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The *Global Campus Human Rights Journal* (GCHRJ) is a peer-reviewed scholarly journal, published under the auspices of the Global Campus of Human Rights as an open-access on-line journal.

Aim: The *Global Campus Human Rights Journal* aims to serve as a forum for rigorous scholarly analysis, critical commentaries, and reports on recent developments pertaining to human rights and democratisation globally, particularly by adopting multi- and inter-disciplinary perspectives, and using comparative approaches. It also aims to serve as a forum for fostering interdisciplinary dialogue and collaboration between stakeholders, including academics, activists in human rights and democratisation, NGOs and civil society.

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- include an assurance that the article has not been published, submitted, or accepted elsewhere.
- conform to the style conventions on the journal web site.
- be concise.
- be written in UK English, or in French or Spanish. If submitted in French or Spanish, an abstract in English (of between 750 and 1000 words) has to be submitted together with the article.
- for English language style, follow the University of Oxford Style Guide (www.ox.ac.uk).
- be between 6 000 and 8 000 words in length, references included.
- (for submissions in English) include an abstract (summarising the article as a whole, including its aim, a clear description of its findings) of between 250 and 300 words. The abstract should include at least five key words.
- include a brief bibliography indicating academic qualifications and current professional position, and email contact address, as follows: Charles Ntuli; BA (Oxford), PhD (Lund); Visiting Professor, University of Sao Paolo; cntuli@uu.ac.za

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The Global Campus of Human Rights is a unique network of one hundred participating universities around the world, seeking to advance human rights and democracy through regional and global cooperation for education and research. This global network is promoted through seven Regional Programmes:

- European Master's in Human Rights and Democratisation (EMA) <https://www.eiuc.org/education/ema.html>
- Master's in Human Rights and Democratisation in Africa (HRDA) <http://www.chr.up.ac.za/index.php/llm-hrda.html>
- European Master's Programme in Democracy and Human Rights in South East Europe (ERMA) www.cips.unsa.ba and <https://www.facebook.com/ermaprogramme/>
- Master's in Human Rights and Democratisation in Asia-Pacific (APMA) <http://www.ihrp.mahidol.ac.th> and http://sydney.edu.au/arts/human_rights_democratisation/
- Master's in Human Rights and Democratisation in the Caucasus (CES) <http://www.regionalmaster.net/>
- Master's in Human Rights and Democratisation in Latin American and the Caribbean (LATMA) www.unsam.edu.ar/ciep/ and <https://twitter.com/Ciepfocial>
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These Regional Programmes offer specialised post-graduate education and training in human rights and democracy from a regional perspective, with an interdisciplinary content as well as a multiplicity of research, publications, public events and outreach activities. The Global Campus integrates the educational activities of the Regional Programmes through the exchange of lecturers, researchers and students; the joint planning of curricula for attended and online courses; the promotion of global research projects and dissemination activities; the professional development of graduates through internships in inter-governmental organisations; and the strong focus of networking through the Global Campus Alumni Association, as well as support to the alumni associations of the Regional Programmes.

The wealth of human resources connected by global and regional alliances fostered by the Global Campus and its Regional Programmes, offer remarkable tools and opportunities to promote human rights and democracy worldwide.

The Global Campus of Human Rights develops its activities thanks to the significant support and co-funding of the European Union – through the *European Instrument for Democracy and Human Rights 2014-2020* and its partner universities around the world. The Global Campus equally boasts many joint institutional agreements and strategic alliances with inter-governmental, governmental and non-governmental organisations at the local, national and international level.



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Editorial

This is the second issue of the first volume of the *Global Campus Human Rights Journal*. It consists of three parts: a part containing articles of a general nature; a part consisting of articles all centred around a special focus; and a part discussing recent developments in human rights and democratisation in various regions of the world.

The first part, 'Articles', contains three contributions. Two articles relate to intractable conflicts, while the third investigates the possibility of the *ChevronTexaco* case in Ecuador being characterised as 'cultural genocide'.

In the second part, 'Special focus: Securitisation', the focus falls on the phenomenon of securitisation and its impact on human rights. The articles in this part were peer-reviewed and reworked after initially having been presented as part of the Global Classroom, a project of the Global Campus of Human Rights. The Global Campus of Human Rights is a unique network of more than 100 universities around the world, seeking to advance human rights and democracy education. It comprises seven Master's programmes – stretching across Western Europe, South East Europe, the Caucasus, the Middle East and North Africa, Latin America and the Caribbean, Africa and the Asia Pacific – with a common emphasis on human rights and democratisation. One of the activities of the Global Campus is an annual 'Global Classroom', bringing together some of the staff and students from the various programmes, to reflect on a contemporary issue of global concern. The discussion is enriched by the participation of experts, including representatives of states, United Nations agencies, European Union experts and civil society organisations. The Global Classroom aims at facilitating closer interaction between students of the different programmes.

In 2017, the issue identified for deliberation was securitisation, and the event was hosted by the Institute for Human Rights and Peace Studies of Mahidol University, from 22 to 26 May in Bangkok, Thailand. It brought together academics, researchers and students from the seven regions of the Global Campus network. Professor Anna Krasteva, who acted as co-editor of the *Journal* for this issue, assisted in overseeing the peer-review process and liaising with authors contributing to the special focus. This part of the *Journal* is introduced by an editorial by Professor Krasteva, followed by some introductory remarks about the topic by Professor Manfred Nowak, the Secretary-General of the European Inter-University Centre for Human Rights and Democratisation. With staff and students from each of the seven Master's programmes authoring an article, the 'Special Focus' section provides a unique array of perspectives on the issue of securitisation, covering Africa, the post-Soviet space, the Balkan states, Europe, the Asia Pacific, the Arab world and the Americas.

The third section, 'Recent regional developments', covers selected regional developments in human rights and democratisation during 2016 in the Arab region, sub-Saharan Africa, Europe and the Asia Pacific.

Although a number of contributors are authors associated with the Global Campus of Human Rights, the editors wish to highlight that the *Journal* is open and welcomes scholars from institutions in any region of

the world to submit their manuscripts for consideration. Further guidelines appear elsewhere in the *Journal*.

The editorial team wishes to thank and gladly acknowledges all the reviewers of manuscripts submitted to the *Journal* for their invaluable assistance.

Editors

Socio-economic development and resource redistribution as tools for conflict prevention and post-conflict peace building in fragile societies: A comparative analysis of Burundi and Rwanda

Nicholas Wasonga Orago*

Abstract: Sub-Saharan Africa has experienced a myriad of conflicts since the end of the Cold War. Many of these conflicts have lasted for long periods, leading to massive violations of human rights and creating general human suffering. The transitional justice processes that have been employed to resolve these intractable conflicts have mainly concentrated on political deal making and support to political-legal structures. Scant emphasis has been placed on the resolution of structural causes and factors contributing to these conflicts, such as poverty, inequality and socio-economic marginalisation. The failure to put in place post-conflict socio-economic development and resource redistribution policies in the context of peace building and conflict resolution processes has led to fragile post-conflict societies vulnerable to the recurrence of conflict. Using Rwanda and Burundi as case studies, this article argues that post-conflict transitional justice processes must implement effective socio-economic development and resource redistribution policies as a critical component of a comprehensive strategy aimed at dealing with all the root causes and factors contributing to intractable conflicts. This will ensure just, stable and peaceful post-conflict societies.

Key words: intractable conflicts; transitional justice; human needs theory; socio-economic development; resource redistribution

1 Introduction

In the post-Cold War era, sub-Saharan Africa has experienced constant sectarian conflicts leading to massive violations of the fundamental rights of the African people. These conflicts have subsisted for a considerable time, leading to intractable human rights and human security situations. Examples abound from Somalia, Sudan, Southern Sudan, the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Northern Uganda, Sierra Leone, Liberia, Chad and Mozambique. When the root causes and factors contributing to these conflicts are not comprehensively,

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substantively and effectively addressed during post-conflict peace building and reconciliation processes, it results in very fragile states that easily fall back into conflict. This endless cycle of conflict and violence creates an ongoing cycle of death, destruction and destitution. Rwanda and Burundi, the countries studied, feature prominently among those countries that have consistently, and with increasing propensity, experienced protracted sectarian violence throughout the decades after their independence (Uvin 2010: 161).

The article undertakes a comparative analysis of post-conflict peace-building and reconciliation strategies in these two countries (Rwanda and Burundi) as they share important historical, geographical, compositional, social, political and economic commonalities, to the extent that they have been referred to as 'false twins' (Ndikumana 2005: 415; Curtis 2015: 1366; Uvin 2010: 161). These countries have the same ethnic cleavages (85 per cent Hutus, 14 per cent Tutsis and 1 per cent Twa); have a similar colonial past, both having been colonies of Belgium; are resource-poor high-population countries dependent on agriculture; and have similarly experienced continuous violent sectarian conflicts during the past 20 years (Curtis 2015:1368-1369; Brachet & Wolpe 2005: 5; Wolpe 2004: 93). Comparing the two countries, the point of departure is the way in which they have chosen to deal with their violent past post-2000. Rwanda has chosen to adopt and implement a policy of comprehensive socio-economic and human development as well as resource redistribution. On the other hand, Burundi has failed to implement such comprehensive measures aimed at dealing with the poverty, inequality and other socio-economic causes of sectarian conflict (Curtis 2015: 1367). These differing choices made by the two countries regarding socio-economic and resource redistribution have resulted in starkly contrasting socio-economic and human development indicators, as evidenced in the table below:¹

General indicators	Rwanda	Burundi
Population (millions)	12 818 724	11 314 502
Size (km squared)	26 340	27 834
Population density (per km squared)	490.5	405.5
Human development index rank 2015	163 out of 188	184 out of 188
Level of inequality (UNDP inequality adjusted HDI 2015)	0.330	0.269
Poverty headcount ratio per cent	44.9 (rural poverty, 48.7)	66.9 (rural poverty, 68.9)

1 Data compiled by author from the following sources: <http://www.tradingeconomics.com/countries>, available at <http://www.doingbusiness.org/rankings>; <http://hdr.undp.org/en/2015-report>; <http://hdr.undp.org/en/composite/IHDI>; and, <https://www.transparency.org/cpi2015> (last visited 11 February 2016).

Total life expectancy (years)	65.7	58.8
Economic growth 2015	7.5	-7.20 (contraction)
GDP 2015 in US\$ billion	7.89	3.09
GNI <i>per capita</i> 2015 (US\$)	650	270
Inflation rate	6.6 per cent	7.1 per cent
Corruption perception index 2015	44 out of 167	150 out of 167
Ease of doing business ranking	62 out of 189	152 out of 189

The article argues that this point of departure – the implementation of comprehensive socio-economic development and resource redistribution policies – has constituted the primary difference in relation to the socio-economic transformation of Rwandan society compared to its Burundian counterpart. Consequently, it is argued that the Rwandan society has thus become more tolerant and reconciliatory as compared to Burundi, with positive dividends as far as peace building and post-conflict reconstruction of the Rwandan society are concerned. This may be seen in the differing responses by the two societies to a similar political challenge in 2015, namely, the non-democratic decisions by their two Presidents to renew their terms of office through constitutional amendments. While the Burundian society reacted to this challenge with the outburst of the latest bout of sectarian violence that has claimed the lives of many civilians, the Rwandan society in comparison was more tolerant, allowing a national referendum to determine the question of the constitutional amendment to review the term limits of the President. This illustrates that conflict resolution and peace-building efforts should be focused not only on political settlements and criminal accountability, but must also effectively respond to poverty, inequality, socio-economic exclusion and the marginalisation of different sectors of society. This is so because, in most instances, these challenges are the root causes of or the factors exacerbating violent sectarian conflicts. A failure to take these critical socio-economic determinants of conflict into account will detract from the peace-building and post-conflict reconciliation efforts, with the consequence that the cycle of violence will continue in the future, developing into intractable conflict situations. This will have adverse consequences for internal and regional stability, human security and the realisation of human rights.

2 Overview of the post-independence intractable conflicts in Burundi and Rwanda

2.1 Overview of the intractable conflict in Burundi

Since independence, Burundi has been mired in a vicious cycle of violent conflicts exacerbating ethnic and regional divisions as well as deepening the already-entrenched poverty, inequality and socio-economic exclusion (Brachet & Wolpe 2005: 1). In 1965 a civil war started in Burundi, three

years after independence from Belgium, when Hutu officers, led by Gervais Nyangoma, attempted a *coup* to overthrow the monarchy. This attempted *coup* resulted in a state-led purge of the Hutu majority by the Tutsi minority from the public sector, and the subsequent socio-economic exclusion of the Hutus (Ndikumana 2005: 420-421; Bundervoet et al 2009: 538). The purge and socio-economic exclusion of the Hutus set the basis for the intractable sectarian conflict in Burundi that has from time to time flared up. These sectarian conflicts have been triggered mainly by power struggles in the country for the control of the state and its resources; the state being the major source of upward socio-economic mobility (Ndikumana 2005: 413-414).² In 1972, Burundi experienced inter-ethnic violence after another failed *coup* attempt led by Hutu politicians. This resulted in the killing of around 200 000 Hutu civilians by the Burundian armed forces and the displacement of another 300 000 Hutus, a tragedy that has been classified as a genocide (Bhavnani & Backer 1999: 4-5). According to Ndikumana (2005: 422), this massacre of the Hutu population was intended to be a 'final solution' to the Hutu problem.

In 1976 Burundi experienced a third *coup* with President Michel Micombero being ousted by Colonel Jean-Baptiste Bagaza. Bagaza ruled the country from that time until 1987, when he was similarly ousted in a *coup* by Major Pierre Buyoya (Bundervoet et al 2009: 538). Though authoritarian in his leadership, Bagaza implemented comprehensive socio-economic policies to enhance economic growth and human development, and his reign was characterised by unprecedented socio-economic development. The consequence of Bagaza's efforts was that no violent sectarian conflicts occurred in the period 1976-1987 (see Curtis 2015: 1369 who draws similarities between the Bagaza regime and the current Kagame regime in Rwanda in relation to socio-economic development efforts). However, following Bagaza's ouster in 1987, Burundi was again plunged into a cycle of sectarian violence, with 1988 witnessing political unrest led by the Hutus. This new cycle of violence resulted in the killing of over 20 000 Hutu civilians by Burundian armed forces and the displacement of over 50 000 people (Bhavnani & Backer 1999: 4-5). This massacre was condemned internationally, with the international community pressuring the ruling Burundi elite to democratise and open up the country's political space. This international pressure for democratisation led to the first free elections in Burundi that brought a Hutu president, Melchior Ndadaye, to power in 1993 (Bundervoet et al 2009: 539; Ndikumana 2005: 422).

However, the transition did not last as Ndadaye was killed in a failed *coup* attempt (see Ndikumana 2005: 423 who states that Ndadaye was killed because he threatened the socio-economic and rent-seeking opportunities of the Tutsi elite). The killing of Ndadaye started the most severe wave of sectarian violence in Burundi between 1993 and 1999 that led to the large-scale massacre of Tutsis and moderate Hutus by peasant Hutus. The violence led to the death of approximately 300 000 Burundian civilians, the second Burundian genocide (Bundervoet et al 2009: 539-542; Desrosiers & Muringa 2012: 501). The conflict also led to the

2 Ndikumana terms the Burundian conflict as distributional rather than sectarian, and that its resolution requires socio-economic empowerment of the masses rather than political deal making.

displacement from their homes of over 50 per cent of Burundians, severely interfering with socio-economic and other livelihood activities, such as farming and livestock keeping. This adversely impacted on the coping capacity and socio-economic welfare of the civilian population, further deepening poverty, inequality and the socio-economic marginalisation of the majority of the Burundian population (Bundervoet et al 2009: 542-543).

Efforts were made by the international community to bring the violence to an end, with the first efforts being undertaken by the United Nations (UN) in the period between 1994 and 1996. This UN-led effort did not bear any fruits due to the unwillingness of the international powers to take diplomatic lead or provide peacekeeping forces (Brachet & Wolpe 2005: 2). A regional peace process was then commenced in Arusha, Tanzania, in 1996 to 1999, facilitated by the former Tanzanian President, Julius Nyerere, and subsequently finalised with the facilitation of the former President of South Africa, Nelson Mandela. The negotiations, boycotted by two of the parties to the conflict – the National Council for the Defence of Democracy – Forces for the Defence of Democracy (CNDD-FDD) and the FNL-Paliphetu – culminated in the signing of the Arusha Peace and Reconciliation Agreements in the year 2000 by 19 of the parties to the conflict (Brachet & Wolpe 2005: 2). The signing of the Peace Agreement brought to an end the extended period of conflict in most of the provinces of Burundi, allowing for the formation of a transitional power-sharing government to govern for a period of 36 months pending the organisation of democratic elections.³ Subsequent to the Arusha Accord and the formation of the transitional government, negotiations were continued between the transition government and the rebel groups that had not signed the Arusha Accord. These negotiations led to cease-fire agreements with all but one rebel group, FNL-Paliphetu, with the agreeable rebel groups, including the CNDD-FDD, joining the transitional government, a development that halted conflict in all but one province in Burundi (Brachet & Wolpe 2005: 2).

Democratic elections were held in 2005 and were won by the CNDD-FDD led by Pierre Nkurunziza. The CNDD-FDD was not a party to the negotiated settlement in Arusha. This, however, was the main reason why the CNDD-FDD was popularly elected, as many Burundians viewed the Arusha Peace Process as an elitist process that had enriched politicians at the expense of the local people, and had failed to take into account the survival needs of the population (Curtis 2015: 1372). Despite the win, the CNDD-FDD remained fractured politically and was not able to create an effective administrative structure to implement comprehensive socio-economic, human development and resource redistribution policies. As a result of this failure by CNDD, Burundi continued facing socio-economic challenges such as poverty, inequality, socio-economic exclusion and marginalisation as well as corruption (Uvin 2010: 165; Nkurunziza & Ngaruko 2005: 1). These factors have militated against peace-building and post-conflict reconciliation that would have resulted in the creation of an

3 The transitional government functioned well, with the then President, Pierre Buyoya, a Tutsi, governing for 18 months and then allowing the Vice-President, Domitien Ndayizeye, a Hutu, to govern for the remaining 18 months, assisted by a new Vice-President, Alphonse Kadege, a Tutsi.

environment of positive peace conducive to socio-economic development, as discussed in section four below.

2.2 An overview of the intractable conflict in Rwanda

Rwanda has also experienced sectarian violence after independence, starting with the 1959 Hutu revolution that led to the overthrow of the Rwandan Tutsi-led monarchy and the establishment of the majority Hutu-led post-independent government with Gregoire Kayibanda as the President (Curtis 2015: 1366). The revolution led to periodic massacres of Tutsis by the Hutu-led government, with massacres occurring in 1959, 1963 and 1967 (Cooke 2011: 6). These successive bouts of massacres of the Tutsi population left over 20 000 Tutsis dead and exiled over 300 000 in refugee camps in Uganda, Burundi and the DRC (Cooke 2011: 6). The exiled Tutsis who had settled in refugee camps in Uganda formed the Rwandan Refugee Welfare Association which metamorphosed into the Rwandese Alliance for National Unity (RANU) in 1979 and finally to the Rwandan Patriotic Front (RPF) in 1987 (Curtis 2015: 1369-1370).

President Kayibanda utilised his position to benefit his community and allies, with major political positions being held by people from his central prefecture of Gitarayama. Similarly, he channelled socio-economic benefits to his province of birth (the Northern Province) to the detriment of other provinces (Justino & Verwimp 2008: 8). This created resentment among the Hutu population from other provinces, leading to the emergence of new north-south regional fault lines amongst the Hutus (Cooke 2011: 6). The resentment of the north-south Hutu divide led to a *coup d'état* in 1973, bringing President Juvenal Habyarimana into power. The new President established an authoritarian one-party system, the National Revolutionary Movement for Development (MNRD), which entrenched the ethnic division between the Hutus and the Tutsis through a system of ethnic identity cards (Justino & Verwimp 2008: 8-9). The ethnicisation of government and the refusal by the Habyarimana government to allow the return of Rwandan refugees fomented rebellion against the government led by the RPF from 1990 to 1994. Efforts were made by the international community to broker peace between the warring factions under the auspices of the Arusha Peace Process, with a Peace Accord being signed by the parties in August 1993. However, the Accord collapsed as soon as it was signed due to the feeling among the major players in the Rwandan conflict that the balance of power struck was not reflective of the proper balance of power held by its signatories (McDoom 2011: 9-10). The result created hardliners within the ruling MRND party, which resorted to ethnic mobilisation using the ideology of 'Hutu power' which excited ethnic Hutu passion against Tutsis (Cooke 2011: 8). When President Habyarimana was assassinated in the plane crash of 6 April 1994, the Hutu hardliners captured power. They used this opportunity to operationalise their 'Hutu power' ideology that culminated in the 1994 genocide in which between 500 000 and 1 000 000 Tutsis (about 75 per cent of the Tutsi population) were killed and around 105 000 displaced (Bhavnani & Backer 1999: 4-5; McDoom 2011: 25). The genocide was perpetrated in an environment of international disengagement, with the UN and foreign governments such as France, the United Kingdom and the United States doing little to prevent it, a fact that led to a military solution to the Rwandan civil war (McDoom 2011: 23-24).

