , constitute the basic tools used to confront illegal immigration by sea and conform to the planning of operations that, under the EU-funded Rapid Response Projects and Mechanisms (RRM), intend to decisively stem the flow of boat migration from the coasts of Mauritania...and Senegal (Operation Goree<sup>22</sup>). In said bilateral projects, in addition to including naval and air resources from the Civil Guard, they integrate other resources of the National Police Body and DAVA<sup>13</sup> (Department of Customs Monitoring). (CANARY ISLANDS, PRE/3108 Presidential Order, 2006).*

It is important to note one aspect that we will return to in the next section: the prohibition of non-refoulement is neither dispensed of when the security forces of one State act by "invitation" of another (in whose territory the acts take place), nor when the actions of the first State take place with the consent of the other (expressed, for example, in a bilateral agreement) (BORELLI, 2005, p. 39-68, p. 57-58). Also, it must be reaffirmed that in this case, even though consent exists, the initiative, the economic resources, the boats that effectuate the patrols, the recent installation of satellites to monitor the African coast,<sup>14</sup> and, finally, the decisions and political interests flow from the States of the EU.

In short, the migrant return operations effectuated in African waters clearly demonstrate the point made by Gondek, in the sense that in the current context, marked by globalization and the rise in State activities outside their own borders, the extraterritorial application of human rights agreements has become increasingly important (GONDEK, 2005, p. 351). The standards relating to "jurisdiction" in human rights treaties expressly endorse extraterritorial application in such circumstances. Accordingly, in the following section, we will observe which fundamental rights come into play when analyzing migration control operations designed and implemented by European authorities in African lands and waters.

### 3. migration control, the right to life and the right to physical integrity

#### 3.1 *The principle of non-refoulement: the inattention to a key principle of international law.*

One of the most serious inquiries that can be made concerning the migration control operations effectuated by European authorities in the territory of African countries relates to the *principle of non-refoulement*. This principle, recognized explicitly and implicitly in various treaties<sup>15</sup>, is an absolute and non-derogable obligation, a preemptory norm of customary international law (*Jus Cogens*)<sup>16</sup>, and, as such, cannot be violated in any way (either by act or omission). According to the International Court of Justice, non-compliance does not weaken, but rather strengthens its character (ALLAIN, 2001, p. 540-541).

The guarantee of non-refoulement prohibits a State from returning a person to another State where there is evidence that he or she may suffer threats to their life or physical integrity in the place to which they will be returned. To determine whether evidence exists that a person is in such circumstances, an individual examination must be conducted in each case. However, according to all informational sources (official or otherwise) that have been identified concerning the mechanisms of interception and return in African waters and on the African coast, there is no evidence that points to the existence of any process that examines the individual circumstances of each person being forcibly returned. Thus, it is impossible to be sure that people returned to the countries from which they came (not necessarily the countries of origin<sup>17</sup>) will not suffer a threat to their lives or physical integrity.

The non-refoulement principle not only applies to cases of asylum seekers, but, being closely linked to the protection of the right to life and physical integrity, also applies to any person who, for whatever reason, would see those basic rights threatened upon being returned to their country of origin. In turn, this principle has no geographical limitations and must be respected by the authorities of a State wherever such State exercises jurisdiction, regardless of the territory in which the actions are executed<sup>18</sup>. The principle of non-refoulement not only applies extraterritorially, but the formal characterizations of the acts of such transfer are also irrelevant (e.g., the extradition of persons accused of crime, expulsion of immigrants, return, etc.). (Borelli, 2005, p. 64).

This position was expressly assumed by the Inter-American Commission on Human Rights (IACHR) in a case that presents several similarities with the current controls on the African coast. In the so-called “Case of Haitians,” referring to the interdiction and return measures undertaken by United States (U.S.) authorities in international waters and the waters (and coast) of the Republic of Haiti, which were intended to prevent the outflow of people from Haiti bound for the U.S. or other countries. The U.S. claimed that the principle of non-refoulement did not apply because the actions occurred outside its territory. The Commission rejected this position and indicated that it shared the view of the UNHCR, which said the principle “does not recognize geographical limitations”<sup>19</sup>.

Moreover, the principle of non-refoulement may not be infringed upon indirectly. This applies not only if a State returns a person to another in which the person's life and physical integrity may be endangered, but also if a State sends the person to a third country (his or her country of nationality) in which such rights may also be violated. Therefore, the legal obligation of a State that sends a person to another country (of which such person is a non-national) includes the duty to assess whether the receiving State also respects the principle of non-refoulement. Otherwise, the two States in question are considered responsible for a violation, through their so-called "indirect removal" (LAUTERPACHT, BETHLEHEM, 2003, p. 115).

On this subject, there are various international human rights protections, which set an important standard. The Committee against Torture, in a case against Sweden concerning the expulsion of an alien that constituted an alleged violation of the non-refoulement principle, challenged the State's action in the sense that the immigration authorities, to resolve the expulsion of an Iraqi person to Jordan, failed to assess the risk that Jordanian authorities would then deport her to Iraq (Committee against Torture, 1998, § 6.5 and 7). At the European level, the European Convention on Human Rights (ECHR) also endorsed the hypothesis of indirect refoulement, although in that case it found no violation because the intermediate State was part of the European Convention and therefore could not violate the prohibition of Article 3<sup>19,20</sup>.