The genocide ended in July 1994 with the successful overthrow of the Hutu government by the Tutsi-led RPF. The RPF proceeded to form a government of national unity in accordance with the Arusha Accord, allowing other opposition parties to take up their role both in government and in parliament (Curtis 2015: 1371; Cooke 2011: 8-9). This was undertaken through a Protocol of Agreement signed on 24 November 1994 with seven opposition parties that were part of the Arusha peace negotiations (McDoom 2011: 10-12; Cooke 2011: 9).⁴ The Protocol extended the period of transition from 22 months to nine years, giving the new government the opportunity to establish stability and plan for long-term socio-economic development, although this came at the expense of political participation in a democratic process (McDoom 2011: 10). The new government also adopted a policy of national unity and reconciliation, abolishing ethnic identities and advocating the adoption of a uniform identity of all people as Rwandans. The objective of this reconciliation strategy of abolishing ethnic divisions was the elimination of ethnic cleavages that were the main vehicles of mobilisation for violent conflicts, including the genocide (McDoom 2011: 12). The uncritical abolition of ethnic identities without a sustained national dialogue on these identities, however, has been criticised, with commentators arguing that this strategy would prevent ultimate reconciliation in Rwanda (see Power 2013: 1-9). It is acknowledged here that these are genuine concerns that must be addressed if Rwanda is to effectively transition from a fragile post-conflict society to a truly stable democratic society.

However, the conflict did not end in 1994 as the defeated government soldiers and the militia group, Interahamwe, fled to the border between Rwanda and the DRC and staged a counter-insurgency against the new Rwandan government. This resulted in continued conflict that lasted until 1999 (Justino & Verwimp 2008: 9). The counter-insurgency led to the massacre of Hutu soldiers and civilians in refugee camps in the DRC in the period 1995 to 1996 by the Rwandan Patriotic Army (formerly RPF). This massacre drew strong reactions from Hutu leaders within the Rwandan government itself, leading to the resignation from government of these Hutu leaders (McDoom 2011: 12). The counter-insurgency ended in 2000 when the majority of the counter-insurgents either moved deeper into the DRC or returned to Rwanda, leading to a process of demobilisation and demilitarisation (McDoom 2011: 27). With the insurgency effectively over, the transition period ended in 2003 with a constitutional referendum being held which led to the adoption of a new Constitution. Subsequent to the adoption of the Constitution, Rwanda held its local, legislative and presidential elections, which were overwhelmingly won by the RPF, with President Kagame garnering 95.1 per cent of the votes (McDoom 2011: 21). The new government proceeded to put in place comprehensive socio-economic, human development and resource redistribution policies aimed at jump-starting the economy and improving the living conditions of the Rwandan people. The stated government vision in adopting this comprehensive framework was that socio-economic empowerment would

4 Under the Protocol, the presidency was to be held by Pasteur Bizimungu, a Hutu member of the RPF. The vice-presidency was to be held by Paul Kagame, a Tutsi and the military commander of RPF, and the position of Prime Minister was to be held by Faustin Twagiramungu, a Hutu opposition leader, marking the first time power had been shared between the Hutu and Tutsi ethnic groups.

create a more stable, united, peaceful and prosperous country. These efforts have borne some peace dividends, as discussed in section four below.

3 Socio-economic development as a tool for peace building and conflict resolution in intractable conflicts

According to the human needs theory propounded by Burton, unsatisfied human needs are the root causes of intractable conflicts, which in most instances are economic or resource-based (Danielsen 2005: 3-5). Burton asserts that in order to effectively deal with intractable conflicts at any level, there is a need for a comprehensive and holistic framework that captures the complexity of the conflict itself and responds to all the unmet needs of the populace (Burton 1997: 130). This is because, if not adequately addressed, the unmet needs would threaten the security of socio-economically excluded groups, thereby creating a vicious cycle of dehumanisation based on fear and want. The dire socio-economic situation is then exploited by different political actors to achieve divergent political agendas, resulting in intractable conflict situations. A good example of the utilisation of unmet human needs to stir violence is the pre-genocide Rwandan situation, when the Habyarimana regime used ethnic discourse based on past socio-economic divisions and disparities between the Hutus and the Tutsis to manipulate the majority Hutu and justify a war against the Tutsi-led RPF, which led to the genocide in 1994. The unmet socio-economic needs of the Hutus as a result of decades-long grievances over land and resource redistribution, coupled with the egregious structural violence of the Rwandan society, thus provided an enabling framework for the subsequent genocide (Miller 2008: 283-284; Uvin 2010: 165 & 175-176). In order to ensure conflict prevention, post-conflict reconciliation and the achievement of sustainable peace in such a society, it is paramount that the underlying human needs, especially the socio-economic and developmental needs of the populace, are adequately and effectively addressed. A failure to address these needs always leads to subsequent violent intractable conflicts that have further devastating consequences to lives and livelihoods.

How, then, does a society in a post-conflict situation meet the important human needs of its people, especially those related to poverty, inequality, socio-economic exclusion and marginalisation, and ensure the creation of a just, stable and equitable society? Suggestions have been made that the best way to create such a society that meets the human needs of its people is through the incorporation of socio-economic development and resource redistribution as important components of conflict resolution and post-conflict justice aimed at achieving social justice and sustainable peace (Mani 2008: 254-255). The UN Charter, a charter inspired by armed conflict and human suffering caused by it, critically interlinks international peace and security with the respect for fundamental human rights and development (article 1). Four fundamental pillars of post-conflict peace-building and conflict prevention emerge from the Charter: 'Security (support to peace negotiations; deployment of peacekeeping troops; disarmament, demobilisation and reintegration; security sector reform); development (measures to support economic growth and social service delivery); governance (elections, decentralisation and civil society

support); and justice (transitional justice, distributive justice and reconciliation programmes)' (Uvin 2010: 162).

Development is thus an important tool in conflict prevention and the creation of stable and just societies that are required for the maintenance of international peace and security. However, traditional transitional justice processes – aimed at conflict resolution, post-conflict peace building, and post-conflict justice and reconciliation – has for a long time ignored the development paradigm in its response to sectarian violence and civil wars. Thus, traditional transitional justice has consistently failed to deal effectively with structural and systemic inequalities and exclusions that make societies prone to conflict (Miller 2008: 266-267 & 272-280; Sharp 2012: 782). Some of the reasons fashioned for this oversight are as follows: First, having been heavily influenced by human rights, transitional justice has replicated human rights' long-standing bias against socio-economic rights (Miller 2008: 275-276; Sharp 2012: 796-800; Arbour 2007: 5-8). Second is the influence of international criminal law on transitional justice, which focuses on the perpetrators of human rights violations and emphasises individual criminal responsibility, and not on the survivors/victims of violence and the structural causes of violence (Miller 2008: 269-270; Arbour 2007: 4-5 & 15). The third reason is the close connection between traditional transitional justice and the 'liberal peace thesis'. This liberal peace thesis asserts that political and economic liberalisation (transition to a Western-style liberal market democracy) promotes sustainable and positive peace. The adoption of this thesis by traditional transitional justice practitioners has led to a focus on political-legal-institutional reform in conflict resolution processes rather than social justice and socio-economic transformation (Sharp 2012: 782 & 796; Arbour 2007: 3-4; Waldorf 2012: 3-4). As a result of these influences, traditional transitional justice has prioritised interventions geared towards the fulfilment of civil and political rights to the detriment of economic, social and cultural rights; those aimed at achieving individual justice for perpetrators than creating a conducive environment that responds to critical survival needs of victims and their general communities; and those aimed at democratisation rather than those aimed at socio-economic transformation.

The narrow conception of traditional transitional justice that ignores developmental issues has been heavily criticised as a truncated conception of the human person, which fails to recognise that the fulfilment of socio-economic human needs is as important as the recognition of the human person as an important right-holding member of the political community (Cobian & Raetegui 2009: 143). Sharp argues that this narrow conception of transitional justice is untenable as it provides a one-dimensional and distorted narrative of conflict based on the notion that socio-economic development and conflict can be neatly separated, while in reality conflict results from a messy and complicated mix of political, social, economic and cultural factors. Sharp asserts that in order for transitional justice to comprehensively deal with the root causes of conflict, it must propose policies that effectively deal with social justice concerns such as poverty, inequality, structural violence and distributive justice (Sharp 2012: 783).

Miller argues that transitional justice plays an important role in conflict resolution and post-conflict reconciliation as it pre-determines issues related to the past that must be resolved. In this context, therefore, by

leaving out important issues of socio-economic development, resource redistribution or inequality of power and wealth, it tells the society that issues of development and conflict are separated, and that inequality itself should not be addressed in the transition process (Miller 2008: 268-270). Miller asserts that the divorce of development and social justice from transitional justice encourages the myth that the sources of intractable conflicts are political and ethnic rather than economic and resource-based (Miller 2008: 268 & 280-284; Sharp 2012: 794). Miller recommends that to deal effectively with intractable conflicts, achieve social justice and build stable post-conflict societies, transitional justice mechanisms must be responsive to three fundamental issues: the socio-economic roots and consequences of conflict; post-conflict economic liberalisation that fails to redistribute socio-economic resources; and the developmental policies and plans of the successor government for the future (Miller 2008: 267). She warns that the failure of transitional justice to comprehensively deal with these issues may actively contribute to the outbreak of renewed violence in the future (Miller 2008: 288).

The need for transitional justice to look beyond political settlements that serve the interests of the political elite to socio-economic development aimed at remedying underlying socio-economic inequalities that foment conflict was affirmed in 2006 by the then UN High Commissioner for Human Rights, Louise Arbour, who stated as follows:

Transitional justice must have the ambition of assisting the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future. It must reach to, but also beyond the crises and abuses committed during the conflict, which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it. When making that search, it is likely that one would expose a great number of violations of economic, social and cultural (ESC) rights and discriminatory practices (Arbour 2007: 3).

She further warned that transitional justice mechanisms that ignore the issue of socio-economic development could not in the long run bring sustainable peace (Arbour 2007: 8-9).

The need for transitional justice mechanisms to put in place socio-economic measures that respond to the actual socio-economic needs and priorities of the survivors of civil war has been affirmed by attitudinal surveys among survivors. This survey shows that survivors prioritise reparative and distributive justice – interventions that meet their basic and urgent socio-economic needs such as food, health, education, housing, clothing, employment and income generation – as compared to retributive justice (see Waldorf 2012: 5). Vinck and Pham, who undertook an attitudinal survey in the DRC, affirm this by stating that ‘as long as basic survival needs are not met and safety is not guaranteed, social reconstruction programmes, including transitional justice mechanisms, will not be perceived as a priority and will lack the level of support needed for their success’ (Vinck & Pham 2008: 404).

As a result of these criticisms, and the renewed requirement that transitional justice mechanisms act as tools for conflict prevention, it has been found that it is necessary for transitional justice to deal expressly and adequately with issues of social justice (Miller 2008: 288-289). Transitional justice has thus reformed to advocate the adoption of holistic and complementary approaches in post-conflict peace building,

reconciliation and reconstruction (Arbour 2007: 2). In this context of reforms, socio-economic development has become an important component of the holistic approaches to peace-building and conflict resolution as it focuses on the needs of the survivors of violence, with the aim of responding to past socio-economic deprivation and exclusion as well as enhancing their capacity to meet their socio-economic needs of the future, thus creating more stable societies.

Who, then, has the major responsibility of putting in place this broad-based and longer-term socio-economic development and resource redistribution policies in the post-conflict setting? It is asserted here that the biggest player in the transitional justice arena, with the responsibility for the realisation of sustainable peace in post-conflict situations, is the successor government itself. For the new government to succeed in maintaining sustainable peace and a stable post-conflict society, it has to adopt and implement effective long-term and broad-based socio-economic development and resource redistribution policies aimed at responding to the structural injustices and socio-economic deprivations that are almost always the root causes or the contributing factors of societal instability and conflict. These policies must be designed, implemented and funded adequately so as to respond to the subsisting needs and priorities of the citizenry affected by civil war. The importance of implementing comprehensive socio-economic development and resource redistribution policies aimed at improving the standards of living of the population in creating stable, more tolerant societies can be seen in the case of Rwanda, which implemented such policies, as compared to Burundi, which failed to implement such comprehensive policies, as detailed in the section below.

4 Socio-economic development efforts in Rwanda post-1994 and in Burundi post-2000 sectarian conflicts

4.1 Rwanda

The requirement that the state adopts a framework for the realisation of human rights, especially socio-economic rights, is entrenched in the Rwandan Constitution itself. Paragraph 9 of the Preamble affirms Rwanda's adherence to human rights as enshrined in several human rights instruments, including the UN Charter; the Universal Declaration of Human Rights (Universal Declaration); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Rights of the Child (CRC); and the African Charter on Human and Peoples' Rights (African Charter). All the above-mentioned international human rights instruments entrench economic, social and cultural rights, with the obligation on states to put in place legislative, policy, programmatic, remedial and other measures to enhance the progressive realisation of these rights. The Rwandan government, thus, has the obligation both under international and national law to put in place effective measures for socio-economic development and resource redistribution to enhance the realisation of socio-economic rights and reduce poverty, inequality and destitution. This is further acknowledged by the Constitution itself in paragraph 11 of the Preamble that affirms the determination of Rwanda to develop human resources, fight ignorance, promote technological advancement and advance the social welfare of the

people of Rwanda. The 'fundamental principles' in article 9 of the Constitution further affirm Rwanda's commitment to establish a state committed to promoting social welfare and establishing appropriate mechanisms for ensuring social justice. The Constitution in the Bill of Rights further affirms the right to equality and equal treatment of the law, the right to free choice of employment and equal pay for equal work, the right to education and the right to health and important socio-economic rights (articles 11, 16 and 37-41). What, then, has been the response by the Rwandan government to these constitutional and international human rights obligations regarding socio-economic development and resource redistribution policies, and what impact has this response had on the reduction of poverty, inequality and the other contributing factors to societal fragility and violence? This question is explored from a historical perspective in this section.

Rwanda experienced a strong economic growth in the 1970s and early 1980s, mainly because of the international coffee boom, with average Rwandans experiencing an increased income in this period (Ansoms 2005: 496). However, this progressive economic growth stagnated in the late 1980s and early 1990s, leading to a major economic crisis. The economic crisis was precipitated mainly by the collapse of world coffee prices, but aggravated by declining governance and poor socio-economic policies that fomented political instability and internal insecurity (Cooke 2011: 7). The economic and governance crisis was further exacerbated by drought and food shortages as well as a demand for austerity by donors and the introduction of structural adjustment programmes. These factors led to the reduction by 40 per cent in the national budget in 1989, with social spending being the heaviest casualty (Cooke 2011: 7). During this period, Rwanda's gross domestic product (GDP) per capita contracted at the rate of 1.28 per cent per annum and inequality increased rapidly. The country transited from a low-inequality country with a Gini Coefficient of 0.289 to a high-inequality country with a Gini Coefficient of 0.451 (Ansoms 2005: 502).

The economic and governance crises culminated in the four-year Rwandan civil war that led to the 1994 genocide. The popular participation in the genocide was not driven solely by ethno-political ideologies, but also by the possibility of increasing access to basic socio-economic goods that were owned by the victims, such as land and other types of property (Ansoms 2005: 503; Justino & Verwimp 2008: 29). The Rwandan civil war thus gives credence to the theory that absolute or relative socio-economic deprivation creates a conflict-prone society that can easily be triggered into actual conflict by an unscrupulous political class. One of the best methods of conflict prevention in such societies, therefore, is enhanced socio-economic development and wealth redistribution aimed at increasing the economic opportunities of the poor and satisfying their basic human needs.

Subsequent to the 1994 genocide and in the context of post-conflict recovery, Rwanda put in place ambitious developmental policies to hasten economic growth and to reduce poverty and inequality through the redistribution of resources (McDoom 2011: 2 & 13; Cooke 2011: 1-2). These developmental efforts were to a substantial extent aided by substantial foreign aid inflows, which were 55 per cent more as compared to the normal sub-Saharan aid standards (Ansoms 2005: 499; Booth &

Golooba-Mutebi 2011: 5). The reasoning behind the adoption of these pro-poor socio-economic development policies was the theory that economic development and wealth redistribution is the cornerstone of social stability, and thus important tools for peace-building and post-conflict social transformation (McDoom 2011: 3 & 13).

In 2000, the government adopted the Vision 2020 policy document as the framework for Rwanda's development. The Vision 2020 policy was aimed at modernising and diversifying the Rwandan economy, generating off-farm employment and transforming Rwanda from a low-income agriculture-based economy to a middle-income knowledge-based economy by 2020 (Rwanda Vision 2020: 2-3). The policy identified six critical priority areas for development to enhance the socio-economic transformation of the Rwandan society: good governance and the strengthening of the state; human resource development to create a knowledge-based economy; private sector-led development; infrastructure development; productive, high-value and market-oriented agriculture; and regional and international integration (Rwanda Vision 2020: 13-21).

The Vision 2020 project was to be realised in periods captured by the different poverty reduction strategies, starting with the first Poverty Reduction Strategy Paper adopted in 2002 to cover the period 2002 to 2006. Its focus areas were rural development and agricultural transformation; human development; economic infrastructure; governance; private sector development; and institutional capacity building (PRSP 2002-2005: 6-7). In the period 2001 to 2006, overall poverty-prioritised spending increased from 25 to 50 per cent, leading to substantive economic growth, although the growth was below the Vision 2020 projection of 6 per cent (actual growth of 5 per cent) (Ansoms 2007: 372 & 376). The result of the relative economic growth was the reduction of poverty by 2.2 per cent as well as the reduction of extreme poverty by 4.2 per cent (EDPRS 2013-2018: 2). This meant that more than half of the population continued living below the poverty line and a third of the population was still afflicted by extreme poverty (Ansoms 2007: 373). Inequality, similarly, increased in that period from a Gini Coefficient of 0.47 to 0.51 (EDPRS 2013-2018: 2; Ansoms 2007: 376-377). At the end of the period, the Institute for Development Studies undertook an evaluation of the implementation of the PRSP, noting that even though a great effort was put in place by the government to meet its targets, there was still a need to integrate its priorities with actual poverty reduction, the enhancement of equity and the provision of broad-based socio-economic growth for all (IDS 2006).

Following on the first PRSP, and based on the Vision 2020 policy goals, Rwanda in 2007 adopted the Economic Development and Poverty Reduction Strategy (EDPRS I) that covered the period 2008 to 2012. It had three flagship areas. The first was sustainable growth for jobs and exports, which was aimed at reducing the cost of doing business, increasing the capacity to innovate as well as widening and strengthening the financial sector. The second flagship area was the Vision 2020 *Umurenge*, a highly-decentralised integrated rural development programme aimed at accelerating poverty reduction by promoting pro-poor components of the national growth agenda with a focus on socio-economic transformation of the rural areas. The third flagship area was good governance, which was aimed at anchoring pro-poor growth through fighting corruption and

building comparative regional advantage in 'soft infrastructure', which included well-defined property rights, efficient public administration as well as transparency and accountability in fiscal and regulatory matters (EDPRS 2008-2012: xi & 1). In the context of the three flagship areas, the EDPRS further called for continued expenditure on social sectors such as health, education, water and sanitation, while also targeting agriculture, transport, information and communication technologies (ICT), energy, housing and urban development.

According to the Rwandan government, the EDPRS I period achieved a perfect developmental 'hat trick' with economic growth at an average of 8 per cent, poverty reduction at 12 per cent and the reduction in income inequality across all sectors of society, with the services sector growing at 10 per cent per annum to become the main contributor to the GDP by 53 per cent (EDPRS 2013-2018: ix & 3-4). The strong socio-economic growth was underpinned by the following factors: prudent and stable macro-economic and market-oriented policies; sustained business confidence; an improved regulatory framework; transparency in government-private sector interactions; a strong anti-corruption stance; high levels of consumption and public investment; and increased support by international development partners (EDPRS 2013-2018: 5). The EDPRS I successes were integrating inclusiveness and sustainability; undertaking home-grown initiatives such as *umuganda* (community work), *gacaca*, *abunzi* (mediators) and *imihigo* (performance contracts between central government and regional provinces) which have strengthened delivery of services; adopting community-based solutions which have empowered communities to be the drivers of their own development; and the use of ICT which has improved service delivery (EDPRS 2013-2018: ix). The EDPRS I period saw a poverty reduction from 56.7 per cent in 2005 to 44.9 per cent in 2011 with rural poverty decreasing from 61.9 per cent to 48.7 per cent (EDPRS 2013-2018: 6). Rural development saw improvements in agricultural production with agricultural output increasing from 21.5 to 26.9 per cent, while non-farm jobs also increased by 50-60 per cent (EDPRS 2013-2018: 6). Inequality generally decreased from a Gini Coefficient of 0.52 per cent in 2005 to 0.49 per cent in 2011, although gender inequality in relation to access to resources persisted and remains a challenge in addressing rural poverty (EDPRS 2013-2018: 6).

At the end of the first EDPRS I, Rwanda in 2012 adopted the second Economic Development and Poverty Reduction Strategy (EDPRS II) covering the period 2013 to 2018. This strategy is based on the redeveloped targets of Vision 2020 which were revised in 2012 with the following objectives: achieving an average growth rate of 11.5 per cent per annum to increase the GDP per capita to \$1 240; eliminating extreme poverty and reducing the poverty headcount ratio to 20 per cent; creating 1.8 million new off-farm jobs and increasing the urban population by 35 per cent; reducing external dependency by increasing the export growth to 28 per cent per annum; and incorporating the private sector as the dominant engine of growth (EDPRS 2013-2018: 2). Based on the experience of EDPRS I, EDPRS II recognises the finite nature of Rwandan development in relation to challenges such as high poverty and inequality; high pressure on land due to increased population growth; youth unemployment; the slow growth of the private sector; the lack of a suitable infrastructure; as well as challenges in the horizontal and vertical co-ordination of developmental activities at different levels of governance

(EDPRS 2013-2018: x). Four thematic priority areas of focus are identified for development in the EDPRS II period in order to deal with the aforementioned challenges, which are economic transformation which targets an accelerated 11.5 per cent average economic growth and the restructuring of the economy towards industry and service delivery; rural development with the objective of reducing rural poverty from 44.9 per cent to below 30 per cent by 2018 through increased agricultural productivity and increased social protection programmes; productivity and youth employment through the creation of 200 000 new jobs annually; and accountable governance through the improvement of service delivery, enhancing citizen participation and ownership of developmental programmes and ensuring efficiency and sustainability (EDPRS 2013-2018: xi-xiii).

Rwandan socio-economic growth policies and political governance have been termed as 'developmental patrimonialism' (Booth & Golooba-Mutebi 2011: 7). This is because they channel available rent-seeking opportunities centrally so as to genuinely grow the economy of the country, enhance redistribution and meet the basic socio-economic needs of the people with the objective of achieving political stability (Booth & Golooba-Mutebi 2011: 7). In adopting this developmental strategy, the government denied itself the easy opportunity of entrenching clientelism by providing private goods to the political elite to maintain political support, and instead opting to build political support and goodwill through demonstrating an ability to provide more and better public goods to the citizenry in general (Booth & Golooba-Mutebi 2011: 7). The strategy involves limiting avenues of corruption and influence peddling among the political elite, with the result that socio-economic and developmental policy-making processes are strictly geared towards enhancing the nation's economic growth and income distribution; and not the creation of rent-seeking opportunities for the political elite as is the case in other post-conflict societies, with Burundi as a prime example (Booth & Golooba-Mutebi 2011: 8-9). This strategy was regarded as the best and most feasible route to overcoming Rwanda's past ethnic divisions and inequalities, as articulated in Rwanda's Vision 2020. The Vision is based on the reasoning that if economic and social progress occurs fast enough, the new generation of Rwandans will embrace their common identity as Rwandans and forget the divisions of the past (Booth & Golooba-Mutebi 2011: 8-9).

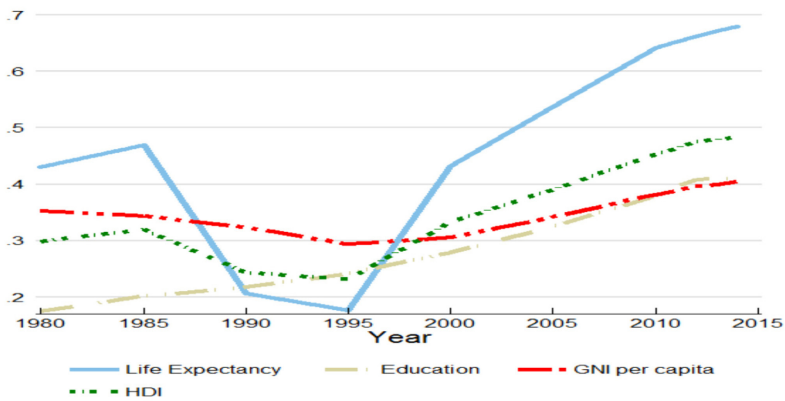
These socio-economic growth and development policies have started to bear fruits for Rwanda in terms of positive economic recovery, with Rwanda being the tenth fastest growing economy in the world in the decade since 2000. This is evidenced by statistical data which reveals Rwanda's GDP per capita growing at an annual rate of 6 per cent in the period 1995 to 2004, and at 7.4 per cent since 2004, becoming 50 per cent greater than the GDP in the 1990s before the conflict (Cooke 2011: 4; Verpoorten 2014: 1). However, data indicates that poverty is still rampant in Rwanda, although efforts by government to address the challenge have borne some fruits. In 1994 after the genocide, the poverty headcount ratio was at 70 per cent (Verpoorten 2014: 1). In 2002, two years after the end of the counter-insurgency, 60.3 per cent of the Rwandan population was poor, with rural poverty being at 65.7 per cent, urban poverty at 19.4 per cent and the poverty rate in the capital Kigali being at 12.3 per cent (Justino & Verwimp 2008: 16). In relation to extreme poverty, 41.6 per cent of the population was experiencing extreme poverty, with 45.8 per

cent in rural areas, 10 per cent in urban areas and 4.5 per cent in Kigali (Rwanda UNDAF Evaluation Report 2013: 6). There have been further improvements in poverty and inequality reduction, with data indicating that in the period 2010 to 2011, the general poverty headcount ratio reduced to 45 per cent and rural poverty reduced to 49 per cent, while the Gini Coefficient for inequality decreased from 0.52 per cent in 2005 to 0.49 per cent in 2011 (Verpoorten 2014: 1; Rwanda UNDAF Evaluation Report 2013: 6).

In relation to education, with the constitutionalisation of free primary education, the primary school net attendance ratio increased from 72 per cent in 2000 to 87.5 per cent in 2010, while the secondary net attendance ratio also improved from 5.0 per cent in 2000 to 14.4 per cent in 2010 (EDPRS 2013-2018: 7; Verpoorten 2014: 6). Health indicators have also improved in the post-conflict period with the number of new-born deliveries in hospitals tripling from 26 per cent in 2000 to 78 per cent in 2010, showing a decrease in the maternal mortality rate from 1 071 per 100 000 live births in 2000 to 476 per 100 000 live births in 2010 (EDPRS 2013-2018: 7; Verpoorten 2014: 3). The infant mortality rate, which had increased from 85 per 1 000 live births in 1992 to 109 per 1 000 live births, decreased considerably to 50 per 1 000 live births in 2010 (EDPRS 2013-2018: 7; Verpoorten 2014: 5). Similarly, the under-five mortality rate, which had increased in the war period from 151 in 1992 to 196 in 2000, decreased to 76 in 2010 (Verpoorten 2014: 5-6). Child vaccination coverage, which had declined in the conflict period from 86.3 per cent in 1992 to 76.0 per cent in 2000, similarly improved to 90.1 per cent in 2010 (Verpoorten 2014: 6). The number of people using mosquito nets increased from 6.6 per cent in 2000 to 82.7 per cent in 2010, an important health indicator taking into account the prevalence of malaria in the Great Lakes region (Verpoorten 2014: 6). Further, the number of people accessing clean drinking water and sanitation increased from 71 per cent to 75 per cent between 2005 and 2011, with electrification cover expanding from 3 per cent to 13 per cent in the same period (EDPRS 2013-2018: 7).

Even though still classified in the low human development category at position 163 out of 188 countries,⁵ Rwanda has over the years shown consistent improvements in the UNDP Human Development Index (HDI) components, as represented by the table below (UNDP HDI Briefing Notes, Rwanda 2015: 2-3):

5 In 2016, Rwanda was ranked in position 159 out of 188 ranked countries with an HDI value of 0.498, an improvement from position 163 the previous year. This is above the average 0.497 HDI value for low HDI countries, but below the average 0.523 for sub-Saharan countries. Rwanda's 2016 HDI value was an increase of 103 per cent from their HDI value of 0.244 in 1990. Its GNI per capita also increased by 90.9 per cent between 1990 and 2015; see UNDP HDI Briefing Notes, Rwanda 2016: 2-4.



The graphic representation above bears evidence of the improvement in the human development indicators from very low bases between 1990 and 1995 as a result of the civil war and the genocide to the current improved status due to the socio-economic and developmental policies that have been implemented by the Rwandan government.

Because of a paucity of disaggregated data on the effect of these socio-economic development policies on different sections of society, opinions conflict as to whether there has been a sufficient redistribution of resources as well as the benefits of the increased economic growth. Some commentators are of the opinion that the effect of the progressive economic growth has not cascaded into the rural areas in relation to poverty reduction and the improvement of the social welfare of ordinary people. Cooke, with reference to the UNDP National Development Report for Rwanda 2007, asserts that Rwanda's economic growth is failing to benefit poor citizens, noting that the population growth will soon outstrip the economic gains (Cooke 2011: 4). She states the Report's warning that if the rising inequality remains unchecked, Rwanda will exhaust its ability to reduce poverty rates through economic growth alone. A study of the UNDP HDI for 2015, as discounted for inequality, affirms that inequality remains an issue in Rwanda, with Rwanda's HDI of 0.483 falling to 0.330, a loss of 31.6 per cent when adjusted for inequality (UNDP HDI Briefing Notes, Rwanda 2015: 4). However, this is lower than that in comparative countries such as Togo and Guinea, which suffer losses of 33.4 per cent and 36.5 per cent respectively, and the loss is also lower than the average for sub-Saharan Africa, which is at 33.3 per cent, and the average for low HDI countries, which is at 32.0 per cent (UNDP HDI Briefing Notes, Rwanda 2015: 4). The comparative lower level of inequality in Rwanda is further affirmed by the Gender Inequality Index, which is at 0.400, ranking Rwanda at position 80 out of the 155 countries evaluated (UNDP

HDI Briefing Notes, Rwanda 2015: 5).⁶ The low inequality in comparative perspective indicates that the resource redistribution policies of the Rwandan government have borne some fruits, even though more needs to be done to ensure that the benefits of economic growth are fairly distributed between all the sectors of society (Ansoms 2005: 503). The challenges of differentiation in relation to poverty reduction in the provinces, gender inequality in relation to access to resources and inequality in Rwanda in comparative perspective are acknowledged by the Rwandan government, and the government has put in place measures within EDPRS II to ensure a more equitable redistribution of resources to ensure that the benefits of socio-economic growth and development are shared by all Rwandans (EDPRS 2013-2018: 8-10).

The strong socio-economic development and redistribution policies as well as the strong leadership provided by the RPF government under the leadership of President Kagame have entrenched social stability in Rwanda and put the country onto a path of reconciliation, social cohesion and social transformation. This has been a positive contribution to peace-building and post-conflict reconstruction, which has borne major peace dividends for the Rwandan people. However, as has been argued by some, basing social cohesion and conflict prevention solely on economic growth and strong leadership is not sustainable as economies fluctuate and leaders change (McDoom 2011: 33-38; Cooke 2011: 1-3 & 15-16; HRW 2012). Therefore, there is a need for political liberalisation to ensure that the Rwandan society is able to transition democratically should the RPF lose its electoral majority. Some of the civil and political reforms that have been suggested to increase the democratic space in Rwanda include the review of laws on genocide ideology and sectarianism so as to ensure that they are not used to muzzle legitimate dissent and political speech; the review of media laws to allow more space for independent media institutions; and the liberalisation of the political space to allow political parties as well as civil society organisations to register and operate freely, subject to legitimate regulation to weed out irresponsible rhetoric and actions (McDoom 2011: 33-34). McDoom and Cooke separately warn that the Rwandan society remains fragile and that, in the absence of the transformation of the political culture and the transition to a more democratic and accountable system of governance, the remarkable socio-economic growth and development of the Rwandan society undertaken by the RPF government may be undone by an unconstitutional change of regime (McDoom 2011: 38; Cooke 2011: 14-15).

4.2 Burundi

The requirement that the state adopts a framework for the realisation of human rights, especially socio-economic rights, is entrenched in the Burundian Constitution itself. Paragraph 3 of the Preamble, read with article 19 of the Constitution, affirms Burundi's commitment to a respect for human rights, as enshrined in several human rights instruments, including the Universal Declaration, the ICESCR, the African Charter, the CEDAW and the CRC, instruments that entrench economic and social

6 It indicates that in Rwanda, 55.7 per cent of parliamentary seats are held by women; 8.0 per cent of adults have reached at least secondary level of education as compared to 8.8 per cent of men; and that female participation in the labour market is at 86.4 per cent as compared to 85.3 per cent for men.

rights. This commitment is further affirmed by paragraph 5 of the Preamble which details Burundi's consciousness 'of the imperative need to promote the economic and social development of our country'. Further, in paragraph 10 of the Preamble the need is noted to put in place measures to enhance economic development and the realisation of equality and social justice in the country; acknowledging that these were profound causes of the ethnic and political violence, genocide, exclusion, insecurity and political stability that had plunged the country into civil war.

In the Bill of Rights, the Constitution entrenches the right to equality before the law and equal protection of the law; the right to an adequate means of survival in a dignified manner; the entitlement to obtain the satisfaction of economic, social and cultural rights and the free development of the human person; the right to education; the right to work and favourable conditions of work; the right of access to healthcare; and the obligation on the state to develop the country (articles 22, 27 and 52-58). These provisions thus place a constitutional injunction on the state to adopt a necessary socio-economic and developmental policy and to implement the same to enhance the socio-economic situation of the Burundian people. What, then, has been the socio-economic development and resource redistribution policy response of the Burundian government to these constitutional and international law obligations; and what impact has that response had on the reduction of poverty, inequality and the other contributing factors to societal fragility and violence? In this section the article explores this question from a historical perspective.

Burundi is a landlocked, low-opportunity country with a high population density mainly reliant on agriculture. Its population mainly lives in the rural areas, with the urbanisation rate at only around 11.8 per cent. Before independence from Belgian rule, the Burundian economy was integrated with that of Rwanda and the Congo (now DRC), with support to the economy coming from the natural resource endowments in the DRC (Nkurunziza & Ngaruko 2005: 3-4). The colonial economic union collapsed after independence in 1962 with Rwanda and DRC forming their own industries, with an adverse impact on the Burundian economy (Nkurunziza & Ngaruko 2005: 4). Due to this severe economic situation, the state became the major source of resources (wealth and upward socio-economic mobility), leading to a fierce struggle for the control of the state and rents that could be controlled by those in power for their own self-enrichment and the benefit of their allies (Uvin 2010: 175-176; Brachet & Wolpe 2005: 8-9; Ndikumana 2005: 415-418).

The dire socio-economic situation has led to continuous conflicts and *coups*, with the different ethnic identities (ethnicities, regionalism and clanism) being channelled by the political elites for the purpose of capture and retention of state power. The essence of the control of state power was the control of the minimal available resources in the country, which was then used by the political elite for the economic and social wellbeing of themselves, their families and allies (Uvin 2010: 169-170; Brachet & Wolpe 2005: 11). In this context of intractable conflicts, in which many regimes did not last more than two years in power, the governing elite adopted short-termism in relation to socio-economic developmental planning and resource redistribution policies, with short-term political goals superseding long-term socio-economic planning (Nkurunziza & Ngaruko 2005: 6 & 26-27). This short-term war-oriented political

mentality and the predatory nature of the state have subsisted throughout governance in Burundi. Consequently, even after the Arusha Accord in 2000 and the subsequent elections in 2005 that brought to power a democratically-elected CNDD-FDD government, not much in terms of long-term socio-economic planning and developmental policies was implemented by the new political elite. This failure in long-term socio-economic planning has had adverse consequences for economic growth, human development, resource redistribution and the general social welfare of the population of Burundi.

There was a short respite to the Burundian economy in 1976 to 1986, when the regime of Jean-Baptiste Bagaza took power and undertook a massive programme of investment aimed at kick-starting economic growth and development, raising the share of public investments from 5.6 to 42.8 per cent (Nkurunziza & Ngaruko 2005: 30). This period saw increased attempts at the modernisation of Burundi with large-scale infrastructural projects, such as the building of roads, dams and schools, being undertaken, which saw Burundi experiencing an economic growth rate above the African average (Nkurunziza & Ngaruko 2005: 11). These efforts were largely bolstered by the coffee boom of the 1970s as well as increased foreign aid from Burundi's development partners (Nkurunziza & Ngaruko 2005: 7). This period of socio-economic development bore peace dividends, as no overt conflict was witnessed. However, it was a missed opportunity as the Bagaza regime failed to put in place effective peace-building, socio-economic inclusion and conflict-prevention structures to bring about positive peace and peaceful co-existence between the different ethnic groups in Burundi.

The socio-economic development gains that might have been consolidated within the Bagaza regime, however, were effectively wiped out in the period between 1988 and 2000 which was characterised by war and an unprecedented economic crisis (Nkurunziza & Ngaruko 2005: 6). The continuous conflicts and undemocratic captures of power led to international and regional economic embargoes against Burundi as well as the withholding of foreign aid by international donors (with aid decreasing from \$318 million in 1993 to \$83 million in 1997). This further exacerbated the dire economic situation, with Burundi recording the highest levels of poverty and inequality (Desrosiers & Muringa 2012: 503). Burundi's economy, which had grown at an average rate of 4 per cent per annum prior to 1993, recorded negative growth rates in the subsequent decade with the country's per capita GDP reducing by more than a half between 1993 and 2001 (Brachet & Wolpe 2005: 8). The country also suffered a 20 per cent devaluation of its currency and inflation shot up by almost 40 per cent by 1998, leading to the doubling of household poverty with 68 per cent of the population living below the poverty line (Brachet & Wolpe 2005: 8). These dire socio-economic conditions not only made Burundi's ethnic and regional cleavages more acute, but they also severely limited any socio-economic aspirations of both Hutus and underprivileged Tutsis, leading to general despondency and despair within the population, a precarious situation receptive to ethnic-based mobilisation for violence (Brachet & Wolpe 2005 8-9). By the time the CNDD-FDD government came to power in 2005, the economy was in tatters and the livelihoods of the Burundian people had been severely compromised, a situation that needed comprehensive socio-economic development and resource redistribution policies to repair. The

important question to ask here is what the new government did in terms of the adoption and substantive implementation of socio-economic development and redistribution policies post-2005, and what impact that has had on growth, human development and the realisation of the socio-economic rights of the Burundian people. This question is important as fiscal, developmental and re-distributional policies are important tools for peace consolidation that can direct available resources towards the less-privileged segments of society so as to reduce poverty, inequality and other types of socio-economic marginalisation that are the fault lines for conflict.

In 2004 Burundi adopted an Interim Poverty Reduction Strategy Paper (PRSP), a primarily donor-driven process, which provided for an ambitious three-year (2004-2006) programme funded by the Poverty Reduction and Growth Facility of the International Monetary Fund. The Interim PRSP was followed by the *Programme Quinquennal de Gouvernement* 2005-2010 and the first complete Poverty Reduction Strategy Paper 2006-2009 (PRSP I), aimed at stimulating the economy, social sectors and development (Desrosiers & Muringa 2012: 506). Despite the adoption of these measures, the economy grew at only 3 per cent, way below the projected 6.7 per cent, with the economy remaining heavily reliant on agriculture which accounted for 35 per cent of the GDP, provided over 90 per cent of jobs and accounted for over 80 per cent of exports (Burundi PRSP II 2012: 20). PRSP I was followed by the *Programme Quinquennal de Gouvernement* 2010-2015; the Vision Burundi 2025, which was adopted in 2010 to guide long-term political and socio-economic transformation;⁷ and the Second Poverty Reduction Strategy Paper 2011-2015 (PRSP II).

The PRSP II retained focus on the four areas of PRSP I, but was more oriented towards economic growth and development (Burundi PRSP II 2012: 20). It acknowledged that socio-economic growth in the PRSP I period was too slow and insufficient for poverty reduction. It noted the challenges in that period as follows: high demographic growth; inefficient agricultural production; weak execution of public expenditure; underinvestment in the private sector; a persistent electricity deficit; and a lack of capacity to manage development. In order to respond to these challenges, the PRSP II adopted four strategic pillars to guide its achievement of Vision 2025: strengthening of the rule of law; the consolidation of good governance and the promotion of gender equality; the transformation of Burundi's economy to generate sustainable job-creating growth; the improvement of access to and quality of basic services and the strengthening of social safety nets; and the promotion of development through sustainable environmental and space management (Burundi PRSP II 2012: xii-xvii). The objective was to increase the economic growth rate to 8.2 per cent by 2015, with the rural areas growing at the rate of 8.2 per cent in 2015 ((Burundi PRSP II 2012: xviii). However, as at the end of 2014 this had not been achieved: The economy had only grown by 4.7 per cent from 4.5 per cent in 2013 (African Economic Outlook – Burundi 2015: para 1).

7 The goal of the Vision is to enhance sustainable development in Burundi, increase economic growth and reduce poverty by half, that is, from 67 per cent to 33 per cent by 2025. Its three primary objectives are good governance and the rule of law; the development of a strong competitive economy; and improved living conditions for all Burundians.

With the development of these strategies came increased foreign aid inflows into Burundi, as donor countries were more certain of political stability in the country and also had a clear framework to focus on in terms of development support. Aid increased from \$420 million in 2005; \$480 million in 2006; \$489 million in 2007; \$511 million in 2008; peaking in 2009 when Burundi received aid worth \$562 million (Desrosiers & Muringa 2012: 507-508). However, according to Desrosiers and Muringa, aid had followed the traditional donor country biases, with more aid being channelled towards the rule of law, transitional justice and security sectors, while aid to social, economic and production sectors that would have bolstered economies of scale and generated pro-poor growth was minimal (Desrosiers & Muringa 2012: 504). This sectoral disparity in aid inflows is affirmed by the UN Internal Peace Building Support Office (PBSO), which details peace-building priorities for funding to include good governance; the security sector; justice, human rights and the fight against impunity; land and reintegration – with economic development coming second last in a category named ‘other areas’ (PBSO 2007: 6).