In the immigration enforcement actions under analysis, there is no information that allows us to affirm – with any degree of certainty – that authorities in countries such as Senegal, Mauritania, and Gambia comply with the prohibition on non-refoulement, once the people intercepted by European authorities are returned. What is relevant is the absence of information which would demonstrate the State's investigation of these issues during the detention and return processes. Spanish social organizations have provided evidence concerning this situation<sup>21</sup>.

The initiatives of the EU itself confirm this absence. In December of 2006, the European Commission said it was necessary to evaluate the possibility of extending the international protection obligations of States, such as the non-refoulement principle, to the situations in which a State's boats implement interception measures. In particular, the Commission said it would be appropriate to analyze the circumstances under which a State is obliged to assume responsibility for examining an asylum application, as a result of the application of international refugee law, during the operations taking place in the waters pertaining to another State or in international waters (European Commission, 2006, § 36). The words of the Commission are sufficiently clear: States should consider whether they are obliged to respect their international obligations in the context of policies and measures carried out in African waters aimed at preventing illegal migration. The answer is very simple and requires no deep inquiry. International norms, standards, and basic principles of international human rights (such as non-refoulement), indicate quite clearly that States must meet these duties, without exception, under any circumstances and in any place where a person falls under its jurisdiction.

This scenario gives rise to a reflection: if borders are "an absolutely undemocratic or discriminatory condition of democratic institutions" (Balibar, 2003, p. 176), a diffuse, ambiguous, and shifting border area constitutes an extreme situation where States do



not apply basic rights normally recognized by the laws governing their own borders (to analyze the guarantees – which are included in these operations, we will see how this perception of a “no-law zone” has been consolidated). Contrary to the position we have taken, if one understands that the responsibility for a possible violation of the principle of non-refoulement falls on the African State in whose territory the acts occur, we would have to ask whether the European States participating in these activities, providing the assistance required for implementation and taking charge of oversight (policy, operational, material, and financial) for these initiatives also share some responsibility.

### *3.2 The right to life and migrant deaths at sea*

Year after year, in the waters of the Atlantic Ocean and the Mediterranean, there are thousands of deaths of people seeking to migrate from Africa to Europe. It is difficult to ascertain exactly how many die in the attempt to migrate to another country, and it is equally or more complex to assign legal responsibility to States in these circumstances. Obviously, this difficulty vanishes when a causal link between certain behaviors and an outcome of death is demonstrated, as in the case where death occurs during return or deportation operations where the person is in the custody of public authorities. But, for those who die in the sea crossing, the issue is more complicated.

At this point, criminal responsibility must be distinguished from responsibilities relating to human rights. The obstacles inherent in the identification of persons responsible from a criminal perspective do not prevent us from making some observations from a human rights perspective, focusing on the behavior of States. As with other fundamental rights, States must respect and fulfill the right to life. In the context of immigration control policies, this obligation translates into the duty to refrain from taking any measures that could lead, directly or indirectly, to the violation of this right.

In response, it is noteworthy that there are several reports that show two narrow connections relevant to this analysis. On the one hand, we have the EU’s increasingly restrictive immigration policies and the increase in irregular migration and trafficking networks (a crime whose main victims are the people, not the States). On the other hand, there is the increase and diversity of the mechanisms of control of irregular migration in the Mediterranean and from the Atlantic coasts of Morocco, as well as the departure of canoes from further south (Mauritania and Senegal), which have demonstrated a notable increase not only in the distance traveled, but also in the danger of the journey<sup>22</sup>. This link between the tightening of immigration policies, greater control of irregular migration, and the increase of people dying at sea, requires us, at a bare minimum, to reflect and debate on the responsibility of European States in adopting measures that may contribute (along with other factors) to the loss of the lives of thousands of people.

Moreover, the obligation to respect human rights includes the duty to establish the necessary policies and measures to ensure that people can actually enjoy such rights. In this sense, one could say that, because the objectives announced by the FRONTEX Agency and by States patrolling international, African, and European waters to prevent irregular migration, include the desire to prevent the deaths of migrants or reduce risk of these trips, their actions constitute an attempt to guarantee the right to life. This

would not be incorrect. In either case, it must be stated that rescue at sea is an obligation under international law (CONVENTION ON THE LAW OF THE SEA, art. 98.1; INTERNATIONAL CONVENTION ON MARITIME SEARCH AND RESCUE, para. 2.1.10; AMENDMENT 2004 of the International Convention for the Safety of Life at Sea, and UNHCR and International Maritime Organization - IMO, 2006) and that the central purpose and priority of the presence of ships and aircraft in these areas is to promote security and, within it, migration control. The results, actions, and other remedies would be irrefutably different if the principle aim was to secure the right to life<sup>23</sup>. In turn, this obligation includes the duty to conduct a serious investigation into the circumstances of the thousands of deaths that occur annually, and, consequently, to modify the policies and mechanisms that could strengthen the protection of this right.

Migration, even if irregular (or rather, especially if irregular) is an extreme decision which is directed precisely at trying to effectively exercise the right to a dignified life, the right to free movement, and the right to leave one's country<sup>24</sup>. Deprivation of component rights that are interdependent with the right to life (health, work, and housing), and on the right to an adequate standard of living, is just one of the leading causes of irregular migration, which is by its nature risky and makes a person vulnerable. Therefore, States should make a concerted effort to refrain from continuing to enact policies that can increase these risks and vulnerabilities, which contribute to the deaths of people seeking to enjoy a better life for themselves and for their families. We face dire circumstances and consequences as a result of the hierarchization of global mobility (Bauman, 1999, p. 93-123). As stated by De Lucas, the right to movement cannot be "a fatal decision, a dangerous and degrading enterprise that appears to be the only option to [...] escape misery, a lack of freedom, or a lack of opportunities in life." (DE LUCAS, 2006, p. 40).