The increase in aid inflow also resulted from the selection of Burundi as an initial country of focus by the new UN Peace-Building Commission (PBC) in 2006, with the aim of ensuring that Burundi moved from conflict to development. This led to the development of a Strategic Framework for Peace Building in Burundi (CSCP) in 2007 to guide the peace-building efforts as well as the disbursement of an initial \$35 million from PBC to undertake quick impact projects as peace dividends (Desrosiers & Muringa 2012: 506). Furthermore, Burundi started to benefit from the Heavily Indebted Poor Countries Initiative in 2005 by receiving interim debt relief assistance, a process that matured in 2009 with Burundi benefiting from full debt relief as well as qualifying for the Multilateral Debt Relief Initiative Assistance (Desrosiers & Muringa 2012: 507). The high aid masks Burundi’s poor use of internal resources, with internal resources forming only 12.4 per cent of the GDP in 2014 as compared to 13.1 per cent in 2013 and 14.2 per cent in 2011 (African Economic Outlook – Burundi 2015: para 1). This is due primarily to corruption which has seen funds diverted from public use to private coffers, a fact that has led to the international community cutting aid support from 5 per cent of GDP in 2010 to 2 per cent of GDP in 2014 (African Economic Outlook – Burundi 2015: para 1).

The tragedy is that despite the impressive policy documents put in place and the international support that was available to Burundi in the post-conflict setting between 2005 and 2015, there was never the requisite political will or governmental capacity to actually implement these policies. Consequently, the intended socio-economic transformation of the Burundian society never materialised (Desrosiers & Muringa 2012: 502). Although other issues contributed to this inability, the primary issue has been poor governance. This was manifested in wanton corruption, which has been the key mechanism for the siphoning of public funds meant for socio-economic development into private coffers to feed patron-client networks that have persevered in Burundi due to the predatory nature of the state and the war-induced short-term political culture prevailing among the political and social elite (Nkurunziza 2009: 1 & 12). Evidence indicates that the elite in or close to power have rapidly enriched themselves. The frenzy of corruption has upset the requisite balance between available resources and the actual implementation of

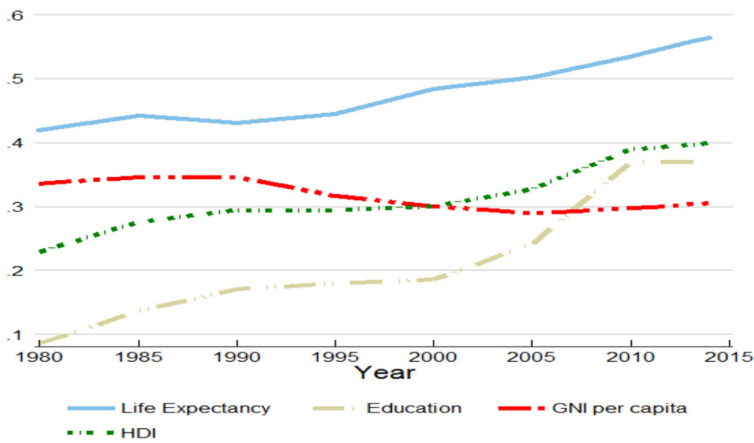
developmental programmes, leaving the state with little resources to achieve any meaningful socio-economic transformation of the society (Nkurunziza 2009: 13-14; Desrosiers & Muringa 2012: 525-526). The government itself has acknowledged this challenge, stating that there was insufficient funding for economic infrastructure (10.3 per cent) and other areas with growth potential (8.8 per cent), which was partly responsible for the sluggish economic growth (AfDB 2011: 4).

As a consequence of this failure, poverty, inequality and socio-economic exclusion have grown deeper and more entrenched in the general population. Data from the UNDP HDI indicates that 81.8 per cent of Burundians are multi-dimensionally poor, with an additional 12 per cent living near multi-dimensional poverty (UNDP HDI Briefing Notes, Burundi 2015: 6). The multi-dimensional poverty data from the UNDP HDI are supported by multi-dimensional poverty data from the Oxford Poverty and Human Development Initiative (OPHI) in its 2015 Country Briefing of Burundi, which is tabulated as follows (OPHI 2015: 1):

Multi-dimensional poverty index	% of poor people	Average intensity across the poor	% of people vulnerable to poverty	% of people in severe poverty	% of people in destitution	Inequality among the poor
0.454	80.8 per cent	56.2 per cent	14.1 per cent	50.5 per cent	39.2 per cent	0.233

Due to these challenges, Burundi has been classified under the HDI system as a low human development country at position 184 out of the 188 countries evaluated by United Nations Development Programme (UNDP) in 2015 with an HDI value of 0.400. This HDI valuation of Burundi falls below the average for low HDI countries at 0.505 and also below the average for sub-Saharan countries, which is at 0.518 (UNDP HDI Briefing Notes, Burundi 2015: 2).⁸ Human development, in relation to the different components of the HDI, in Burundi over the years may be elaborated by the following graph (UNDP HDI Briefing Notes, Burundi 2015: 3):

8 In 2016, UNDP HDI still ranked Burundi at 184 out of 188 countries, with an HDI value of 0.404. This remains below the average HDI value of 0.497 for low human development countries and average HDI value of 0.523 for sub-Saharan African countries; see UNDP HDI Briefing Notes, Burundi 2016: 2-4.



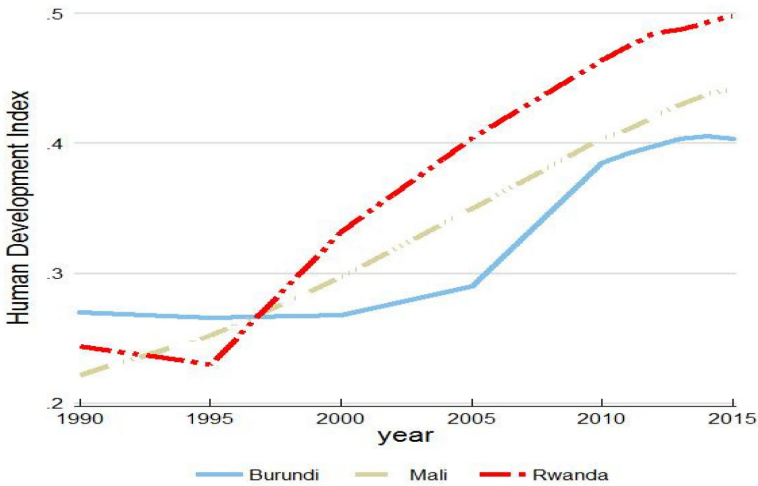
The HDI also indicates that Burundi is a highly-unequal country, with its HDI value falling to 0.269 representing a 32.6 per cent loss due to inequality (UNDP HDI Briefing Notes, Burundi 2015: 4).⁹ Inequality in Burundi is further affirmed by the Gender Inequality Index (GII) which positions the country at position 109 out of the 155 ranked countries with a GII value of 0.492, with only 5.3 per cent of women having reached at least a secondary level of education as compared to men at 8.3 per cent (UNDP HDI Briefing Notes, Burundi 2015: 5).¹⁰ As far as education is concerned, the introduction of free primary education led to increased enrolments, but completion rates have remained poor, only increasing from 37 to 47.7 per cent between 2005 and 2010, a progress which the government itself noted as unremarkable (Burundi PRSP II 2012: 23). Due to a lack of infrastructural development in schools, there is overcrowding with an average of 82 students per classroom. The overcrowding, coupled with other quality learning challenges in the Burundian education system, has resulted in high levels of class repetition, with data indicating 35 per cent repetition levels in primary schools, 28 per cent in communal secondary schools and 18 per cent in public secondary schools. The poor quality of learning and habitual repetition have led to poor transitioning to higher levels of education, especially to secondary schools, with only 33 per cent of primary school pupils transitioning to secondary schools (Burundi PRSP II 2012: 23).

The differing human development paths of Rwanda and Burundi resulting from the different choices on socio-economic development and

9 In 2016, inequality continued in Burundi, with the HDI value of 0.404 falling to 0.276, a decrease of 31.5 per cent when discounted for inequality, see UNDP HDI Briefing Notes, Burundi 2016: 4-5.

10 In 2016, Burundi improved by one position from 109 to 108 out of 159 ranked countries with a gender equality index value of 0.474, with 7.1 per cent of women accessing at least secondary level of education as compared to 9.6 per cent for men. Female participation in the labour market has increased to 84.6 per cent as compared to 82.7 per cent for men; see UNDP HDI Briefing Notes, Burundi 2016: 5-6.

resource redistribution policies are reflected in the graph below (UNDP HDI Briefing Notes, Rwanda 2016: 4).



This clearly shows that the policies of the Rwandan government have borne human development fruits for the people of Rwanda in comparative perspective to Burundi, which has struggled to achieve improved socio-economic transformation as reflected in the poor human development indicators as shown in the graph above.

The failure of socio-economic transformation of the Burundian society has led to greater frustrations and suspicion, creating new fault lines of social disintegration. These frustrations have been voiced through popular uprisings led by citizen movements against deteriorating socio-economic conditions and a rising cost of living due to the high prices of basic necessities (*la vie chère*), which have resulted in popular demonstrations and strikes (Desrosiers & Muringa 2012: 523-524). These movements, and the resultant increasingly authoritarian and violent reaction towards them on the part of the government, has led to a greater strain on state-society relationships, leading to greater social instability; a major recipe for the recurrence of cycles of violent conflict (Desrosiers & Muringa 2012: 526). It is in this strained socio-economic context that a new cycle of violent conflicts erupted in Burundi in 2015 when the incumbent sought to change the Constitution and extend his term of office, as discussed in section 5 below.

5 Viability of socio-economic development in resolving intractable conflicts

The wave of democratisation in Africa after the Cold War saw many African states entrench presidential term limits in their constitutions as a

bulwark against personal or authoritarian rule, with the objective of transitioning into pluralistic modes of democratic governance (Dulani 2015: 1-2). Unfortunately, in relation to the violation of constitutional term limits, the year 2015 brought a challenge to Africa, with at least five incumbent heads of state bidding to renew their terms of office through constitutional amendments, a list which included President Pierre Nkurunziza of Burundi and President Paul Kagame of Rwanda.

In Burundi, Nkurunziza's efforts started in 2014 when his government engineered a motion attempting to amend the presidential term limit entrenched in article 96 of the 2005 Constitution which provided that '[t]he President of the Republic is elected by universal direct suffrage for a mandate of five years renewable one time'. The proposed constitutional amendment was narrowly defeated in parliament (Arief 2015: 2). The government then adopted a different strategy, arguing that in 2005, the President had not been elected by universal direct suffrage as required by the Constitution, but indirectly by parliament, and had thus not served two terms, having only been directly elected in 2010 (Arief 2015: 2-3; Dulani 2015: 10). Therefore, they argued that the President was entitled to another term and was free to vie in 2015, an interpretation that was opposed by the opposition parties and civil society. The opposition approached the Supreme Court to challenge the President's attempt at a third term, but the Court on 5 May 2015 upheld the government's interpretation of the Constitution, allowing Nkurunziza to vie for another term (Arief 2015: 2-3). The determination by the Court that President Nkurunziza could legitimately seek a third term sparked heavy domestic protests. The protests were led by the *Halte au troisième mandat* (Stop the third mandate) movement, a movement composed of all sectors of society opposed to the third mandate. However, the protesters were met with ruthless repressive force from the state and its agents, especially the 50 000-strong CNDD-FDD youth wing, the *Imbonerakure*, leading to a massive displacement of over 216 000 Burundians by November 2015 (WFP 2015).

Although the contested third term was the trigger of the violence, analysts argue that the root cause of the massive protests was the collective frustration of the Burundian populace at the entire socio-economic and socio-political system built on impunity, structural violence and nepotism (Impunity Watch 2015: 2); Acker 2015: 7-8). The authoritarian reaction to the protest led to an attempted *coup* on 13 May 2015 by Major General Godefroid Niyombare. The fallout from the attempted *coup* sparked the massive killing of innocent people (109 deaths on 11 December 2015 alone); the assassination of political and military leaders; as well as the arrest and detention of several politicians and military leaders on accusation that they were the leaders of the *coup* attempt (Bentley *et al* 2016: 2-3). Undeterred by national and international pressure, President Nkurunziza organised an election in July 2015, which the opposition effectively boycotted, with the effect that he won his desired third term in office.

Peace brokerage efforts started before and after the July 2015 elections in Kampala, Uganda, led by the East African Community (EAC) under the leadership of President Yoweri Museveni of Uganda (Global Counsel 2015: 2). An African Union (AU) Fact-Finding Mission also visited Burundi and decried the high levels of torture, killings, harassment and intimidation of

opposition parties and civil society organisations, among other serious human rights violations by the Nkurunziza regime (ACHPR 2015). Due to the findings of the mission, the AU authorised the deployment of a 5 000-member peacekeeping force (African Prevention and Protection Mission in Burundi – MAPROBU). The mandate of the mission would have been to restore order and protect civilians from wanton killings and serious violations of human rights. The AU decision, however, was rejected by the Nkurunziza regime, which threatened to view such a force as an invading force and fight it accordingly (AUPSC Communiqué DLXV 2015: para. 13). Due to this impasse, the AU had to put their decision to send peacekeeping troops on hold as they sought a negotiated solution to the current crisis in Burundi (AUPSC Communiqué DLXXI 2015: para.11). It may be argued that this was an abdication of responsibility on the part of the AU contrary to its mandate in article 4(h) of the Constitutive Act empowering it to send in troops even without the acquiescence of the governing regime if the necessary threshold has been reached, as was the case in Burundi.

The UN similarly had been seized of the situation in Burundi with the UN Security Council adopting Resolution 2248 (2015) in which it condemned the increasing violence in Burundi and called on the government to respect, protect and guarantee human rights and fundamental freedoms to all. The Resolution further called on Burundi to institute the Inter-Burundian Dialogue, and to co-operate in the EAC-led mediation to bring an end to the political impasse. It also reflected the intention of the Security Council to adopt additional measures to deal with the actors perpetuating violence in Burundi (UNSC Resolution 2248 2015: paras. 3-6). The Resolution was followed by a High Level UN Security Council Mission to Burundi from 21 to 23 January 2016 that held meetings with the government, political parties, civil society organisations, religious organisations and other relevant sectors of society. This visit did not yield any meaningful way forward on the resolution of the crisis, with the President remaining recalcitrant and unresponsive to efforts by the international community to bring the crisis to an end (UNSC Dispatch 2016). The International Criminal Court had also warned that it would undertake investigations in relation to crimes against humanity and hold those responsible for such violations to individually account for the crimes (Statement of ICC Prosecutor 2015). Due to the threats of ICC prosecution, the Burundian government started the process of withdrawal from the Rome Statute, with the aim of foreclosing the possibility of perpetrators being held criminally accountable at the ICC (HRW October 2016). Although an uneasy calm has returned to Burundi in late 2016 and early 2017, the peace negotiations under the EAC, facilitated by former Tanzanian President Benjamin Mkapa, have not borne much fruit. This has led to fears that Burundi will remain on the verge of deeper violence, with the threat of a third genocide still present (Rift Valley Institute 2017: 1-2; UNPBC 2017: 1-4).

In Rwanda, the process of constitutional amendment was brought about by an apparent massive petition by members of the public for the amendment of the Rwandan Constitution; especially article 101 on presidential term limits. This petition apparently was a popular initiative, with at least 3.7 million signatures received in support by August 2015, representing 60 per cent of the registered voters (Moestrup 2015). This led to the formation by parliament of a Constitutional Review Commission in

September 2015 to review the petition and develop possible amendments to the Constitution. After its analysis of the petition, the Commission made recommendations for the review of several provisions of the 2003 Constitution. The recommended amendments, which were affirmed by parliament, reduced the term of office of the President from a seven to a five-year term, with the period between 2017 and 2024 being a transitional period in which the President serves a seven-year term. Subsequent to serving in the presidency for the transitional period, the President still has a constitutional right or permission to serve another two five-year terms. This means that should president Kagame so wish, he can continue vying for the presidency and, if elected, could stay in power until at least 2034. The proposed constitutional amendments were challenged in the Rwandan Supreme Court by the opposition Democratic Green Party. However, the suit was lost, with the Court leaving the decision to be made by the people through a referendum. In making its determination, the Court stated that 'it would be undemocratic to deny the people the right to choose how they want to be governed'. Subsequent to the decision by the Supreme Court, the proposed amendments were subjected to a popular referendum on 18 December 2015 where the overwhelming majority of Rwandans, namely, 6.16 million voters (98 per cent of the cast votes) voted for the proposed amendments. This referendum vote to ratify the constitutional amendment effectively permits President Kagame to run for not only one, but three subsequent presidential terms, which would allow him to govern Rwanda until 2034. Following the entry into force of these constitutional amendments, President Kagame has confirmed that he will seek a third term in office by contesting the 2017 presidential elections, despite pressure from donors and the international community that he should step down.

With regard to democracy, the constitutional change in Rwanda and the threefold extension of the incumbent President's ability to run for election is more deleterious than the one-term extension of office by the Burundian President. Yet, the reaction in Rwanda has been more subdued, with Rwandans voting in a referendum to make an overwhelming decision to allow the President to again run for office while, in Burundi, the decision was met with massive popular protests, an attempted *coup* and continued rebellion which has led to the death of over 500 people and the displacement of over 216 000 civilians. The question this article has sought to deal with is why it was possible for Rwanda to maintain relative peace and stability in the face of this anti-democratic challenge, while Burundi crumbled, reverting to violence and destruction. It is argued that the reason why Rwandans chose relative stability was due to the general popularity of President Paul Kagame and his RPF regime because of the increased socio-economic and human development that had been occasioned by the government's implementation of comprehensive socio-economic development and resource redistribution policies, a strategy that has generally led to increased economic growth, increased access to socio-economic goods and services, a reduction in the levels of poverty and the general reduction in inequality. As a result, the Rwandan people have felt valued and included in the state's efforts to develop the country, thus creating popular buy-in and local ownership of the developmental agenda of the state. This, however, has not been the case in Burundi, where the government failed to effectively implement socio-economic and resource redistribution policies, instead engaging in corruption and other short-

term rent-seeking behaviour that has generally impoverished the masses. This has generally led to destitution, despondency, disenchantment and outward opposition to the Burundian government, reflected in mass protests and violent opposition to the government. From the above analysis, it may be argued that comprehensive socio-economic development and redistribution policies, that engender pro-poor development and the reduction of poverty and inequality, are an important tool which can be utilised, in the context of a comprehensive and holistic response to conflict, to create post-conflict peace and stability where long-term reconciliation and social cohesion can be built, with long-term dividends to positive peace and conflict prevention.

6 Conclusion

Post-conflict peace building and reconciliation play an important role in creating stable societies capable of preventing the recurrence of cycles of violence that lead to intractable conflicts. For very many generations, this peace-building and post-conflict reconciliation has been based on the cessation of conflict, political deal making, and accountability for the violation of civil and political rights as well as the creation of Western-style liberal democracies. The missing link has been a clear policy of addressing the socio-economic and structural causes of violence, such as poverty, destitution, inequality and the general socio-economic exclusion of the majority of the population. Research has shown that this method of addressing conflict has largely been unsuccessful in effectively dealing with intractable conflicts, as the socio-economic and developmental aspects of civil war and sectarian violence remain unaddressed. This failure leaves the relevant society fractured and fragile, and thus easily manipulated to generate subsequent cycles of violence. Suggestions have been made that post-conflict peace building and societal reconstruction efforts must take into account the critical human needs of the majority of the population. This can be done by designing comprehensive and holistic conflict-resolution, peace-building and post-conflict reconstruction mechanisms that are responsive to these human needs. Such comprehensive mechanisms must take into account the need for the successor governments to implement comprehensive socio-economic development and resource redistribution policies that engender pro-poor growth capable of addressing the critical human needs of the populace. Specifically, these policies must address concerns relating to social service provision, access to education and employment opportunities, the enhancement of the livelihoods of the poor sectors of society and the general reduction of poverty and inequality in society. The viability of such a comprehensive approach in responding to intractable conflicts was affirmed as far back as 1941 by President Franklin Roosevelt of the United States in his famous 'Four Freedoms Speech' address to Congress, where he recognised that socio-economic inequalities were the root causes of World War II and had to be addressed if the international community was to achieve international peace and security (Roosevelt 1941: 6-7). This article, taking into account the example of Rwanda as contradistinguished with Burundi, strives to show that the adoption of comprehensive socio-economic development and resource distribution policies can go a long way towards creating a more tolerant and stable society, a prerequisite for

societal reconciliation and conflict prevention in relation to subsequent cyclic conflicts.

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Human rights violations in the *ChevronTexaco* case, Ecuador: Cultural genocide?

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Abstract: *This article discusses the Chevron contamination case in Ecuador with the aim of illustrating the scope of the human rights violations suffered by the affected indigenous communities. The contribution is inserted into a broader debate on the need for business to respect human rights, in a society where profit seems to be corporations' only concern. The facts of the case and the damage to the indigenous peoples' rights and culture are presented. The legal developments of the case are illustrated, with the focus falling on Chevron's delaying strategy before the judicial system. The risk of new forms of colonisation hidden in cases like the Chevron Ecuador case is highlighted. When threats resembling colonisation are posed to the rights, culture and dignity of the local inhabitants, ex post reparations seem inadequate. However, participatory processes of defining the remediation together with the affected communities may restore some of the values lost. The analysis of the facts leads to the assertion that the Chevron Ecuador case could be regarded as cultural genocide and even as a crime against humanity. The supposed reasons that induced the multinational to intentionally 'destroy' the local culture are outlined. Numerous international treaties to which Ecuador is a party support this statement. Moreover, it is suggested that the case should be considered not only from the perspective of the Inter-American system, but also from the European Union's normative framework. EU action on behalf of the Ecuadorian affected people is presented as advisable and recommendations on possible forms of this action are highlighted.*

Key words: *environmental crime; indigenous rights; human rights violations; oil exploitation; cultural genocide; United Nations system; European Union system*

1 Introduction

In a world where the environment and the rights of the people living therein constantly seem under threat by the insatiable greed of corporations, an increasing consensus has arisen on the duty of companies to respect human rights principles and ethical parameters. The formulation of the United Nations (UN) Guiding Principles on Business and Human Rights (UN 2011) – aimed at providing an authoritative global standard for preventing and addressing the risk of human rights violations caused by businesses – is evidence of this trend. Another milestone of the described process undoubtedly is the enshrinement in international law of

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the principle of free prior informed consent (FPIC), as defined by the United Nations Permanent Forum on Indigenous Issues (UNPFII).¹ The principle found recognition at the international level through its inclusion in article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):²

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the *free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Lastly, considerable progress has been made regarding the reconsideration of the role of businesses in society, namely, a shift has been registered from a solely profit-oriented company to a company that equally values its profits and its environmental and human rights impact. For example, the movement of the B Corps,³ a new type of company using the power of business to solve social and environmental problems, demonstrates this tipping point. The aim of this article is to contribute to this fundamental debate by reflecting on whether unregulated and irresponsible natural resources exploitation may be regarded as a *new wave of colonisation, cultural genocide* and even a *crime against humanity*.

This contribution strongly advocates the ever-growing presence of international eyes where there is the risk of crimes by businesses to the detriment of local inhabitants. When a powerful company enters a territory, the defence of the local inhabitants' rights must be promoted, in particular through a proactive role played by the international community. International bodies have a duty to watch over wrongdoings by multinationals and to put pressure on corporate strategies to respect human rights.

This contribution illustrates the *Chevron* oil contamination case that occurred in the Ecuadorian Amazon rain forest. The case is analysed through the lens of the human rights violations perpetrated on local indigenous communities by the oil company. The article focuses on the harm caused to the indigenous peoples by the oil exploitation conducted by Chevron in the area. An insight into the indigenous culture is provided, with a view to presenting the human rights violations associated with Chevron's operations.

The article progresses through the areas of impact of the oil company, namely, the consequences for indigenous peoples' cultures and their *cosmovisión*; the deprivation of their territories; the effects on their health; the changes in their traditional diet; the misinformation about the oil-related dangers; the impact on their demography; and the alterations in the

- 1 FPIC: 'Free' means that there is no manipulation or coercion of the indigenous people and that the process is self-directed by those affected by the project. 'Prior' implies that consent is sought sufficiently in advance of any activities being either commenced or authorised, and the time for the consultation process to occur must be guaranteed by the relative agents. 'Informed' suggests that the relevant indigenous people receive satisfactory information on the key points of the project, such as the nature, size, pace, reversibility and scope of the project, the reason for it, and its duration. 'Consent' means a process in which participation and consultation are the central pillars. Sources: Fontana & Grugel (2016: 49); Barelli (2012); Doyle & Carino (2013).
- 2 UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly by Resolution A/61/295, 61st session (13 September 2007).
- 3 See <https://www.bcorporation.net/>.

composition and stability of families. Subsequently, the article briefly outlines the legal developments of the case, underlining Chevron's illicit strategy during the litigation. The scope of Chevron's opponents' network is presented in order to illustrate the aversion of a large segment of the public's opinion to Chevron's operations worldwide.

The core of the discussion is represented by the assertion that the *Chevron* case could be regarded as a form of colonisation, cultural genocide and even a crime against humanity. This reflection is rooted in the analysis of international instruments enacted in defence of indigenous peoples' rights. The article suggests that the case should be considered not only from the perspective of the Inter-American system, but also from the perspective of the normative framework of the European Union (EU). In conclusion, the new wave of colonisation represented by natural exploitation at the detriment of local peoples' rights is condemned. The opportunity of an intervention at the European level on behalf of the Ecuadorian affected people is discussed, through the elaboration of possible responses by the EU.

2 Business obligations, ethics and human rights

The *Chevron* case presented in the article primarily is an occasion to reflect on the *status quo* of today's global business practices. The fact that companies nowadays do not in principle have human rights duties is the central cause of crimes, such as those occurring in the Ecuadorian rain forest. The fact that the firm can bind itself only *voluntarily* to respect for human rights is not enough. The *Chevron* case is proof that human rights and an environmental ethics today more than in the past must orient business activities and investment choices. However, the logic of the economic convenience often wins over the ethical reasoning.

This appeal to put a human rights and environment-based moral first in orienting the conduct of companies dates from long ago. The German philosopher, Hans Jonas, in the early 1980s in the text *The imperative of responsibility. In search of an ethics for the technological age* (1984) already called for an ethic regulating the growing power humans (and thus businesses) were acquiring on nature. More than about drastic environmental apocalypses, Jonas was concerned about a gradual one, resulting from the inadequate use of human progress. Cases of massive oil contamination exactly are examples of what Jonas warned of the 1980s.

Once nature and the people living therein are the power of under businesses, as in the case of oil drilling operations, the companies acquire a relationship of *responsibility* towards them, despite not being acknowledged in binding texts. This contribution endorses the business ethic proposed by Jonas, which considers not only the human profit but also the wellbeing of nature and the local inhabitants as crucial components of the common good, together with environmental developments. An ethic of conservation, of prevention and of prudence must prevail over progress and economical growth at any cost because the preservation of the environment and of the native inhabitants, in the end, coincides with the preservation of *life*.

The business ethic proposed here is oriented towards the future, a future where future generations will judge this generation's choices. This

view requires from companies to be responsible for the impact they have on society and on nature. The economic progress is not neutral: Now, more than in the past, it should be ethics-based and submitted to human-rights control.

The challenge of introducing ethics into corporative strategies will be analysed through the example of the *Chevron* case, as a clear example of the failure by society to subject a business to obligations with regard to human rights. The case serves as the basis to affirm that the respect for human rights can no longer be left to companies' *voluntary* initiatives and best practices. Although recognising the complexity of protecting human rights against corporate abuses (see below *Chevron's* mechanisms to avoid accountability), this contribution aligns with the debate claiming mandatory human rights due diligence legislation in order to substantially reduce corporate human rights violations, pursuant to the United Nations Guiding Principles on Business and Human Rights.

3 The case of contamination by Chevron in Ecuador

Chevron is responsible for major environmental crimes around the world (Kinman et al 2011).⁴ Nevertheless, this analysis focuses only on the company's conduct in Ecuador. The *ChevronTexaco* case in Ecuador represents one of the world's largest oil contaminations, which has affected and continues to affect the Ecuadorian Amazon rain forest. The case concerns the area where the firm conducted its extractive operations from 1964 to 1992 under the name of *Texpet* in the concession area called *Concession Napo*. These operations were controlled by *Texaco Ecuador*, the head of the consortium formed by the state oil company, *CEPE (Corporación Estatal Petrolera Ecuatoriana)*, and *Texaco Gulf*.

The impacted area covers the territories surrounding the wells, the stations where the extracted crude was processed and the open-air pools into which the oil produced was directly discharged, without any safety precautions. The consequences of this irresponsible conduct negatively affected the entire ecosystem, from water resources to soil and air. It is estimated that *Texaco (ChevronToxico 2017)*,⁵ over the time that it operated the sites, spilled directly into bodies of water a total of 18 billion gallons of formation water, at a rate close to 10 million liters of toxic water per day, and 16 800 million gallons of crude. This amounts to about 30

4 Examples of legal cases involving *Chevron* in countries other than Ecuador can be found in Kinman et al (2011). In particular, noteworthy are the following cases: For example, *Chevron's* Pascagoula Refinery located at the Mississippi Gulf Coast, home of *Chevron's* largest refinery, on a daily basis produces benzene, a known carcinogen, and paraxylene, causing eye, nose or throat irritation in humans. The US Environmental Protection Agency (EPA) reported that the company had released more than 1,1 million pounds of toxic waste from the site in 2009 (report 16). In addition, *Chevron* is known to be operating on projects creating revenues for criminal military regimes. For example, in Myanmar (Burma), the firm partnered with the state-owned oil and gas enterprise on the *Yadana* natural gas project, one of the largest sources of income for the Burmese military regime, convicted of human rights abuses (report 27). In the report, other evidence of crimes perpetrated by *Chevron* against local communities worldwide, from Angola, Thailand, Colombia, Ecuador, Kazakhstan and Nigeria to Australia, Canada, Alaska, California, Mississippi and Texas.

5 For more information, see <http://chevrontoxico.com/about/environmental-impacts/> and <http://chevrontoxico.com/about/rainforest-chernobyl/>.

times the oil spilled in the Exxon Valdez disaster in Alaska. Due to the use of outdated techniques for oil-associated gas combustion, around 6 667 million cubic meters of gas were burned outdoors during the operation period. The overall area affected reached 450 000 hectares and the population impacted amounts to 30 000 victims. This contamination, as explained below, not only harmed the ecosystem, but also destroyed the subsistence of the affected people and deeply influenced their cultures (Beristain 2009).

The firm decided to conduct exploratory drilling and full-scale production without properly disposing of toxic byproducts such as excess crude, chemicals, and produced water. In contrast, Chevron dumped the toxic byproducts into badly-constructed pits,⁶ or directly into surrounding rivers and streams (Maldonado 2013). This is particularly reprehensible given that proper disposal techniques were not only available⁷ and known to be cost-effective, but also were already in use by the company in the United States and other countries.⁸

In 1993, a group of Ecuadorian indigenous peoples and farmers living in the vicinity of the contaminated sites filed a class-action law suit (*Aguinda v Texaco Inc*)⁹ against Texaco in the Southern District of New York, under the Alien Tort Claims Act (ATCA). The plaintiffs denounced the company's intentional use of substandard environmental practices, which caused massive soil and water pollution. The Ecuadorian plaintiffs were acting on behalf of 30 000 inhabitants of the Oriente region of Ecuador affected by the company's oil operations. Some years later, the company petitioned to have the case transferred to Ecuador. The case, *Aguinda v Texaco*, was reopened against Chevron in Ecuador in 2003,¹⁰ before the Superior Court of Justice of Nueva Loja, Province of Sucumbíos. In the meanwhile, Chevron acquired Texaco (2001), *de facto* purchasing Texaco's legal, financial and reputation liabilities stemming from the Texaco operations in Ecuador.

After nearly two decades of litigation, on 14 February 2011, one of the most severe court judgments ever for environmental damage, in terms of damages awarded, was issued against the multinational. On this day, the

6 Texaco's pits were simply dug out of the jungle floor without any of the hydrologic studies necessary to place them outside groundwater flows, and without any of the technology, such as synthetic liners, leachate collection systems, or leachate monitoring systems, which at the time was customary in the industry.

7 Indeed, at the time Texaco held leading patents on produced water monitoring (Patent 3,680389) and subsurface reinjection (Patent 3,817,859).

8 Texaco's Ecuadorian operations in the 1960s and the 1970s evidently were in violation of regulations then in effect in major oil-producing US states. For example, in Louisiana, where Texaco operated several wells, the discharge of produced water into natural drainage channels had since 1942 been outlawed. See Louisiana Department of Conservation (Minerals Division) State-Wide Order Governing the Drilling for and Producing of Oil and Gas in the State of Louisiana, Order 29-A, 20 May 1942. In Texas, where Texaco had extensive operations, the use of open or earthen pits was outlawed in 1939. See Railroad Commission of Texas, Open Pit Storage Prohibited, Texas Statewide Order 20-804, 31 July 1939. Among the European countries where Chevron was and is active are Norway, Denmark and the UK (see <https://www.chevron.com/operations/exploration-production/exploration-production-in-europe>).

9 No 93 Civ 7527 JSR, filed 3 November 1993) <http://chevrontoxico.com/assets/docs/complaint-1993.pdf>.

10 (Case 2003-002) <http://chevrontoxico.com/assets/docs/2003-ecuador-legal-complaint.pdf>.

Ecuadorian Provincial Court of Sucumbíos, first instance, issued its final judgment¹¹ condemning Chevron to be liable for \$19 billion in compensatory (\$9,5 billion) and punitive damages (equivalent to an additional 100 per cent of the aggregate amounts of the remedial measures, therefore another \$9,5 billion). The Court explained that the punitive damages awarded were based on 'Texaco's misconduct, the bad faith with which the defendant has acted in [this] litigation and the failure to publically acknowledge the dignity and suffering of the victims of the defendant's conduct'.

On 3 January 2012, the Ecuadorian Provincial Court of Justice of Sucumbíos, second instance, confirmed the judgment in its entirety.¹² The judgment read (Judgment: 12):

This Court holds that the analysis of civil liability contained in the lower court's ruling is correct in the procedural situation in question, since this is a situation involving objective civil liability regarding activities which, conducted as a result of the defendant's corporate purpose, imply risk ... The operations of Texpet could have been avoided solely by using available technology ... Therefore this Court finds no reason to modify the ruling issued by the lower court and holds that it is appropriate to confirm the pecuniary amounts specified as proportional for the reimbursement and indemnification.

On 12 November 2013,¹³ the Supreme Court of Ecuador partly upheld the lower court's ruling. While removing the punitive damages, the Supreme Court assessed the compensation for the victims as amounting to \$9,51 billion.

On 23 December 2013, Chevron appealed the ruling to the Ecuadorian Constitutional Court, through an extraordinary recourse,¹⁴ the so-called Extraordinary Action of Protection (EAP). Under this action, a judgment can be challenged in terms of the violation of constitutional rights. Chevron claimed that the Supreme Court of Ecuador, through its judgment, had violated its following constitutional rights: due process rights; legal certainty; the right to defence; the right to submit and challenge evidence; and proportionality. The main aim of Chevron in pursuing this action was to invalidate the cassation judgment. At the end of 2017, the file remained pending before the Constitutional Court. Despite the status of this action, the discussion about the lack of justice and reparation remains appropriate. This is because, as the country's court of last resort, The Supreme Court's judgments are considered definitive and already enforceable pursuant to the Ecuadorian *Ley de Casación*.

Meanwhile, Chevron has removed all its assets out of Ecuador to avoid enforcement. Therefore, the lawyers of the affected people are undertaking legal actions in different countries, such as Argentina, Brazil and Canada, to recover the payment of the fine (Amazon Watch 2015). On 4 September

11 <http://chevrontoxico.com/assets/docs/2011-02-14-Aguinda-v-ChevronTexaco-judgment-English.pdf>.

12 Cause 2011-0106 <http://chevrontoxico.com/assets/docs/2012-01-03-appeal-decision-english.pdf>.

13 Case 2012-174) <http://chevrontoxico.com/assets/docs/2013-11-12-supreme-court-ecuador-decision-english.pdf>.

14 http://doc.corteconstitucional.gob.ec:8080/alfresco/d/d/workspace/SpacesStore/68eca69b-9eda-42a6-83b7-2779aeb49c62/demanda_0105-14-ep_parte1.pdf?guest=true.

2015, seven judges of the Supreme Court of Canada unanimously decided that the *Aguinda* plaintiffs, representing the 30 000 victims of the Chevron oil contamination, could sue Chevron in Canada. The decision set a worldwide precedent for global environmental justice. Nonetheless, the dilatory actions and misuse of laws by the company aimed at avoiding payment mean that the affected people are forced to continue living in a contaminated environment, without justice and reparation.

4 Aspects of the reparation

The reparation process for which compensation is sought consists of five elements, according to what was demanded by the plaintiffs in *Aguinda v Chevron Texaco*:

- remediation of soils and sediments;
- restoration of ecosystems;
- research on alternative methods for the treatment of contaminated water (plants, fungi, and so forth) and the creation of a drinking water system;
- the construction of health centres and research centres in the area; and
- the preservation of indigenous peoples' culture.

Each of the five actions has to be run on a participatory basis, directly involving the affected communities.

Currently, the reparation plan has been defined by the *Unión de Afectados por las Operaciones Petroleras de Texaco* (Union of People Affected by Texaco's oil operation),¹⁵ representing the 30 000 victims of the environmental damage. The organisation has entrusted the preliminary studies to *Clínica Ambiental*,¹⁶ an association specialised in integral environmental reparation.

With regard to the ecosystem's restoration, up to the present date the company has not implemented proper reparation. The contaminated sites were simply covered with soil or left untouched. Consequently, the contaminants continue to leak into groundwater and soil (Basteiro Bertoli 2015). Nonetheless, grassroots studies are being launched with the aim of evaluating the potential of nature-based solutions to remediate contaminated sites. For example, the Amazon Mycorenewal Project,¹⁷ also known as *Alianza de Biorremediación y Sostenibilidad de Sucumbios* (ABSS), a non-profit organisation based in the Sucumbíos, is researching to find a way in which to bio-remediate the region through the cultivation of fungi and bacteria, at the same time creating a platform for environmental education. Furthermore, the use of plants to achieve the treatment of this hazardous waste ('phytoremediation') is under investigation. Nonetheless, further studies are indispensable to assess the potential of these techniques. Unfortunately, field researches and funding are still limited, although immediate action is vital in the contaminated area as the environmental harm worsens daily.

With regard to health, currently numerous strategies have been developed in order to create health centres in the region and to study the

15 See www.chevrontoxico.com.

16 See www.clinicambiental.org.

17 See www.amazonmycorenewal.org.

real effects of the oil contact on people's lives. Moreover, a training programme on how to deal with oil risks has been included as a central part of the reparation plan. Furthermore, a series of studies on the psychosocial impacts of oil extraction on people living in the operated sites has been identified as crucial, along with the need for psychological support for the victims of the contamination.

5 Impact of Chevron's operations

5.1 Ancestral indigenous cultures and the *cosmovisión*

The area where Chevron deployed its illicit practices were inhabited by indigenous peoples who had retained most of their ancestral culture, as a result of a centuries-old adaptation to tropical ecosystems transmitted across generations. Although they already had had previous contact with foreigners, the inhabitants of the area were still living on the land of their ancestors, in harmony with nature, basing their subsistence on the use of local resources. The indigenous communities living in the concession area before the arrival of the multinational were the *Kichwa*, *Huaorani*, *Secoya*, *Siona* and *Cofán* peoples, each with its own cultural practices, language and territories.

This harmony was destroyed upon the arrival of the company, the employees of which introduced forced acculturation processes and customs, without any respect for the native peoples' culture (Beristain 2009). Urbanisation and the construction of roads altered the local equilibrium between man and nature, causing pollution, deforestation and considerable losses of fauna and flora. The introduction of money highly affected the local commercial practices based on barter, which generates increasing dependence (Burger 2014). A true form of modern colonisation was introduced and, as with any type of colonisation, this left behind a spoiled culture (Kimmerling 2000; Vickers 1989). Under 'colonisation', the article understands a series of practices entailing natural resource exploitation, conducted through the subjection of the local inhabitants and the violation of their human rights, without any respect for the longstanding decisions of indigenous communities and their traditional culture and livelihoods (Kinman et al 2011: 2). The new generations currently inhabiting the region no longer speak the language of their ancestors nor celebrate their cultures and practices. They have forever lost the priceless link their grandparents held with nature. The judges addressing the case took account of this invaluable loss and established a compensation for cultural reconstruction, as long as it will be possible.

Furthermore, many communities suffered the loss of their *shamans*, which represented the mayor authority of the clan. A well-known case is that of a *shaman* Cofán who died after the excessive consumption of alcohol, tempted by Texaco's workers (Beristain 2009: 75).¹⁸ Each *shaman* is considered to have the power to communicate with spirits of nature,

18 The episode was intentionally induced by Texaco workers, giving as a gift to the local dwellers big quantities of alcohol, despite being aware of the fact that they were not at all accustomed to alcohol consumption; (Beristain 2009: 75): '*Además en una de las comunidades se recogieron numerosos testimonios de cómo el consumo de alcohol conllevó la muerte de un shaman cofán como consecuencia de un episodio propiciado por trabajadores*

animals and ancestors. The loss of the *shaman* accompanied the annihilation of the indigenous view of the world, the *cosmovisión*, based on the existence of a god, *Chiga*, who is the creator of the universe and of its different parallel worlds, and who governs the interaction between humans, animals and nature.

In addition to the consequences directly caused by Texaco, it is important to also discuss the role of the *Instituto Lingüístico de Verano* (the Summer Linguistic Institute), an evangelic mission from United States, which settled down in the Northern Ecuadorian Amazon with the aim of converting these peoples to Christianity, and of 'civilising' their way of living. This process strongly transformed the traditional lifestyle of these peoples and, at the same time, facilitated the settlement of the oil firm because these missionaries, conversant in both Spanish and English, became the principal interlocutors between the native communities and Texpet's technicians (Jochnick et al 1994).