#### **4. Apprehension and return of migrants: the impact on the right to freedom of movement**

The control of migration in Northwestern Africa also presents a challenge in terms of the personal liberty of migrants who are returned, on two levels: (1) in the arrest immediately after interception, and (2) in the establishment of a punishment for attempting to migrate illegally.

(1). As part of interdiction efforts, one consequence may be the deprivation of freedom upon returning to the coast. Spain and other EU countries have contributed (materially and politically) to the creation of Detention Centers for migrants in countries like Morocco and Mauritania. These centers, as Nair points out, are a new phenomenon that is spreading outside the European area, namely through implementation of the policy of containment and selection assigned by the EU to neighboring countries. Such centers are characterized, Nair says, by the indeterminacy of the legal status of detainees and the period of detention, as well as by the lack of statistics and basic information about the centers<sup>25</sup>.

Non-governmental organizations and media sources have repeatedly described how, after the interception of boats or canoes near the coasts of these countries, people

were detained in these types of centers (APDH, 2007, p. 19-20). In some cases, the situation was more serious. In February 2007, the Marine I boat was intercepted off the coast of Mauritania, with 372 people on board (300 from India and Pakistan and the rest from other countries like Myanmar, Sri Lanka, Sierra Leone, and Liberia). The Spanish authorities at the port of Nouadhibou, following an agreement with Mauritania, divided the people according to the destinations determined for them<sup>26</sup>. Twenty people were deprived of their liberty at Nouadhibou. According to the information not denied by the governments involved, these people were detained in a “fish warehouse” for over two months. One can imagine that the conditions of detention there could not meet the requirements of laws and core principles (like the set of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN, cf. UN - GA Resolution 43/173, 1988). In addition, in contravention of international standards<sup>27</sup>, there was no intervention by any judicial authority (Mauritanian or Spanish) during that period to review the legality of such administrative detention or the conditions of detention.

As a result of this, and due to the fact that the detention of these persons had been imposed after the intervention of Spanish authorities and that hangar migrants would have been in the custody of security agents of Spanish nationality, the Spanish Center for Assistance to Refugees, Doctors of the World (Medicos del Mundo), and Amnesty International made a legal complaint against the Spanish State for violations of the rights to liberty, physical integrity, and effective judicial protection<sup>28</sup>. The National Court (2007a<sup>29</sup>) rejected the demand, arguing that there had been no human rights violations and that the events occurred under Mauritanian jurisdiction. This argument is remarkable because, according to documents submitted to the court by the State (an agreement between Mauritania and Spain), the security forces of both countries would be in charge of operations performed<sup>30</sup>. The ruling also noted that the Spanish intervention was limited to compliance with humanitarian and rescue obligations. While in part this is true, it ignores the political and regulatory framework of the State’s presence in these waters, whose primary purpose is not of a humanitarian nature, but rather to control immigration and “fight against illegal immigration.”

(2) This scenario of controlling migration from Africa to Europe has also resulted in legislative changes (and changes in enforcement) in African countries, much to the detriment of the right to personal liberty of those who migrate or try to migrate. In this regard, the UN Special Rapporteur on migrants’ rights – although admitting that reducing irregular migration can be a legitimate objective – said the EU policies have contributed to the criminalization of irregular migration by treating such migration as a criminal offense (UNHRC, 2008, § 19). Indeed, in recent years, countries like Morocco and Senegal have changed their laws or practices regarding migration control, establishing prison terms for those who emigrate irregularly. Thus, immigration law No. 02-03 (adopted in Morocco in 2003) imposes fines and imprisonment from one to six months (art. 50) for persons who leave Moroccan territory illegally or enter the country through places other than those established for such purpose.

Moroccan investigators agree on the causes of these changes. For Khachani (2006, p. 48-50), this legislation seems to be a response to external pressures relating to security,

involving in the State in action that prioritizes regional and international security at the expense of human rights and places Morocco where the EU wants it, in order to control migration. The role assigned by the EU to Morocco, according to Belguendouz (2002, p. 42), is that of a “safety belt or quarantine line” of Europe. In developing the project that later would become law, Khachani stated that this was a “capitulation” to the Spanish and European interests, a response to “blackmail” and “pressure” that “Schengen-ized” Moroccan politics and criminalized those who immigrated to Morocco and the EU (BELGUENDOZ, 2003, p. 33-35).

Another issue that exacerbates the regressive nature and size of change is the fact that, ten years before the new law, Morocco made a significant gesture in the opposite direction. In June 2003, Morocco ratified, unlike any of the EU States, the Convention for the Protection of the Rights of All Migrant Workers and their Families, whose text, according to the Committee that verifies compliance, prevents the sanction of irregular migration with custodial sentences<sup>31</sup>.

Since 2006, this turn in Moroccan policy has progressively taken place in other countries on the West African coast as well. In this sense, it has been emphasized that Spain has convinced Senegal and Mauritania to arrest potential migrants on their respective coasts, and readmit those who managed to enter illegally (in this case, through readmission agreements). Consequently, Senegal has disclosed its intention of arresting 15 thousand people ready to depart for the Canary Islands, while 116 people have already been sentenced to two years of imprisonment (SPIJKERBOER, 2007, p. 130). The media has reported similar cases, both in Senegal<sup>32</sup> and in Algeria<sup>33</sup>.