The damage to the indigenous culture can neither be truly repaired nor quantified, but this does not mean that actions aimed at recovering the traditional culture should not be undertaken. Both the representatives of the affected people and independent organisations active in the area have developed guidelines for the recovery and preservation of the indigenous culture. These plans have been drafted differently in consideration of the contacted/uncontacted nature of the community at issue. The importance of local peoples' direct engagement and empowerment in the process has been stressed, as well as the necessity for them to gain awareness of their own cultural loss. More specifically, three methods of cultural recovery have been pinpointed: the restoration of the identity of each community; of its traditional medicine; and of its traditional education. The better way to achieve this goal has been identified in the creation of a centre for indigenous education, addressed to each community's members but in particular to the youngest members.

5.2 Indigenous territories

Apart from culture, the two other crucial elements of indigenous life are their territory and sources of subsistence. As far as the first is concerned, Texaco's operations caused the massive displacement from ancestral lands due to a twofold reason: the fear of the *cusmas*, which in the *Cofanes'* language means 'white' or *mestizo* people; and the alteration of ecosystems, which adversely affected their hunting and fishing practices (Beristain 2009).

For example, the centre of the *Cofanes'* ancestral lands was situated in what today is Lago Agrio, which is precisely where Texaco's oil extraction began. In the 1970s, the *Cofanes*, no longer capable of sustaining the

de la Texaco. Según los relatos de la comunidad y de un testigo presencial, dicha acción tuvo un carácter intencional (Yumbo 2007: 53; Criollo 2006: 53). 'El impacto también fue indirecto. Según un testimonio individual en el grupo focal de Dureno otra persona (hermano del testigo) se alcoholizó como consecuencia de los abusos sufridos por su mujer a manos de los trabajadores de la compañía. El alcohol inicialmente era regalado por los trabajadores a los indígenas según numerosos relatos de consenso en los grupos focales. Estos ejemplos muestran el impacto psicológico y colectivo de la introducción de dicho consumo en al menos una parte de las comunidades indígenas.'

pressure from the firm's operations, moved 20 kilometers down the Aguarico river and settled down in Dureno. However, in the mid-1980s Texaco opened the Guanta oil field, just a few kilometres from Dureno. Rapidly, wells, pipelines, and stations surrounded Dureno. The *Cofanes*, who had chosen Dureno to escape the oil enterprise, once again saw their lands being threatened.

The community attempted to legalise their territory under Ecuadorian law in an attempt to avoid the oil exploitation, but this was not enough to stop Texaco from opening numerous oil pits in the area. Most of the *Cofanes* decided to leave Dureno and move to Zabalo, another territory located more than 100 kilometres from their previous lands. This second territory was the ancestral property of the *Secoya* people, but they fortunately reached a compromise and divided the land. Currently, the *Sionas*, *Secoyas* and *Cofanes* communities aim to recover around 40 000 hectares of land, considered as belonging to them ancestrally.

For a community, the deprivation of its territory, as is seen in this example, does not mean just the loss of a physical place but of all their cultural and religious practices linked to these lands. For instance, certain plants, such as the *banisteriopsis caapi*, or *yagé*, which is found in particular territories only, represented for the *Secoya* and *Siona* peoples an instrument for communicating with their ancestral spirits.

It has been affirmed that the connection between the indigenous peoples and their lands is a 'deeply spiritual special relationship ... basic to their existence as such and to all their beliefs, customs, traditions and culture' (Cobo 1986: para 196; Ksentini 1994: paras 77, 78-93). This special relationship is seriously threatened in the case of forced displacement and massive contamination.

Moreover, the appropriation of ancestral territories by the company destroyed the balance that the communities had over centuries established. This balance was based on collective ownership, not on any officially-recognised title but on a shared consensus. This made it very difficult for the indigenous inhabitants to defend their territories (Beristain 2009: 27).

5.3 Traditional diet

The eating habits of the indigenous communities in the north-western region of Ecuador were based on what nature offered them. They fed themselves by hunting, fishing and collecting the products of the forest. The exploitation of local resources by the oil firms greatly reduced the primary forest's extension, its biodiversity and the animals inhabiting it, therefore hampering the variety in their diet.

The contamination of the watersheds and, in particular, that of the principal river in the sector, the Aguarico river, not only adversely affected the quality of the water the inhabitants drank, but also the fauna present in it and the flora reached by these rivers (Beristain 2009: 43,¹⁹ 67, 69, 120, 143, 184). As a consequence of all these alterations, the indigenous

19 In Beristain (2009: 43) a statement is reported by a focus group organised in the *Cofán* community in the area of Dureno: '*Donde hay pozos petroleros hay piscinas abiertas y ahí cuando llueve y se llena de agua se va circulando a río pequeño después a río Pisuli y se pasa al río Aguarico por eso se contamina todo hasta el río Aguarico.*'

peoples had to modify their ways of subsistence, from itinerant agriculture to new forms of farming their lands. As a result, their diet was significantly impoverished by these changes and, consequently, they became more vulnerable to diseases.

In order to restore the traditional eating habits of these indigenous communities, some proposals have been made based on the breeding of species that have suffered as a result of the oil contamination in specifically-dedicated sites free of pollution. For example, a solution may be to breed native fish in special pools in order to gradually reintroduce them to those uncontaminated rivers. The same technique can be applied to endemic mammals, by breeding them in special breeding centres in order to subsequently reintroduce them.

Lastly, it is also important to consider the variations in local peoples' eating habits due to the introduction by foreign workers of the firms of new imported products. Often, these foods were not nutritious, and fattier or sweeter than those to which the indigenous populations were used. In addition, the alcohol introduced by the foreigners greatly affected the drinking culture of the indigenous people, causing alcoholism and related diseases, as well as social issues for families and the community at large. In particular, the *Huaoranis* people do not have in their bodies the dehydrogenated enzymes of alcohol, which made them much more vulnerable to the effects of alcohol as their bodies were unable to process alcohol.

5.4 Health of local inhabitants

Several studies conducted in the area demonstrated a direct relationship between the presence of contaminants and the diseases registered among the members of the local communities (Maldonado 2013). Among the elements identified by the World Health Organisation (WHO) as carcinogenic, the bodies of water in the areas analysed show an amount of Cadmium, Chrome and Chrome VI higher than the WHO's settled maximum values. In particular, 26 site inspections conducted in the framework of the lawsuit *Aguinda v ChevronTexaco* (2011) showed a cancer rate three times higher than the state average, with a greater frequency of stomach (20 per cent) and uterine cancer (20 per cent), and in leukemia (9 per cent) (Basteiro Bertoli 2015; Beristain et al 2009; Jochnick et al 1994). In addition, the population concerned experienced skin diseases, hepatic diseases, kidney diseases, respiratory diseases and, in the case of women, a higher incidence rate of miscarriage. These infirmities were much more frequent in the case of those people living less than 500 metres from oil infrastructures, while they were nearly absent in communities not exposed to oil activities (Maldonado 2013).

All this occurred amidst a total lack of regional health care infrastructure and limited access to reliable diagnostic tools, which meant that illnesses often were diagnosed too late. The poor medical intervention increased the vulnerability of the affected population. Inadequate health care may be ascribed both to the oil company operating the sites and to the Ecuadorian government's failure to provide health care (namely, infrastructure, materials and medical personnel) to these remote provinces (Maldonado 2013).

Currently the health goal in the reparation process is to create health centres in the region and to launch studies aimed at a better understanding of the real effects of oil exposure on people's wellbeing. Moreover, a training programme on how to deal with oil risks has been included as a central part of the reparation process. Lastly, a series of studies on the psychosocial impacts of the oil extraction on people living in the operational sites has been identified as crucial, along with the need for psychological support for the victims of the contamination.

5.5 Misinformation about oil-related dangers

A key element in handling toxic byproducts of oil extraction is the awareness of the people cohabiting with these activities about the potential harm deriving from these materials. This awareness inevitably depends on the information about the oil effects that the corporation responsible for producing the toxic products discloses to them. In contrast, the level of information provided to the local communities by Texaco on the risks the daily contact with oil residues had for human health was low or, in some cases, absent.

The lack of awareness about health consequences of oil exposure was one of the main reasons for the increase in ailments and even deaths of the local inhabitants (Davidov 2010: 5). A passage of the affidavit presented in the framework of *Aguinda v Texaco* (Inc Case 93-CV-7527) reads:²⁰

Our health has been damaged seriously by the contamination caused by Texaco. Many people in our community now have red stains on their skin and others have been vomiting and fainting. Some little children have died because their parents *did not know* they should not drink the river water.

Although knowledge alone is not enough to prevent people from oil-related threats, misinformation worsens the exposure to the risk. The inhabitants of the affected regions, even if properly informed about diseases caused by oil, would have kept on living in those dangerous areas as they had nowhere else to go. However, the lack of knowledge caused them to live confidently in close contact with oil and oil byproducts, even unnecessarily using these in their daily lives. For example, they used oil to treat wood in their homes or for other purposes without any protection.

The reasons for the contact of the local dwellers with the oil and its toxic byproducts must be associated with the fact that Chevron dumped the oil and byproducts untreated directly into the waterways relied upon by local people for drinking, fishing and bathing. The company also erected unlined open-air waste pits filled with crude and toxic sludge in areas surrounding and inside the native villages.²¹ As an open letter from

20 Excerpt: Affidavit of the Secoya Tribe made by Elias Piaguaie, *Aguinda v Texaco* Inc Case 93-CV-7527.

21 Letter from Chevron/Texaco lawyer Rodrigo Pérez Pallares to Xavier Alvarado Roca, president of *Vistazo* magazine, published in *El Comercio* newspaper 16 March 2007. In the letter, Pérez Pallares writes that '15,834 billion gallons of produced water were spilled in Ecuador during the operations of the Texaco Consortium between 1972 and 1990'. See also Technical Summary Report by Engineer Richard Stalin Cabrera Vega, Expert for the Court of Nueva Loja, 24 March 2008, 43.

an inhabitant illustrates, the oil menace often was right inside the villages, without any chance of escape:²²

We even had an oil well, Dureno 1, *inside our own community*. That affected our people tremendously. There were spills and massive amounts of produced water. The flames from refinery towers were visible day and night. Animals abandoned the forest and fish disappeared from the river.

The focal group study conducted by Beristain (2009: 63) – in which six focal groups were set up on the basis of ethnicity (indigenous and *mestizo*) – demonstrated that the community often did not complain (at least at the beginning of the exploitation) because they had not been informed about the risks. A telling passage reads as follows (Beristain 2009: 63):²³

No nos quejamos porque no sabíamos que era tóxico y malo para la salud, por eso incluso la bebíamos y nos bañábamos en ella, ya que el río era nuestra fuente de vida. (We did not complain because we did not know it was toxic and harmful for our health. Hence, we even used to drink and bath in that water, given that the river was our life.)

The qualitative data collected by Beristain in the area (2009: 64), in which 1 064 individuals of more than 24 years of age from different families were interviewed, demonstrated a lack of information before and during the period of Texaco's operations. Ninety per cent of the interviewees by Beristain's research group reported *a total lack of proportioned information* from the company with regard to the risk deriving from oil contamination. Seven per cent reported limited information, and only 2,9 per cent reported adequate information.

The company even deceived the people by telling them that the crude was beneficial to their health (Beristain 2009: 66). This argument has been tested by Beristain by way of targeted questions regarding this aspect. A minor but still significant number, namely, 13,7 per cent of the interviewees, affirmed that the workers and managers of the company had told them that the oil was beneficial to their health (Beristain 2009: 66). This conduct represents not only a form of minimisation of the risk, but also denotes an increase in the exposure of the community to the oil-related dangers, as captured in the following words of an interviewee:²⁴

Nosotros les decíamos a los señores de Texaco, que los químicos estaban haciendo daño a los animales, y ellos decían que no es dañino: 'despreocúpense, pueden bañarse y utilizar porque no es dañino, el petróleo cura. (We told the Texaco's people that the chemicals were harming the animals, and they said that the oil was not dangerous: Do not worry, you can bath in it and use it because it is not noxious, it is like a medicine.)

As a consequence, the people used to bath themselves in oil-contaminated rivers and wash their laundry therein. Unaware of the harmful effects of oil exposure, the inhabitants often simply removed surface crude from the watersheds to drink the water running underneath. Despite the lack of information and the wrong messages, the affected population by

22 Open Letter from Emergildo Criollo, May 2009, <http://collazoprojects.com/2009/05/27/carta-abierta-a-los-estados-unidosopen-letter-to-america/>.

23 Encuesta KICH067, Kichwas, Huamayaku.

24 Grupo Focal, mujeres mestizas, Coca.

experience learnt the consequences of oil pollution on their animals, crops and own health (Beristain 2009).

5.6 Demography of the indigenous communities

Several years of investigation demonstrated how the operations of Texpet strongly reduced the number of the local indigenous peoples (*Consejo de Desarrollo de las nacionalidades y pueblos del Ecuador* 2007: 32). The considerable decrease in the number of the native inhabitants is to be linked to two main causes. The first is represented by the higher death rate due to the health effects of the exposure to oil and its toxic byproducts (see section 5.4 above). The second cause of the reduction in the number of dwellers lies in the induced displacement caused by the arrival of the company. The local inhabitants indeed were forced to move to areas different to those where the company operated, for instance, along the rivers Dureno and Cuyabeno (Beristain 2009: 60-62; Bertoli 2015: 48).

For example, the *Cofanes* community, which for centuries have inhabited the area between the Rivers Aguarico and Guamués, formerly numbered around 15 000 individuals. Now, only 849 people remain in the region. The *Secoya* community also suffered a sharp decrease in its numbers, now counting only 260 members. Similarly, the *Sionas* decreased to 390 people after Texpet's exploitation. The *Huaorani* people, characterised by their warrior's aptitude and limited contact with the outside world, originally occupied the southern area of the oil concession. They have defended their independence for centuries; however, the temptations of the oil firms' gifts in the end undermined this independence. There are now around 3 000 people. Because of the lack of information on the uncontacted *Huaorani*, it is difficult to determine their exact number. After the Texaco era, there no longer is evidence of the existence of two nationalities, the *Sansahuari* and *Tetete*, inhabiting the Sucumbios province. The two peoples, uncontacted by the outside world when the company arrived, probably were decimated and gradually wiped out completely due to conflicts that arose upon arrival of the company and diseases and epidemics brought on by contact with the outside world (ChevronToxico; Gould 2015: 15).

5.7 Composition and stability of the families

Another important impact of the oil exploitation in the region was the shift from a traditional extended conception of family life to a 'nuclear' one, mainly determined by a newly-introduced model of development. The ancestral idea of the extended family, comprising three or four generations, was abandoned for a 'nuclear' way of conceptualising the family unit (Ruiz 1992: 99). This change generated individualism and produced a sense of loneliness and abandonment among the inhabitants. Families were divided by the temptations and changes brought by the company. In particular, family members who refused the company's gifts – such as alcohol, cigarettes, clothes and money – blamed those who accepted these gifts.

The increase in prostitution due to the influx of wealthy workers' groups affected the psychosocial balance in many families. Indigenous men were forced to work for the oil company, taking the most dangerous jobs for the lowest pay. The family structure was broken down from two points of view: The women were forced into prostitution, while the men

became the firm's under-paid employees under sub-standard conditions. This meant less time together as a family. Further damage was done as the men of the community began to spend time in brothels.²⁵ The combined result was a degradation of the family unit (Beristain 2009: 172).

Not surprisingly, a substantial increase in violence was registered in the communities. Domestic violence heightened as men's frustration grew in the face of these dramatic changes; sexual abuses perpetrated by Texaco's workers plagued the region; concurrently the rate of suicides and murders²⁶ markedly increased in the area (Beristain 2008: 109, 172). Many children, born with white or partially white skins, were the tangible proof of these rapes, and this brought shame on their mothers (Beristain 2009: 109). Overall, these changes in the family balance and violent behaviour demonstrated the trauma caused to the inhabitants of the region.

6 *Aguinda v ChevronTexaco* as cultural genocide and a crime against humanity

Under international law, genocide is recognised as the gravest of international crimes. In the *Aguinda* case, although it is not possible to speak of a physical genocide, there may be grounds to argue that a cultural genocide has occurred. The concept of genocide was created to protect vulnerable groups against powerful antagonists, an aim which fits the circumstances of this case. The vulnerable group is the Ecuadorian Amazon's indigenous communities, while the antagonists are the American oil corporation ChevronTexaco.

An act of genocide is defined by the Convention on the Prevention and Punishment of the Crime of Genocide as aimed to 'inflict on [a] group conditions of life calculated to bring about its physical destruction in

- 25 With regard to alteration of the families, it is worth mentioning a passage from the Legal Analysis 2006 – submitted on occasion of the proceedings of *María Aguinda y Otros v ChevronTexaco Corporation*: 'The indigenous peoples not only suffered the environmental destruction unleashed by Texaco, they also claim to have suffered directly at the hands of Texaco employees themselves. According to firsthand witness testimony gathered by the plaintiffs in the *Aguinda* case, some Texaco employees heaped abuse on indigenous individuals and subjected indigenous women to sexual harassment. Among the stories that are now tragically part of the oral traditions of the region's indigenous peoples are [about] the girl who accepted an offer of a "thrill ride" in a Texaco helicopter, only to be taken to a remote site and *raped by oil workers*. The foreign oil workers told a group of upset indigenous individuals not to worry about the pollution because petroleum was natural and healthy – "like milk". As their traditional ability to live off the rainforest declined – as the fish died, the animals fled due to the seismic testing and excessive hunting by oil workers, and the forest itself was chopped down to clear land for roads, platforms, or provide materials for the same – indigenous women *were forced to prostitute* themselves to provide for their children, and indigenous men were forced to enter oil company service, taking the most dangerous jobs for the lowest pay.'
- 26 About the episodes of violence in Beristain (2009: 109), an interview with Cofán people is reported: '*Estas respuestas se refieren a amenazas directas y violencia intencional ejercida contra personas y comunidades que se resistian a la destrucción u ocupación de sus tierras, pero también en una buena parte de los casos se incluyen descripciones sobre accidentes de tráfico con carros a gran velocidad por la zona que generaron inseguridad. ... Las mujeres cuando escuchaban acercarse a una canoa a motor corrian a esconderse o se lanzaban al río para evitar ser abusadas. Quien no lograba esconderse era abusada y por eso había bastante inseguridad.*'

whole or in part'. With regard to the discussion of genocide, it is worth mentioning an analysis submitted in 2006 to the framework of the case of *Maria Aguinda y Otros v ChevronTexaco Corporation*. The analysis claimed that the company's prolonged conduct of personal abuse and intimidation against the indigenous peoples, and its strategy to divide families and alter their customs, were intended to destroy indigenous identity, thus resulting in a violation of the above-mentioned Convention.²⁷

The Convention in its final form does not literally mention the concept of cultural genocide, although the Polish law professor, Rafael Lemkin, who first developed the concept, described three forms of genocide: *physical* genocide (articles II(a)-(c) of the Convention); *biological* genocide (articles II(d)-(e) of the Convention), and *cultural* genocide (article III of the Convention). The reasons for the exclusion from the final Convention of the explicit mention of 'cultural genocide' is to be linked to the political necessities of the time, among which is the fact that at the time there was insufficient international discussion of the notion (Kingston 2014: 63). However, it can be affirmed that the prohibition of cultural genocide is enshrined in customary international law, and aligns with the aims of the Convention. Indeed, Professor Lemkin himself firmly claimed that 'if the diversity of cultures were destroyed, it would be as disastrous for civilisation as the physical destruction of nations' (Draft Convention 1947: 27).

The sub-concept of cultural genocide has been strengthened by numerous subsequent forms of recognition. For example, in 1981 the UN-sponsored San José Declaration affirmed that 'ethnocide, ie cultural genocide, is a crime against international law, as is genocide'. The UNDRIP in article 7(2) mentions generically 'any act of genocide', and affirms that indigenous peoples

have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to *any act of genocide* or any other act of violence, including forcibly removing children of the group to another group (emphasis added).

Again, political concerns seem to prevail over the recognition of the notion of cultural genocide. Arguably, crimes involving direct physical killing or violence were more easily recognisable as 'genocide', whereas cultural rights violations, often not involving bloodshed, were hard to be assimilated with the notion of genocide. However, as Kingston (2014: 63) points out, the concept of 'cultural genocide' must be endorsed as a tool for human rights promotion and protection, whenever the violations go beyond the physical sphere.

Although less explicitly, many other legal documents have supported this concept. Among these, article 27 of the International Covenant on Civil and Political Rights (ICCPR) states that members of ethnic, religious or linguistic minorities 'shall not be denied the right, in community with the other members of their group, to enjoy their own culture'. Despite the breadth of the article, it can be affirmed that the right to the enjoyment of one's own culture is the positive side of the coin containing also a negative side, namely, the denial of this right, which may entail a cultural genocide.

27 *Aguinda v Texaco* (2006) 38 *New York University Journal of International Law and Politics* 413, 417, 449-68, 473-74. See also Kimerling (1991: 31, 37-84, 111-1).

The impediment for a community to fully develop its culture and enjoy it together with the other members of the community is exactly what occurred in the *Chevron* case, as presented above.

Furthermore, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples, as well as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol), implicitly recognise the concept discussed. In addition, a wide range of case law dealing with aspects of cultural genocide against indigenous peoples has emanated from the UN Human Rights Committee,²⁸ the Inter-American Commission on Human Rights,²⁹ and within the framework of the special procedures of the UN Human Rights Council dedicated to the theme of indigenous rights.³⁰

The state of Ecuador has since 1948 been a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide and ratified the Convention in 1949. Moreover, the Ecuadorian Constitution in article 23(2) recognises genocide as a crime that is not covered by the statute of limitation. However, given that the *Aguinda* law suit is a civil trial and not a criminal trial, a civil forum was not appropriate for raising a charge of genocide. Notwithstanding, demonstrating that the indigenous plaintiffs have suffered a form of genocide would strengthen their claims even under civil law.

Substantially, according to article II(c) of the Genocide Convention, the act to be considered under this legal category should be 'calculated to bring about physical destruction in whole or in part (of a group)'.³¹ Therefore, the specific intent to achieve genocide is crucial, whatever the motive may be (land expropriation; national security; territorial integrity; and so forth), as stated by the International Campaign to End Genocide.

Chevron's intentions are difficult to prove. However, the following circumstances suggest that the intention of the company could be assimilated to the intentional production of a cultural genocide: These circumstances are listed as follows:

- First, the company was aware that the negligent environmental practices adopted had the potential to destroy indigenous nationalities (two nationalities, not in contact with the outside world before Texaco's arrival, have no longer been seen in the area after the Texaco era). In section 5 of this article, the various components of Chevron's misconduct are listed. For example, not informing the inhabitants about oil-related danger, not adopting the safest practices for oil extraction and not properly managing the toxic byproducts all are avoidable conduct that lead to deaths among the inhabitants (ChevronToxico; Gould 2015: 15). These factors strongly suggest that the company intentionally took the

28 See, eg, *Bernard Ominayak and the Lubicon Lake Band v Canada* in Report of the Human Rights Committee (Vol II) UN GAOR, 45th session, Supp 40, paras 2.3, 11.2, 16.4, 27.4, UN Doc A/45/40 (1990).

29 See, eg, Res 12/85, Case 7615, Inter-Am CHR, OEA/ser. L./V/II.66, Doc 10 Rev 1 (5 March 1985) (*Yanomami* case).

30 See, eg, Martinez Cobo Report (1986).

31 It is important to note that the Convention also criminalises 'attempted genocide'; thus the physical destruction need not actually occur, even in part (art III).

responsibility to expose the native inhabitants to a risk that endangered their survival.

- Second, it is worth noting that the firm would in all likelihood not have attempted these illicit practices in the United States or any other developed country.
- Third, as demonstrated above, Texaco was aware that the indigenous peoples relied for their subsistence on the natural resources that the company was destroying. The intentional choice to use sub-standard practices demonstrates a disregard for the value of indigenous life and culture and may further substantiate a claim of cultural genocide. Racism towards indigenous peoples may be derived from an empirical study performed by Beristain among the affected communities demonstrating a correlation between the ethnicity of the inhabitants and the treatment they received from the company (Beristain 2009: 115). This evidence proves that, in the view of the company, belonging to a supposedly 'inferior' ethnicity was a ground justifying different treatment. Compared to the *mestizos* or *colonos* population, the indigenous people were subjected to greater suffering. A focal group conducted by Beristain on the ground reported that the indigenous inhabitants were considered 'savages, without education or anything' (*Los veían como salvajes, sin estudio y sin nada, Grupo Focal, comunidad Kichwa, Rumipamba*; Beristain 2009: 115). This attitude still is evident today in the way the company handles the litigation.³²

The question remains as to the basis on which Chevron's intention could be said to produce a cultural genocide. The answer emerges from the above-mentioned circumstances. A common tactic in war is to weaken the enemy before attacking. Similarly, it would have been more difficult for Chevron to fight against a solid and strong community of indigenous inhabitants. A community proud of its roots would fight hard to defend its existence. In contrast, a community corrupted by the arrival of foreigners, tempted by gifts, and persuaded with offers of labour is easier to dominate. Moreover, the Latin saying seems appropriate: *divide et impera* (create division to rule). Regrettably, the strategy of the company to create internal division among the local inhabitants and undermine their only strength, their culture, succeeded in the end.

If one considers the genocides in European history, the ultimate example probably would be the Jewish holocaust during World War II. Classic tactics of this genocide included the practice of 'destroying, or preventing the use of, libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group'.³³ In comparative terms, it is possible to see these elements in the rain forest contaminated by Texaco which, for the indigenous people, served not only as the source of their subsistence, but also as the 'institution' fulfilling all the cultural roles that the Draft Convention ascribes to 'libraries, museums, schools and so forth.

32 Eg, in October 2005, Chevron's lawyers persuaded Ecuadorian military intelligence to cancel a crucial judicial inspection by claiming that members of the Cofán community were planning to ambush them during the inspection. See Amazon Watch (2005).

33 Summary Record of Meetings (1948).

Furthermore, the acts committed by Texpet in the Ecuadorian Amazon could be categorised as a crime against humanity, according to the Rome Statute. Chevron's operations could be said to meet the Rome Statute's requirements of being 'widespread or systematic', 'involving the multiple commission of acts', under an 'organisational policy to commit such acts' (Rome Statute: art 7(1)). Among the acts considered crimes against humanity are deportation, broadly defined as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present', and 'inhumane acts ... intentionally causing great suffering' (Rome Statute: arts 7(1) & 7(2)). This definition could coincide with the forced displacement of the entire *Cofán* people from the Lago Agrio area, and later from Dureno, as explained above. Despite the absence of physical transportation of people, the massive contamination by the company arguably is sufficiently coercive in nature to meet the threshold of 'forced' displacement. It may be argued that cases of serious environmental destruction, causing great suffering to the civilian population due to forced displacement or deprivation of means of subsistence, qualify as crimes against humanity. This argument can be substantiated on the recent trends registered at the level of the International Criminal Court (ICC). Indeed, a recent ICC Policy Paper on Case Selection and Prioritisation (2016) announced that the Office of the Prosecutor would start considering the advisability of prosecuting under the Rome Statute crimes 'committed by means of, or that result in' environmental destruction.

Moreover, Texaco's overall conduct of constant abuses at the detriment of the indigenous peoples, their right to a healthy environment, and their fundamental rights to life and to health, may be defined as 'inhumane acts' within the definition of crimes against humanity.

7 Chevron's unfair strategy in the Ecuadorian case

The oil company must be reprimanded not only for the massive environmental crime committed in the Ecuadorian rain forest, but also for its subsequent strategy during the various trial steps. Firstly, Texaco endeavoured to have the case moved to Ecuador, submitting several affidavits³⁴ on the suitability of the Ecuadorian judicial system to hear the case. The company agreed to respect any adverse final judgment issued by an Ecuadorian court. When the plaintiffs re-filed the case in Ecuador in 2003, Texaco – having since been acquired by Chevron – tried to evade accountability by arguing that the Ecuadorian court lacked jurisdiction over Chevron, in contradiction with the company's own filings in *Aguinda v ChevronTexaco*.

Once the Ecuadorian court ruled in favour of the indigenous plaintiffs, the oil company started a tireless strategy aimed at invalidating the

34 Affidavit of Adolfo Callejas, attorney for Chevron, 1 December 1995: 'The Ecuadorian courts provide an adequate forum for claims such as those asserted by plaintiffs in the *Maria Aguinda* action.' Texaco Inc's Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non-Conveniens and International Comity: 'Ecuador's judicial system provides a fair and adequate alternative forum.' Brief for Chevron, US Court of Appeals for the Second Circuit: 'Ecuadorian legal norms are similar to those in many European nations.' See 'Examples of Chevron's high praise of Ecuador's courts' <http://chevrontoxico.com/assets/docs/affidavit-packet-part2.pdf>.

Ecuadorian court's judgment on the basis of allegations of fraud, bribery and coercion. The company appealed to the Racketeering Influence and Corrupt Organisations Act (RICO) to prevent the enforcement of the judgment in the United States. On 7 March 2011, a US district judge, Lewis A Kaplan, issued a preliminary injunction (*Chevron Corp v Donziger*, 11 Civ 0691LAK, 2011 WL 778052) banning the execution of *any* Ecuadorian court judgment in *any* country outside Ecuador. The aim of the injunction was to prevent Steven Donziger, the American lawyer for the Ecuadorian plaintiffs in the *Aguinda* case and his plaintiffs, to obtain enforcement in the United States of the multibillion dollar judgment issued by the Ecuadorian Supreme Court. The grounds for the ban allegedly lay in the fact that the ruling had been obtained by means of fraud, bribery and coercion. The injunction was also aimed at seeking equitable relief for the claimants for the alleged harm suffered due to the illicit proceedings in Ecuador. The action was filed by Chevron on the basis of the personal jurisdiction that the US district court of New York has on Steven Donziger as an American citizen. In addition, Donziger belongs to the New York bar, and consequently is subject to the relative rules on lawyers' ethic and fair conduct. The decision was repealed by the US Second Circuit on 19 September 2011, but the fraud behind the Ecuadorian judgment was reaffirmed on 8 August 2016 (Case 14-0826L, 14-0832C) by the US Court of Appeals for the Second Circuit of New York.

From this series of events, it appears evident that the company's strategy was to move the attention from the environmental crime to the fraud issue, in order to hide the truth about its responsibilities regarding the as yet unrepaired contamination. This conduct is even worse if one considers it in light of the historical reality of the case, namely, that Chevron itself requested the transfer of the trial from the US to Ecuador on the basis of the adequacy of the Ecuadorian forum.³⁵ Supposedly, the firm made this demand in the belief that it could manipulate and influence the Ecuadorian judiciary for obtaining a favorable ruling, as part of a clear strategy of 'forum shopping' (Kinman 2011: 36-37; *ChevronToxico*).

Among other unfair tactics adopted by Chevron to escape accountability, there is also the manipulation of the judicial process and, in particular, the forced annulment of the judicial inspection of polluted sites; concealing contamination; taking samples selectively; and using techniques designed to minimise the detection of toxins (Amazon Defence Coalition 2009). In addition, the strategy of forum shopping (Chevron even filed an international arbitration claim against Ecuador, seeking to remove the case from Ecuadorian jurisdiction) is condemnable (Cueto 2010). Lastly, the threats by the company to the plaintiffs and their supporters should be mentioned (an example is the lawsuit filed by

35 Affidavit of Adolfo Callejas, attorney for Chevron, 1 December 1995: 'The Ecuadorian courts provide an adequate forum for claims such as those asserted by plaintiffs in the *Maria Aguinda* action.' Texaco Inc's Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity: 'Ecuador's judicial system provides a fair and adequate alternative forum'; Brief for Chevron, US Court of Appeals for the Second Circuit: 'Ecuadorian legal norms are similar to those in many European nations.' See also 'Examples of Chevron's High Praise of Ecuador's Courts' <http://chevrontoxico.com/assets/docs/affidavit-packet-part2.pdf>.

Chevron against the documentary film maker Joe Berlinger for his film 'Crude' exploring Chevron's legacy in Ecuador) (*Los Angeles Times* 2010).

With regard to the unjust annulment of judicial inspections, it is important to mention the event that occurred in Guanta on October 2005. The Confederation of Indigenous Nationalities of Ecuador (CONAIE), among other organisations, denounced that the corporation, allied with the Ecuadorian army's military intelligence, stopped an inspection aimed at assessing the environmental disaster caused by the firm in the territories of the *Cofanes*. The multinational did so by filing a request for suspension of the inspection before the Superior Court of Nueva Loja, along with a report by the head of the Intelligence Special Forces, 24 Rayo, claiming that in the field of Guanta there was the risk of 'problems and incidents between Chevron's personnel and natives of the region'. The Intelligence report wrongly asserted that the intention of the indigenous inhabitants was to 'retain Chevron's personnel by blocking the roads into and out of the site', depicting them as savages. Consequently, a few days later the first inspection in Guanta station within *Cofanes* territory, legally granted under the judicial trial, was unlawfully suspended. The CONAIE demanded the military authorities in the area of Guanta to be held accountable for discriminatory treatment against the *Cofanes* and for being partial to the interests of the transnational oil company (Macas 2005).

Overall, despite the attempts by the corporation to hinder the achievement of reparation, the affected indigenous communities have shown that they are willing to fight for justice, no matter how long it takes. However, quoting the maxim 'justice delayed is justice denied', the indigenous people of the Ecuadorian rain forest have already been denied justice for far too long.

8 Scope of Chevron opponents' network

The Ecuadorian indigenous communities are not the sole victims of the corporation's misconduct. Several other affected peoples are fighting Chevron worldwide, such as in Alaska, Mississippi and California, in the United States, as well as in Canada, Panama, Colombia, Suriname, Brazil, Peru, Nigeria, Angola, Belgium, Poland, Romania, Kuwait, Kazakhstan, Thailand, Indonesia, The Philippines and New Zealand. A global community of opposition strengthens the battle of the affected people of Ecuador.

The network against Chevron is one of the broadest against oil exploitation, and is becoming increasingly co-ordinated and unified. In 2010, when Chevron moved its annual shareholders' meeting from its world headquarters in San Ramon, California, to Houston, Texas, in an attempt to avoid facing the network of opponents (Kinman 2011: 51), the Ecuadorian victims were present to join the battle. Indeed, the company's opponents were not deterred. On the contrary, their number in Houston was even greater. Guillermo Grefa and Mariana Jimenez, *campesinos* from Ecuador, attended the reunion as spokespeople of the Ecuadorian plaintiffs. In Houston, the second edition of *The true cost of Chevron: An alternative annual report* (2011) was released. Ecuadorian spokespeople and activists, together with Nigerian representatives, held a series of

conferences and meetings with regard to the developments of the two cases, and with the aim to keep vital the memory of Chevron's acts.

On the one hand, this international network strengthens the Ecuadorian victims' action. On the other, the *Aguinda* plaintiffs and the organisation representing them, the Union of People Affected by Texaco (UDAPT), have constantly contributed to the network. In recent years, for example, the UDAPT launched an interactive map³⁶ of Chevron's conflicts worldwide (Environmental Justice Atlas, 20 May 2016). In addition, in 2016 and in 2017 the UDAPT committed to contact Chevron's shareholders with targeted letters, particularly directed to pension funds and religious investors, asking for a more responsible and ethical exercise of their ownership rights. Lastly, for several years UDAPT has put its efforts in the organisation of the International Anti-Chevron Day, which is an occasion to call the international attention to the social and environmental impacts of Chevron around the world.

Considering all the presented initiatives, it appears that the network of Chevron opponents is determined to keep struggling and to demonstrate to the firm's own employees, executives, board members and shareholders and to the broader public the wrongdoings of the oil giant.

9 Relevance of Inter-American system and European Union

The Inter-American human rights system guarantees the territorial rights of indigenous and tribal peoples mainly through article XXIII³⁷ of the American Declaration of the Rights and Duties of Man and article 21 of the American Convention on Human Rights.³⁸ Although none of these articles explicitly refers to the rights of indigenous and tribal peoples, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have interpreted these two provisions in a way that protects these rights. In recent years, the jurisprudence of the Inter-American human rights system developed the minimum content of the right granted by the American Convention and by the American Declaration. These treaties have been interpreted in light of the provisions of Convention 169 of the ILO (International Labor Organization), of the United Nations Declaration on the Rights of Indigenous Peoples, and of the Draft American Declaration on the Rights of Indigenous Peoples.

The provisions of the American Declaration and the American Convention are regarded as evolving standards, which must be interpreted in light of developments in the field of international law on human rights. Therefore, both legal instruments include the evolution of standards and principles governing human rights of indigenous peoples. For example, the relevant norms are contained in the subsequent ICCPR; in the Convention on the Elimination of All Forms of Racial Discrimination

36 See <http://ejatlas.org/featured/chevronconflicts>.

37 'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'

38 'The right to private property (1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'

(CERD); in the ICESCR; and in the Convention on the Rights of the Child (CRC). Lastly, also article 8(j) of the Convention on Biological Diversity (1992) deserves special attention as it requires the states parties to

respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices.

According to this articulated system, the *Texaco* case in Ecuador results in a dispute over various indigenous rights violations. Specifically,

the right to life and the right to health, economic and social rights, the right to cultural identity and religious freedom, labour rights, the right to property on ancestral territories, the right to restitution of ancestral territories, the right to control their lands, the right on natural resources, the right to have their spiritual relationship with nature respected, the right to access their sacred sites and have them preserved, the right to be protected against forced displacement, the right of self-determination and self-governance, the right to psychological and moral integrity, the right to environmental integrity, the right to free, prior and informed consent, the right to participate in the decision-making process, the right to effective implementation of the existing legal standards, the right to state's protection, the right to access justice, and lastly the right to obtain reparation for the harms suffered.³⁹

Moving to the European scenario, the EU in turn supports indigenous peoples' rights, mainly on the basis of the UNDRIP. Since 1997, when the topic first entered its agenda, the EU has played an active role in indigenous people's defence through its external policies (political dialogues, multilateral fora, financial support).

The EU has also implemented several projects on behalf of indigenous nationalities in the framework of the European Instrument for Democracy and Human Rights. The EU also committed itself to integrate indigenous peoples' concerns at all levels of co-operation. The EU supports their full participation in decision-making processes affecting them and their free, prior and informed consent (see discussion above on the FPIC at the international level). This principle has been affirmed in the European Consensus on Development (2005), a joint statement by the Council, member states, the European Parliament and the European Commission in the field of development co-operation.

Furthermore, EU delegations organise events worldwide to celebrate the International Day of the World's Indigenous People (9 August), with the aim of creating global awareness and consensus on their rights. The EU also actively participated to the UN World Conference on Indigenous Peoples held on 22 and 23 September 2014 in New York. On this occasion, the EU underlined the importance of the full and effective participation of indigenous peoples at the conference. During the World Conference, the EU claimed that the protection of indigenous peoples' rights was a top priority for the EU and that the EU would be committed to ensuring that the decisions and recommendations resulting from the Conference be put into action (European Union External Action, 2014).

39 Extract *recursos naturales: normas y jurisprudencia del sistema interamericano de derechos humanos*. from *Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y*.

In 2014, the European Parliament's Sub-Committee on Human Rights requested a study on the impact of extractive industries on indigenous peoples' human rights. In this document, there is a discussion of topics such as the rights to life of indigenous peoples; the prohibition of forced displacement; their rights to consultation and participation in decision making; their rights to self-determination; their rights to lands and resources, their rights to a clean environment, and their cultural rights (Burger 2014). All these rights have for decades been infringed by Texaco's operations in Ecuador. Despite not having issued a specific legal tool to protect indigenous peoples' rights, the EU has demonstrated itself to be deeply concerned about this topic. Therefore, the intervention of the EU on behalf of the Ecuadorian affected nationalities would be coherent with the EU's external policy of indigenous defence.

Although the definition of the intervention sought at the EU level falls outside the primary focus of this article, a few lines and directions are formulated in this regard. The advised forms of intervention may be organised in three levels.

The first level concerns a *knowledge and awareness generation approach*, combined with the creation of scientific expertise. Concretely, this approach could be developed along the following lines:

- A task force of EU experts may be set up to investigate the current status of the polluted sites and to produce a *super partis* expert report.
- A study aimed at confronting environmental and health standards applied by Chevron in the EU (for instance Poland) and those used by the oil company in countries of the south (Peru, Angola and The Philippines) may be initiated and funded.
- EU partnerships for the remediation of the impacted areas, particularly locally supporting the ongoing efforts on alternative remediation techniques (for instance, bioremediation with fungi and plants) may be launched, in order to create value and knowledge in the area.

The second recommended intervention strategy is a *media-oriented approach*. Indeed, it may be very beneficial to the Ecuadorian victims to receive the following from the EU:

- a clear support on the occasion of Anti-Chevron Day (both media and network wise);
- an alignment to the advocacy conducted by the UDAPT on Chevron's stakeholders, also considering that a considerable number of them is in the EU (for instance, the Norwegian Pension Fund Global and the Dutch Pension Fund PGGM).

At a *theoretical and political level*, it could be advisable for the EU to support the following two movements, namely, the international recognition of the notion of cultural genocide; and the inclusion of the crime of ecocide among the crimes against humanity.

10 Conclusion

In this article, the illustration of the *Chevron* contamination case in Ecuador served as a demonstration that processes similar to new forms of colonisation nowadays still occur. Every time a foreign corporation exploits local resources disregarding the rights, culture and dignity of the local inhabitants, this new wave of colonisation takes place. Reparation is not the solution; however, it does bring back some of the values – economical and non-economical – lost in the exploitation process. The *ChevronTexaco* case illustrates how complex and often delayed (or unfulfilled) the reparation is, particularly for environmental crimes involving human rights violations.

A hierarchy of the losses suffered by the inhabitants of the Ecuadorian rain forest cannot be established. However, these have been listed as damage to their cultures and the *cosmovisión*; the deprivation of their territories; the effects on their health, also due to misinformation about the oil-related dangers; changes in their traditional diet; an impact on the demography of the indigenous communities; and, lastly, changes in the composition and stability of the families. In addition, it has been illustrated how *Chevron* employed delaying and avoidance tactics as part of the litigation process.