In this manner, European pressure to control and sanction irregular migration has contributed to increased use of the term “illegal emigration.” Thus, EU states are supporting a trend that would criminalize the exercise of the right to leave a country and, in many cases, punish the victims of such crime. In this regard, Bauman presents the paradox of this scenario, in which the “rational” world faces the challenge of having to deny others (in a situation of total vulnerability) the right to freedom of movement, a right that is exalted “as the maximum achievement of the globalized world” (Bauman 1999, p. 102). In this regard it is noteworthy that the IACHR, in the Haitian case cited above, concluded “that the act of intercepting Haitians at sea in ships is a violation of the right to freedom”<sup>34</sup>. The right to freedom is unlawfully restricted not only by imprisonment but also by the mere act of interception.

## **5. The right to asylum: returns without the possibility of soliciting international protection**

Interceptions carried out on African territory by authorities of European countries (e.g., the Spanish Civil Guard in the Cassamance River, south of Senegal) are carried out without the adoption of an individualized procedure to establish the steps to be taken for each person found in a canoe. This results in harm to those seeking asylum. The European Commission itself (2006, § 10) questioned whether it would be necessary to take steps to verify if any such people required international protection.

Currently, any completion of an application for examining whether any of the

intercepted persons needs asylum is effectuated, once the operation of the European security officials has been finalized, by officials of the respective African country, under the rules and procedures applicable in each case. It is noteworthy that in several of these countries there is no legislation or official procedure for the recognition of refugee status (Conseil consultatif des droits de l'homme, 2008, AMNESTY INTERNATIONAL, 2008).

But, the problem that we want to stress is that, within the framework of procedures for interception and return designed and implemented by European authorities, it is not possible to invoke the right of asylum and to request the initiation of a proceeding to analyze the request. If the interception were effectuated a few miles further north (in European or international waters), everything indicates that those same authorities would be forced to initiate the process for determining the granting of refugee status or other protection. But, further south, this obligation vanishes. In this regard, the United Nations Rapporteur on the rights of migrants stressed the novelty and gravity of these actions on the African coast, and noted the importance of

*states taking measures so that cases of persons intercepted and rescued at sea are dealt with on an individual basis and assured judicial guarantees, and that people who claim international protection can have access to the national procedure for asylum. (UN. HUMAN RIGHTS COUNCIL, 2008, § 38-40).*

The international refugee law does not seem to legitimize these practices, even if interceptions are carried out within the framework of an action of rescue at sea. The IOM (2001, Annex, § 5) has indicated that any action taken at such times must be in accordance with the Law of the Sea and other international instruments such as the 1951 Convention on Refugee Status. On the other hand, UNHCR has stated that the

*interception measures should not result in the denial of access to international protection for asylum seekers and refugees, or in the return of those who need international protection, directly or indirectly, to the frontiers of territories where their lives or freedom would be threatened on account of the grounds enumerated in the Convention, or where the person has other grounds for protection based on international law. (UNHCR, 2003, § IV)<sup>35</sup>.*

Similarly, the ECHR has ruled that States' actions meant to control attempts to violate immigration rules cannot result in depriving people of the right to asylum guaranteed by various treaties<sup>36</sup>. The IACHR, in assessing practices significantly similar to European operations in African territory, stated that the U.S. controls in Haitian waters constituted a violation of the right to asylum protected by the American Declaration, by failing to provide a procedure that could determine the need for such protection<sup>37</sup>.

However, because the EU and its members are aware of their obligations under these circumstances, current practices in North Africa over the past few years seem to justify the criticism that characterizes this outsourcing process as an attempt to control and select immigrants, thus delegating to other States the eventual fulfillment of human rights obligations.

## 6. The absence of due process guarantees in the european controls in africa

The implementation of return measures contrary to the principles of due process and the minimum components of the right to effective judicial protection is being developed with particular intensity and magnitude in the control operations carried out off the North African coast. It is the “southern front,” explains Nair (2006, p. 60-65), where policies of “combating illegal immigration” are carried out by Spain, Italy, and other European countries, as well as some “subcontracted” African States. In these operations, there is no procedure available to substantiate – and justify – return procedures (i.e., the “punishment” for an alleged infringement of the regulations upon entry to and exit from the corresponding country).

There is no formal procedure. These “ways of doing things” are prohibited by international standards, as they involve the forcible detention of persons and, depending on the location of the acts (sea, coast), their transfer. It is true that measures of return (in cases of attempted illegal entry) are implemented based on the content of bilateral agreements or general agreements on the subject, or on an ad hoc basis in particular situations (as in the pact between Spain and Mauritania in the case of the *Marine I* ship). But, these agreements do not include or contemplate due process. Additionally, their “secret” character must be emphasized (CARRERA, 2006, p. 21-22, 25-28). This situation seems to correspond to what Mezzadra (2005, p. 107) describes as an “eruption of administrative criteria in areas of constitutional significance, with the burden of uncertainty and arbitrariness that this entails.”

The act of overlooking the guarantees established by human rights treaties, even considering the restrictive case law of the ECHR with respect to the procedural safeguards applicable to immigration control processes<sup>38</sup>, extends to EU law itself. Article 13.3 of the so-called “Schengen Borders Code” provides that persons denied entry have the right to appeal such decision and are required to receive, in writing, instructions on how to obtain information necessary for this purpose (EU. EUROPEAN PARLIAMENT AND EUROPEAN COUNCIL. Regulation No. 562/2006).

In the case mentioned on the interdiction of the Haitian boat people by the U.S., the IACHR concluded that these operations constituted a violation of the right of access to the courts to defend their rights<sup>39</sup> and dismissed the allegation of the U.S. government that such operators sought to reduce deaths at sea<sup>40</sup>.

In the present context of migration control into southern Europe, a sort of virtual fence has been established along the African coasts and African waters, so that by materially moving away from the EU’s external borders, the limited guarantees established by the immigration legislation of those States no longer apply. If the legislation of EU countries demonstrates inconsistencies with regard to due process and in the provision of an effective remedy against expulsion or return measures, the present situation goes even further (geographically and legally) to omit even the implementation of the few remaining guarantees (such as to legal assistance, administrative action, or at the very least, the right to submit an application!). While border controls and coercive mechanisms have spread hundreds of miles to the south, this externalization

is not complete, since the fundamental guarantees have not been “forgotten” across the European territory. With such guarantees, the principles of universality of human rights and the extraterritorial nature of their obligations remain.

Moreover, this type of operation jeopardizes the principle that prohibits collective expulsions, as recognized in Protocol 4 to the ECHR (art. 4), the American Convention (art. 22.9), the African Charter for Human and Peoples’ Rights (art. 12.5), and the CHARTER OF FUNDAMENTAL RIGHTS OF THE EU (art. 19.1). As defined by the European Court in various judgments, collective expulsion is a measure requiring foreigners, as a group, to leave a country except when such measure is taken as a result of and based on a reasonable and objective examination of the particular situation of each person. For the ECHR, a number of foreigners receiving a similar case disposition would not necessarily constitute a collective expulsion, if everyone had the opportunity of individually presenting his or her case against deportation before the competent authorities<sup>41</sup>.

This prohibition is inseparably associated with the right to due process and judicial protection since the purpose of prohibition is precisely so that a person can only be deported from a country as a result of a legal process related to his or her particular situation and based on the facts and evidence of each case. This process would include the possibility of knowing the reasons for deportation, the evidence on which the decision is based, and the right to challenge the order with an effective remedy. Therefore, the prohibition serves as a guarantee against arbitrariness and enables the questioning of actions when they are considered illegitimate based on due process guarantees.

To determine whether a case is in compliance with the prohibition, not only should there be a reasonable, objective, and individualized examination for each action of return, but the circumstances surrounding the execution of the decision must also be considered, as noted by the ECHR<sup>42</sup>. In control operations in African waters and on its coasts, there is no evidence that situations are evaluated individually. Thus, this principle, which has been most explicitly guaranteed by the European Court and its equivalent agencies in African and American contexts<sup>43</sup>, is now facing a serious threat from immigration control policies that, under certain circumstances, prioritize the “efficiency” and “speed” of enforcement over the fundamental rights of thousands of people.

As a corollary, these multiple restrictions on rights and guarantees also reveal discriminatory treatment. Being “illegal immigrants” before people, migrants are dispossessed of the minimum level of protection. Without consideration for whether or not the ultimate result in each case was the return of people to their country of origin, such treatment does not legitimize the removal of basic rights. After committing a simple administrative offense, migrants receive differential treatment based on their immigration status and, ultimately, even if often hidden or implicit, because of their identity. The result is a profound degradation of the notion of person as holder of rights. Behind these mechanisms, or in their justification, policies and practices are fraught with phrases like “public order, fighting, emergency, invasion or threat,” as if to substantiate (as a state of emergency) the cancellation of guarantees, which would not even be allowed in such circumstances. Faced with the message of emergency disorder and insecurity, a premium is placed on a police response (DE LUCAS, 1994,

p. 156) and, as we have seen, without the safeguards that guide even the policies of “punishment” in a democratic society.

This treatment is consistent with the doctrine of the “penal law exception,” in which, according to Ferrajoli, one element consists of the infraction being defined based on a certain status rather than a particular act, that is to say, from the subjectivity of a person or a social group rather than his or her or their conduct. Therefore, in these circumstances, the policy – that derives from a friend/enemy framework – is defined as a “fight against...” (Ferrajoli, 1995, p. 820-822). Likewise, in the field of migration control policies and restrictions imposed on rights, Zamora (2005, p. 60-61) believes that the dichotomy of good immigrant or suspect immigrant is the consequence of a process of “producing a social emergency,” from which the justifications for a policy based on exceptional measures stem.

The Return Directive approved by the EU is the latest and clearest example of the denial of the most basic safeguards for people who are apprehended in their attempt to enter the European territory through irregular means (CERIANI CERNADAS, 2009b). What is remarkable is that the problem consists, not only of the fact that rights are restricted and few guarantees are recognized, but also of the fact that a directive (Article 2) states that such limited guarantees could “not” apply with respect to persons apprehended while trying to cross the EU external borders illegally.

## **7. Final reflections: migration control, human rights, and the right to freedom of movement**

The current international political and economic context, its impact in each country – and particularly on migration flows within and between regions of the planet – as well as the many difficulties faced by those who seek to enter or reside in another country and exercise their rights there, have increasingly formed part of the discussion on the issue of right to freedom of movement. Obstacles to the exercise of freedom of movement are far reaching and intimately connected with the inequalities between countries and regions, the maintenance of restrictive notions of State sovereignty and citizenship, and, ultimately, the denial of the universality of fundamental rights.

According to Carens, citizenship and border control policy act to effectuate stratification, and refer us to the liberal criticism of feudal institutions, in which the birth was the basis of privilege or misery (now the place of origin, or nationality, which largely determines the rights, opportunities, and needs of each person). If the practices of the “old regimes” were contrary to the freedom and equality of individuals, how are they justified today? (Carens, 1992, p. 26). Therefore, many authors have stressed the need and duty to review the scope of the right to freedom of movement in order to include recognition of the right “to immigrate” (DE LUCAS, 2006, p. 37-44; AGUELO, CHUECA SANCHO, 2004, p. 291-292) when amending the policies governing the admission of foreigners and the degree of “openness or porosity” of borders (Benhabib, 2005, p. 151-156; Wihtol de Wenden, 2000, p. 49), due to the human rights violations effectuated during border control, or due to the structural inequalities of the current global model (Pecoud, 2007, p. 10-11).



The common policy concerning the right to free movement, Article 13 of the Universal Declaration, is wholly or partially ignored by State policies, being associated only with the right to emigrate, and not with the right to immigrate. However, given the progressive restrictions of immigration control policies, which are more pronounced by their outsourcing, as in the case analyzed in this article, this position has become so contradictory that it is now paradoxical. Sixty years ago, the right to leave one's country had much to do with the strong pressure exerted by "Western" countries. Even later, in the Act adopted at the European Conference on Security and Cooperation in Helsinki (1975)<sup>44</sup>, the right to emigrate was the main concern of the "Western" states, who stressed the need to enforce that law through various measures, including by ensuring family reunification (Hannum, 1987, p. 48). Undoubtedly, an interpretation of the right to free movement (and the right to family life) is substantially different from the present approach of various European States and the EU itself.

In contrast, control measures in African waters and coasts account for the practical impossibility of thousands of people leaving their country by virtually the only avenue they have available. Indeed, in some cases, the act of trying can mean detention (without basic guarantees) and the subsequent submission to a criminal trial, either for the crime of "illegal emigration" or as an accomplice to the crime of trafficking of persons. Thousands die in the attempt. The circumstances that depict this situation -- military checkpoints, intelligence services, detention, criminalization, and deaths -- are becoming ever closer to realities that the world seemed to have overcome, as aptly described by Sassen (2006) as the *Berlin Wall on Water*.

Along with the inability to leave the country by formal means, the policy of European States, the EU (FRONTEX) and the (subsidized) collaboration of African countries have led to an inability to do so irregularly. Note that: historically, the relevance of this right was precisely linked to the special need for protection in the event that a State imposed constraints on leaving the country through regular channels, in which case people were forced to resort to alternatives. In the present circumstances, immigration controls in countries of origin and transit, along with restrictions on entry, make it virtually impossible, in one way or another, for a person to exercise that right. In operating in African waters, the right to leave is seriously threatened (Weinzierl, 2007, p. 47-50).

Also, given the formal recognition of the right to leave the country, when a State implements policies that directly restrict or prohibit the entry of immigrants into its territory, it is alleged that there is no "right to enter" another country. In this regard, it must be stressed that in both States in this situation, shielded by the principle of sovereignty and seeking to continue to freely control their borders (albeit with low efficiency), there is "a moral crisis: while emigration is widely regarded as a human rights issue (asylum and non-refoulement), immigration is seen as an issue of national sovereignty (entry, residence). But, if people are only free to leave their country, where can they go?" (Wihtol de Wenden, 2000, p. 49).

The current scenario, therefore, is characterized by deep iniquity. On the one hand, people who are nationals of the most economically developed States -- the majority being recipients of migration flows from other regions -- find few barriers in

exercising the right to freedom of movement in all its components: the right to leave their country and its logical counterpart, the right to enter another. Thus, the right to mobility seems to be available only for those of certain nationalities or, in other countries for the very few who have a certain economic status or other privileges. Other people may, after overcoming innumerable obstacles, leave their country, enter another, and reside there, thanks to family ties in the host society, or to the needs and convenience of the labor market. However, the vast majority of people are deprived of that right, in one or both directions. This situation is legitimized even though those deprived of mobility are precisely those people for whom this right would represent one of the few – or only – opportunities to enjoy other basic rights such as health, nutrition, physical integrity, and so on<sup>45</sup>.

The circumstances are even more complex if we incorporate other variables into the analysis. More than two decades ago, Hannum (1987, p. 34-40) described several debates of the '70s, which assessed whether it was legitimate for developing countries to impose restrictions on the right to leave the country, with the objective of avoiding “brain drain” and assisting the development of that society. It is ironic that today, the countries receiving these migrants are those imposing these constraints, although such restraints are not applied to the better educated people, but to those who suffer from different mechanisms of exclusion and disenfranchisement in their places of origin. Thus, this “leak” is allowed or promoted<sup>46</sup> (without prejudice to its impact on the country of origin), while severely restricting the exit of those who do not benefit from an unequal and marginalizing development.

At the current juncture, particularly in international law, there is a dispute referred to in clear terms: at one extreme, there is a discretionary exercise of state sovereignty, and at the other, there is a right to immigrate and the rights of migrants. The powers of the States with respect to the admission of migrants, which in previous decades was almost without objection, are now constantly being questioned. The law of human rights is not outside of that debate, but rather is a particularly important factor tipping the balance toward recognizing the right to immigrate (without negating the other extreme). Central principles of international human rights law, such as non-discrimination, progressivism, *pro homine*, universality, and dynamism, have a determinative role. Reaffirming and deepening these principles is perhaps the most important task, not only within States but also internationally.

However, immigration control policies and mechanisms being implemented by States and European organizations on African soil not only avoid the debate over the right to freedom of movement (and negatively impact this right), but also pose a grave danger to the protection of various fundamental rights. While these operations are a clear exercise of the jurisdiction of the individual European States involved, it is necessary to analyze – in an extraterritorial manner – their responsibility with regard to human rights, without prejudice to the liability of African States. The main objective of this article was to contribute to raising awareness of this reality, reflect on its implications and propose the discussions needed for a comprehensive approach (focusing on human rights) to the complex phenomenon of international migration, its causes, and its consequences.

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## NOTES

1. Created by Regulation No. 2007/2004 of the European Council.

2. It is incomprehensible that the EU bodies keep formally alluding to the concept of "illegal" immigration, given the many criticisms made against this term, as with the complexity of the migration phenomenon in terms of a "fight" against it. (EU European Commission, 2005). The Spanish government acts in the same manner. (Spain, Ministry of the Interior, 2008).

3. For more, see JOHN (2004).

4. For more information about the different EU migration control programs and mechanisms (s.f.).

5. A detailed analysis of the externalization process of migration controls can be found in the many works compiled by the Southern Border (FRONTERA SUR) (2008).

6. In the last few years, there has been a considerable rise in the number of migrants going from these countries to Europe. To a large extent, the transfer of exit points further south and to the Atlantic coasts have increased with the rise in European control mechanisms in the Mediterranean.

7. According to FRONTEX, during the Ilamada Hera II operation (2006), 57 canoes were intercepted with total of 3887 people ("illegal immigrants," according to the official terminology), and in 2008, 5443 people were intercepted and returned.

8. EU. EUROPEAN COMMISSION ON HUMAN RIGHTS. *Stocke v. Federal Republic of Germany*. Decision. 12 Oct. 2005, § 166.

9. CIJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Advisory Opinion. 2004. §102-113.

10. Presidential Order, published by the Council

of Ministers, which provides for the creation of authority for coordination of actions to tackle illegal immigration in the Canaries and to set standards for their performance (CANARY ISLANDS, Presidential Order No. PRE/3108, 2006).

11. We cannot avoid mentioning the historical paradox of the name attached to this transaction ("Goreé"). The Gorée Island, off the coast of Dakar, was for centuries one of the main points of the slave trade from Africa to America (and for this reason was declared a World Heritage by UNESCO). Therefore, it is striking that the name of a place that symbolizes the forcible transfer of millions of people (a crime against humanity) is now invoked – also coercively and by European boats – to "stem the outflow of boat trips."

12. The information disseminated by the Civil Guard on its operations in African waters also demonstrates the on "authority" they have over persons apprehended and returned. In this regard, see Spanish Civil Guard (sf.).

13. The program Sea Horse Network, funded by the EU and the Spanish State, started in January 2009 with satellite monitoring of canoes in the waters of the Atlantic Ocean.

14. Among these, those ratified by Spain include: the Convention on the Status of Refugees (art. 33); the ECHR (art. 3); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (art. 3); and the International Covenant on Civil and Political Rights (art. 7).

15. See, among others: ECHR. *Chahal v. UK*. Decision. 15 Nov. 1996b, § 80.

16 It should be stressed that these vessels not only move people from the countries where European Patrols operate (i.e., Senegalese, Mauritians, etc.), but also carry thousands of migrants from



other sub-Saharan African countries (Sudan, Congo, Chad, Guinea Conakry, etc.) and even from Asia (Myanmar, Pakistan, Sri Lanka, among others).

17. The UN High Commissioner for Refugees (UNHCR) has also explicitly confirmed the validity of the non-refoulement obligation where one State acts in the territory of another (UNHCR, 2000, § 19, 22, 23).

18. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1997, § 157).

19. ECHR. T.I. v. United Kingdom. Decision of inadmissibility. 07 Mar. 2000, § 15.

20. For a discussion of the case and of indirect refoulement, see De Schutter (2005, p. 28).

21. According to the APDHA (2007, p. 19) in this type of mass repatriation procedure, it is not evaluated on a case by case basis whether "there are sufficient guarantees that the country to which migrants are returned is the true country of origin, that they will not suffer mistreatment or torture, or they will not be stranded in the desert, as has happened on countless occasions." They also complained that many people returned to Senegal have been tortured, fined or imprisoned.

22. Among others, see: SPIJKERBOER (2007, p. 127-139); CUTTITA (2006, p. 4-5); Khachani (2006, p. 27-30).

23. Such acts of "rescue" do not represent, in many cases, a comprehensive and coherent policy to ensure the right to life and other fundamental rights, if, as we have seen, the person intercepted is returned without even being asked whether, as a consequence of such return, his or her life or physical integrity could be endangered.

24. For more on the right to leave the country and its content and scope, see Hannum (1987).

25. A simple change of word placement (2006, p. 153) gives us a better view of reality: they are "Illegal detention centers for foreigners," not "Detention Centers for *Illegal* Foreigners."

26. See more detailed information in the SPANISH COMMISSION for Refugee Aid (CEAR) (2007).

27. Among them, ECHR (art. 5.3) and the International Covenant on Civil and Political Rights (art. 9.3).

28. A few weeks later, these people were transferred to the migrant detention center built in the city of Nouadhibou (in cooperation with Spain and the EU) (APDHA, 2007, p. 19). While this involved an "improvement" of the conditions of detention, it did not result in judicial intervention (CEAR, 2007).

29. National Court, Contentious- Administrative Chamber, 5th Section. N. 01584/2007. December 12, 2007a.

30. On the contrary, the Supreme Court recognized its jurisdiction for the prosecution of crimes against foreigners produced outside Spanish waters, through the journey in canoes from

Africa. It was forced to conclude that, if justice may intervene in alleged crimes against migrants, produced beyond the Spanish territory and in the framework of policies to control irregular migration, then it also has jurisdiction to ensure the rights and interests of victims of such offenses (Spain, Supreme Court, Chamber II – Criminal.. October 8, 2007).

31. The Committee recommended that the Mexican State adjust its immigration laws to comply with the provisions of the 1990 Convention and other international treaties, which included the duty to remove "a crime punishable with imprisonment for the illegal entry of a person in its territory" (COMMITTEE ON PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES, 2006, § 15).

32. The EFE Agency (2007) reported that after FRONTEX intercepted a wooden boat with 138 people, the occupants were arrested in the police station in Dakar and could be tried by a court for violation of the law on "illegal emigration." *El Pais* stressed that the Attorney General of Senegal had revealed the decision of the Minister of Justice to strengthen the punishment for migrants. So, people who pay to travel by canoe would not be considered "victims" of trafficking, but perpetrators of crimes (SOMEONE Delate, 2006).

33. According to *El Pais*, "[a] court [...] sentenced [...] 65 Algerians who tried to emigrate to Spain to two months in prison [...] they were arrested [...] by a patrol boat as they sailed towards the Spanish coast. With this first prison term of those aspiring to migrate, the Algerian authorities seek to discourage young people from emigrating illegally." (ALGERIA IMPRISONS, 2006).

34. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 169.

35. For a more detailed analysis on the measures that the authorities of the intercepting ship took to ensure the right to asylum, see UNHCR and IOM (2006).

36. ECHR. *Amuur v. France*. Decision. 25 Jun. 1996a, § 43.

37. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 163.

38. In this regard, see CERIANI CERNADAS (2009).

39. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 180.

40. IACHR. Case 10,675: Haitian Human Rights Committee and Others v. United States. Report No. 51/96. Decision. 13 Mar. 1977, § 53).

41. See the following cases: ECHR. *Andric v. Sweden*. Eligibility Decision. 23 Feb. 1999; ECHR. *Congo v. Belgium*. Decision. 05 Feb. 2002 ECHR, *Becker v. Denmark*. Decision. 03 Oct. 1975 and

ECHR, *Alibaks et al v. Netherlands*. Decision. 16 Dec. 1988.

42. ECHR, *Congo v. Belgium*. Decision. 05 Feb. 2002, § 61-63.

43. IACHR. *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. Provisional Measures. Decision. August 18, 2000; African Commission for Human and People's Rights. *Communication n. 71/92: African Conference for the Defense of Human Rights v. Zambia*. Decision. 20th Session, October 20-31, 1997a; African Commission for Human and People's Rights, *Communication n. 159/96: Inter African Union for Human Rights and*

*others v. Angola*, Decision. November 11, 1997b.

44. See, in particular, the section on "Human Contact."

45. DE LUCAS (2006, p. 40) states that the right to movement cannot be "an option reserved for the few, the rich, and the famous (a privilege)."

46. In this sense, besides the regulation of different countries on the migration, categories included the proposal for a directive currently under discussion in the EU "concerning the conditions of entry and residence of third country nationals for highly qualified employment."

## RESUMO

Os instrumentos normativos adotados pela União Européia (UE) para garantir a livre circulação entre os territórios de seus Estados-membros estão estreitamente ligados ao controle de suas fronteiras nacionais. Nos últimos dez anos foram criados diversos mecanismos para prevenir, controlar e punir a imigração irregular para a comunidade européia, cujo modelo migratório caracteriza-se por sua visão instrumental que burla os direitos fundamentais e reduz a imigração à mão-de-obra que seu mercado de trabalho necessita. A partir disso, derivam-se normas que reconhecem direitos conforme a nacionalidade e a condição migratória da pessoa. Nesse contexto, o artigo analisará, com um enfoque de direitos humanos, o que se supõe ser um "avanço" radical do processo de exteriorização, do ponto de vista físico, simbólico, político e também jurídico: as operações criadas para impedir a migração de pessoas em "cayucos" ou "pateras" para a Europa a partir das costas de países como Marrocos, Argélia, Senegal e Mauritània.

## PALAVRAS-CHAVE

Controle Migratório – União Européia – Direitos Humanos – Extraterritorialidade – África.

## RESUMEN

Los instrumentos normativos adoptados por la Unión Europea (UE) para garantizar la libre circulación en el territorio de los Estados miembros están estrechamente ligados al control de las fronteras exteriores. En los últimos diez años se han creado diversos mecanismos para prevenir, controlar y sancionar la inmigración irregular hacia la comunidad europea, cuyo modelo migratorio se caracteriza por su visión instrumental que regatea los derechos fundamentales y reduce la inmigración a la mano de obra que necesita el mercado de trabajo. De allí se derivan normas que reconocen derechos según la nacionalidad y condición migratoria de la persona. En este contexto, este trabajo analizará, con un enfoque de derechos humanos, lo que supone un "avance" radical de ese proceso de externalización, desde el punto de vista físico, simbólico, político y también jurídico: los operativos creados para impedir la migración de personas en "cayucos" o "pateras" hacia Europa desde las costas de países como Marruecos, Argelia, Senegal o Mauritania.

## PALABRAS CLAVE

Control Migratorio – Unión Europea – Derechos Humanos – Extraterritorialidad – África.

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