The analysis of the facts and of the relevant legal framework has made it possible to contend that the *ChevronTexaco* oil contamination case could be regarded as cultural genocide and even as a crime against humanity. This affirmation stems not only from the letter of the law but also from its spirit. The promises of an evolving legal scenario protecting indigenous rights, and the consideration of the scope of the network of *Chevron* opponents bring hope to the affected people. Nevertheless, considerable effort is still needed in order to grant proper restoration to the violated cultures and environment. In this article, it has been argued that the Ecuadorian case should be considered not only from the perspective of the Inter-American system, but also from the perspective of the EU's normative framework. The flourishing activity of the EU in view of the protection of indigenous rights underlines the potential of EU action on behalf of the people affected in Ecuador. The lines along which this action could be developed have been illustrated in this article and hopefully will inspire a series of EU initiatives in defence of the rights of the indigenous people of the Ecuadorian Amazon rain forest.

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Intractable conflicts in Africa: The international response to the Darfur and South Sudan crises

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Abstract: *This article considers the intractable conflicts and human rights situations in Darfur, Sudan and South Sudan, respectively, against the international responses they elicited. Intractable conflicts are conflicts that have lasted for a long time with resistance to settlement despite various attempts at intervention and conciliation. These conflicts from neighbouring nations have both elicited extensive engagement from the international and regional communities but, while some clarity regarding the direction to be taken has been achieved in the case of South Sudan, the situation in Darfur remains dire. The article analyses the difference in the peace-building approaches in the two conflicts and how these approaches have contributed to the different outcomes in Darfur and South Sudan. Following an exposition of intractability in the introduction, the second section applies the factors identified to the case of Darfur, confirming that this indeed is an intractable situation. It then considers the international response to the conflict in Darfur and the mechanisms employed by the global and the regional community in an attempt to address this conflict. The third section considers the situation in South Sudan and the international response, noting that efforts were led by the regional and sub-regional bodies, with the UN's role being to complement these efforts. The methodology employed is a comparative analysis, in which the international and regional legal and institutional responses to the crisis in South Sudan are analysed with a view to identifying the lessons to be applied in addressing the situation in Darfur, utilising theoretical and functional approaches to legal and political interventions. The final section draws from the insights gained in comparing the international response in Darfur and South Sudan, and concludes by attempting to extract general principles about intractability and the effectiveness of international responses to situations considered to be intractable, noting in particular the importance of regional and sub-regional bodies taking the lead in efforts to resolve intractable conflicts.*

Key words: *conflict; intractability; human rights; South Sudan; Darfur*

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1 Introduction

Intractable conflicts are conflicts that have lasted for a long time with resistance to settlement despite various attempts at intervention and conciliation. The article considers the conflicts in South Sudan and Darfur, Sudan, which have both elicited extensive engagement from international and regional communities, in an attempt to analyse the difference in the peace-building approaches in the two conflicts and to understand how these approaches have contributed to the different outcomes in Darfur and South Sudan.

This introduction considers the general definition of intractable conflicts and the characteristics or factors that make a situation intractable. The second section applies the factors identified to the case of Darfur, confirming that this indeed is an intractable situation. It then considers the international response to the conflict in Darfur and the mechanisms employed by the global and the regional community in an attempt to address this conflict, including United Nations (UN) Security Council resolutions, international sanctions, and responses from the African Union (AU). The third section considers the situation in South Sudan and the international response, noting that, while the peace process in South Sudan is mainly led by the sub-regional trade bloc, the Inter-Governmental Authority on Development (IGAD), and the AU, the global community led by the UN has played a crucial role in complementing these efforts. The methodology employed is a comparative analysis, in which the international and regional legal and institutional responses to the crisis in South Sudan are analysed with a view to identifying the lessons to be applied in addressing the situation in Darfur, utilising theoretical and functional approaches to legal and political interventions. The final section draws from the insights gained in comparing the international response in Darfur and South Sudan, and concludes by attempting to extract general principles about intractability and the effectiveness of international responses to situations considered to be intractable.

Simply stated, intractable conflicts may be defined as conflicts that have lasted for a long time with resistance to settlement, despite the various responses from different stakeholders (Crocker et al 2005: 5). Crocker et al argue that a conflict becomes intractable due to factors that include the geographic location of the conflict; the level of willingness to accept settlement; unsuccessful peace-making efforts; historical grievances; and a lack of social cohesion. In identifying the nature of intractable conflict, Kriesberg (2005: 65) provides three elements: First, an intractable conflict is a conflict that is complex by its nature and persists for a long time; second, it is considered to be destructive by observers; and, third, various interventions fail to solve the conflict. In addition, any kind of support to either of the armed groups involved contributes to the protracted nature of a situation (Wallenstein & Sollenberg 1998: 621). Further elaborating on the characteristics of intractable conflicts, Bercovitch (2003) analyses intractability in terms of actors, issues, duration, relationship, geopolitics and management. Accordingly, he concludes that intractable conflicts involve actors who have long-standing complaints on issues of identity, recognition or values, which complaints persist for a long period causing mass atrocity and violence. In addition, he indicates that such conflicts occur among two significant groups, and these groups usually resist

peaceful settlement, leading to failed peace-keeping efforts. However, the intractability of conflicts does not mean that they cannot be settled at all, as there are possibilities through which they can be resolved (Coleman 2006: 533). In fact, the termination of and recovery from intractable conflicts are identified by Kriesberg (2005) to be the last phase of an intractable conflict. Kriesberg summarises the phases of intractable conflicts as starting with the outbreak of the conflict; followed by an escalation of violence; followed by the unsuccessful settlement of mediation efforts; followed by the institutionalisation of the conflict; followed by the de-escalation of the conflict; and, finally, the termination of the conflict (Kriesberg 2005: 72). An intractable conflict, thus, in simple terms may be defined as a conflict that has existed for a considerable time between strong military groups that have no interest in settling their dispute, and who often have external support enabling them to continue their conflict, seemingly indefinitely, with no clear resolution in sight. Intractable conflicts persist in a number of countries on the African continent, but the article is limited to two of these conflicts that have elicited significant responses from the international community, namely that in the Darfur region of Sudan and the protracted conflict in South Sudan.

2 Failure of interventions in the intractable conflict in Darfur, Sudan

Intractable conflicts are demoralising. Apart from destabilising the families, communities and international regions in which they occur, they tend to perpetuate the very conditions of misery and hate that in the first place contributed to these conflicts (Vallacher et al 2010: 262).

The conflict in Darfur, which continues to this day, reached its peak in February 2003 and was widespread in the north, west and south (Hagan & Palloni 2006: 1578). The main conflict is between the Sudanese armed forces, on the one hand, and the Sudan Liberation Movement (SLM) and Justice and Equality Movement (JEM), the two groups that had rebelled against the central government due to what they perceived as marginalisation, on the other (Brosché 2008: 7). The Janjaweed militia, a group believed to be affiliated with and supported by the government, also joined the government in attacking SLM and JEM (Salih 2008: 8). The three Darfur tribes of Fur, Massalit, and Zaghawa, including civilians, were the main victims of the conflict, which resulted in killings, rape, abduction and the destruction of property and welfare infrastructure (Brosché & Rothbart 2013). Since its independence in 1946, Sudan has witnessed successive civil wars, including the north-south conflict as well as conflicts in the Nuba Mountains, the Upper Blue Nile, and the Beja region (Sikainga 2009). The conflict in Darfur erupted due to grievances over historical marginalisation and, in particular, over the use and control of natural resources in the region (Sakainga 2009). The intractability of the Darfur conflict is further entrenched by the fact that various peace-keeping missions, attempts at settlement and even the indictment by the International Criminal Court (ICC) of the President for war crimes have failed to resolve the conflict, which continues to have a devastating effect on the lived realities of millions of people. This international response

directed towards resolving the conflict and their failure is discussed in the next section.

An important factor which has contributed to the intractability of the Darfur conflict is that it is not a single conflict of a group rebelling against marginalisation by the centre; rather, 'communal conflicts' underpin the existing conflict (Mohamed 2009: 8). There are three main conflicts: an inter-groups conflict; region-centred conflict; and communal elite conflict (Mohamed 2009: 8). The inter-group conflict mainly is a fight over resources and land by different local groups. During the past few decades, Darfur has witnessed drought and desertification which have led to the displacement of nomadic communities in Darfur (Salih 2008: 7). The nomads fled to the territories of the sedentary tribes, and this gave rise to conflict over resources between the nomads and farmers of sedentary tribes (Salih 2008: 7). This conflict had been settled for some time but has, however, re-emerged in the past few years (Salih 2008: 8). The region-centre conflict was prompted by the marginalisation of non-Arabic people by the central government. Almost all government regimes in Sudan have thus far neglected the Darfur people's quest for human and economic development, resulting in the underdevelopment and marginalisation of a relatively resource-rich region (Bassil 2004: 26). Adding to the complexity is the power struggle among the local rebel groups pitting the Arabs against the non-Arab communities (Crisis Group 2015a). Finally, the communal-elite conflict is the result of conflict among the elite of the rural communities particularly over the holding of political positions (Mohamed 2009: 8). Taken together, it is clear that these overlapping and often opposing conflicts of interest could lead to a physical conflict such as the one which currently exists, which is difficult to disentangle and resolve.

Another factor that contributes to the intractability of the conflict in Darfur is the cross-border effect on neighbouring countries, an example being Chad where the Janjaweed have crossed the border, attacked civilians and caused displacement of many people (Bercault 2007: 859). This changes the nature of the conflict from a non-international armed conflict into an international armed conflict, which adds another dimension to the already-existing conflicts and ultimately results in a prolongation and increase in the magnitude of the conflict, both characteristics of intractable conflicts. Furthermore, the intractability of the conflict is entrenched by the massive nature of its destructive impact, which includes internal displacement. The UN has indicated that the Darfur conflict is the worst humanitarian crisis in the world (United Nations News Centre 2004). According to the UNHCR (2015), 400 000 new internal displacements were recorded between January and August 2014 alone. In January 2015, 100 000 people were displaced, bringing the number of people in need of humanitarian assistance to 6,9 million (Crisis Group 2015a). All these factors are exacerbated by a complete lack of political will on the part of the current leadership to negotiate for peace. These facts illustrate the complex nature of the Darfur conflict. Given that the conflict has existed in various forms since at least 2003, thus for almost 15 years, that the military rebel and government-sponsored groups have no interest in finding a resolution and that despite all the interventions there is no clear resolution in sight, the conflict in Darfur clearly is an instance of intractable conflict.

3 Global response to the Darfur crisis

This sub-section and the one that follows are aimed at giving a narrative overview of the different responses by the global and regional communities to the crisis in Darfur with the aim in the final section to be able to compare this to the responses to the South Sudan crisis in order to assess the effectiveness of the different approaches. A number of different strategies or measures have been employed at the global level, particularly by the UN, in an attempt to bring about a resolution of the conflict in Darfur, including resolutions of the Security Council, the indictment of the President of Sudan at the ICC, and various unilateral and multi-lateral sanctions against Sudan.

3.1 United Nations Security Council resolutions

The first UNSC resolution on the situation in Darfur, Resolution 1547, was adopted on 11 June 2004. Its purpose was to set up an 'advance team' (UNAMIS) to 'prepare for a future United Nations peace-support operation [in Darfur] following the signing of a comprehensive peace agreement' (United Nations 2004a). About a month later, the UNSC demanded as per its power under Chapter VII that 'the government of the Sudan disarms the Janjaweed militias' (United Nations 2004b). However, this resolution lacked implementation mechanisms and was ignored by the government of Sudan mainly because for the next few months the UNSC was preoccupied with the peace process in Southern Sudan which culminated in the signing of the Comprehensive Peace Agreement in January 2005 (Prendergast & Sullivan 2008).

Thereafter the focus shifted back to the crisis in Darfur, and in March 2005 three resolutions, Resolutions 1590 (2005), 1591 (2005) and 1593 (2005), followed in close succession. These resolutions dealt respectively with the establishment of the UNMIS, a peace-keeping mission consisting of 10 000 military personnel; an asset freeze and travel ban on certain persons who were considered to have had a significant role in the Darfur crisis; and the referral the situation in Darfur to the ICC. While these resolutions together had the ability to bring about real change in the region, some factors prevented any meaningful action to flow from them. One of the most important reasons is that there was division among the P5 (the five permanent members of the Security Council) about the way in which to approach the situation, leading to the abstention of Russia and China from these resolutions (Prendergast & Sullivan 2008). There have even been allegations that China was supporting the government of Sudan and was providing them with fighter jets and training (Prendergast & Sullivan 2008). Without agreement among the P5, it is unlikely that any real action will follow on the implementation of resolutions, as was indeed the case. Second, there was no consultation with the African states on these resolutions, with the result that they also were reluctant to cooperate with the UNSC (Prendergast & Sullivan 2008).

In 2006 the negotiations seemed to start paying off, and the Abuja Peace Agreement was signed in May 2006 between the government of Sudan and one of the large rebel groups. However, this agreement was not signed by two of the smaller rebel groups (United Nations 2005). The UN maintained its peace-keeping forces on the ground, and in late 2006 it was decided that the UN should launch a joint mission with the AU. However,

it took until July 2007 for the requisite resolution, Resolution 1769 (2007) to be adopted by the UNSC. This was the first time such a joint mission was attempted, and it was the biggest UN mission after that in the Balkans (Prendergast & Sullivan 2008). Yet from the beginning there was a continued power struggle within the UNAMID, with the UN continuing to blame the AU for any failures and insisting that it was primarily a UN mission since it had been constituted by a UN resolution (Prendergast & Sullivan 2008). In 2011, through Resolution 1997 (2011), the UNSC recalled UNMIS in order to leave UNAMID as the only UNSC-constituted body present in Sudan.

The security situation in Darfur continued to deteriorate, and while UNAMID was there as a peace-keeping mission, there was no peace to keep and they repeatedly failed in their main mandate of ensuring the protection of civilians (Prendergast & Sullivan 2008; Abdulbari (2015). Members of UNAMID were also killed, and blame is unofficially attributed to the government of Sudan (Prendergast & Sullivan 2008). In 2011 a further peace agreement, the Doha Document for Peace (DDP), was signed between the government of Sudan and the Liberation and Justice Movement providing for power sharing and a compensation fund for victims of the conflict in Darfur. This was intended to bring peace to the region, but conflict, human rights violations and internal displacement continued. The escalating violence in Darfur in February 2014 led to the adoption of UNSC Resolution 2148 (2014) in April 2014 in which the mandate of UNAMID was revised to focus on the following three priority areas: the protection of civilians; mediation between the government of Sudan and non-signatory armed movements; and support for the mediation of community conflict. In February 2016, there was a new bout of hostilities which led to tens of thousands of civilians fleeing their homes in Darfur (United Nations Human Rights Council 2016a). As can be seen from this exposition, the Security Council has been highly involved in the situation in Darfur, albeit often not with the required results – sending large peace-keeping troops, working together with the AU in a manner which had never before been attempted and even going so far as to refer the matter to the ICC.

3.2 International Criminal Court

The resolution of the UNSC in 2005 referring the conflict in Darfur to the ICC led to retaliation by the government of Sudan through the expulsion of all Western aid groups from Darfur (International Coalition for the Responsibility to Protect 2015). However, the fact that both China and Russia abstained in this decision and the fact that very little funding was provided for the prosecution process, indicate that from the outset there was no clear commitment by the P5 to ensure the success of the legal process. Further, the AU Assembly of Heads of State and Government resolved on 3 July 2009 not to co-operate with the ICC as it felt its concerns had been ignored by the UNSC, such as the potentially negative impact of the arrest warrant against Al-Bashir on the ongoing peace processes in Sudan, and the fact that they viewed the warrant as a violation of customary international law related to the immunity of sitting heads of state (Mekuriyaw 2016: 119). The resolution of the Assembly of Heads of State and Government asked for a stay of prosecution of Al-Bashir. However, this resolution was not acted upon by the UNSC. This lack of co-operation and co-ordination between the regional powers and UN

bodies on efforts and initiatives to address the challenges in Darfur in a concerted manner is a factor which has contributed to the continued intractability of this conflict.

The decision by the AU not to acknowledge the ICC's warrant of arrest has enabled the government of Sudan to act with impunity and ignore the ICC process (Prendergast & Sullivan 2008). Various states that are party to the Rome Statute of the ICC, such as Kenya, Uganda and South Africa, have also failed to arrest President Omar al-Bashir when he was on their territory. South Africa argued that this failure was due to being 'caught between its obligations under the Rome Statute and those that grant immunity to heads of state' (Ngari 2017). Initially, it seemed that no political consequences would flow from this violation of an international obligation. However, in a decision in December 2016 – the first of its kind – the ICC decided to rule on whether South Africa had acted contrary to its obligations under international law by not arresting Al-Bashir during his visit to the country in 2015, and in July 2017 determined that South Africa 'had the ability to arrest and surrender him and it chose not to do so'. However, there will be no real consequences, since the ICC did not proceed to apply any of the measures at its disposal, such as referring the matter to the UNSC (De Wet 2017). Similar proceedings are underway at the ICC against Uganda (Journalists for Justice 2017). The failure by the international community to support the process led the Prosecutor of the ICC to announce in December 2014 that the investigation would go into hibernation until the UNSC provides the necessary support and cooperation (Bensouda 2014). Since then, the ICC has determined that as it is a UNSC referral to the Court, the UN members have an obligation to cooperate, but nothing more has come of it (International Coalition for the Responsibility to Protect 2015).

While many African countries supported and participated in the establishment of the ICC and have even referred cases to the ICC, the arrest warrant against a sitting head of state was only one of the steps in the disenchantment African states have experienced in relation to the ICC (Mekuriyaw 2016: 119). Further criticism of the ICC by African states include selective prosecution, with successful prosecutions being focused disproportionately on the global south and particularly Africa (Mekuriyaw 2016: 126). This has led a number of African states, including South Africa, to declare that they would opt out of the ICC. It is thus not surprising that to date there has been no attempt to adhere to arrest Al-Bashir.

It is interesting to note that in other cases of similar internal conflicts, the precedent is that of the institution of special mechanisms. This took the form of special tribunals in Rwanda, the former Yugoslavia and Lebanon, an *ad hoc* chamber in Senegal (Cassese 2012: 495) as well as the intended hybrid court in South Sudan. These special mechanisms have in most cases been considered to be legitimate and have enabled the prosecution of war criminals locally (Cassese 2012: 495). Another benefit is that such courts or tribunals can be used in conjunction with other transitional justice processes, such as a 'truth commission and reparations authority' in order to ensure comprehensive justice processes and reparation for the victims (Lucey & Kumalo 2017). Finally, given the amount of backlash that the UNSC's decision to refer the situation in Darfur to the ICC has generated, it would in all probability also have been

a smarter decision in terms of international relations to opt for the less politically-loaded option of a tribunal at national level. The question thus remains as to why in the case of Sudan the situation was referred to the ICC rather than considering an analogous solution to those that have seen such success in the past and that continue to be used in other situations. One reason for this may be the continued presence of Al-Bashir as the head of state in Sudan for more than 28 years, a person who has no interest in a transitional justice process that would see him being prosecuted for genocide and other massive human rights violations. Another reason may be that while tribunals have generally been set up in countries where the majority of the country had been involved in the violence, either as perpetrators or victims, in the case of Darfur, this is a small region of a vast country, which means that most parts of the country remain relatively unaffected.

3.3 Sanctions

Apart from the purely political steps discussed above, one of the ways in which the international community displays its dissatisfaction with a particular country, in a manner that may have far-reaching implications, is through the imposition of sanctions. The UNSC during an extraordinary meeting in Nairobi in 2004 attempted to impose sanctions on Sudan, but because of the interests of China and Russia in the Sudanese oil industry, this attempt failed (Global Policy Forum). However, UNSC Resolution 1564/2004 stated that if Sudan did not co-operate, particularly with the AU monitors, the UNSC 'would consider taking additional measures, including sanctions, to affect Sudan's oil sector and the government or its individual members' (United Nations 2004c). These threats were followed through in one of the 2005 trio resolutions, as referred to above. However, the effectiveness was limited in that the expert panel which was to determine to which persons the travel ban and asset freeze would apply took more than a year to be set up (Prendergast & Sullivan 2008). Even after the panel submitted 17 names to the UNSC, no meaningful action was taken (Prendergast & Sullivan 2008). The sanctions against people blocking peace in countries such as Sudan were renewed in April 2016 (*Sudan Tribune* 2016). Thus, the success of sanctions by the UN, even where they go beyond mere threats or warnings and are effected, is called into question by the lack of willpower displayed in their enforcement. Often individual states do not abide by UN-imposed sanctions and continue their relations with them, with the result that these measures are further undermined.

Arguably, the unilateral coercive measures (UCM) taken by various states against an individual state are much more effective, particularly where these states are important trading partners. In the case of Sudan, states that imposed such UCMs include the United States of America (US), the United Kingdom and the European Union. Some of these UCMs, particularly those of the US (which were finally lifted in October 2017 after having been in place for 20 years (Dahir 2017) are of a comprehensive nature, meaning that they do not target specific persons but apply to the whole country (Saeed 2015). These sanctions include trade embargoes, which block the transfer of money to Sudan and limit access to vital technological tools (Sperber 2014). Since this is not in line with the approach followed by the UNSC which aims to target specific persons, rather than the country as a whole in order not to cause undue

and unfair suffering (United Nations Human Rights Council 2015), in December 2015 the UN Special Rapporteur on Human Rights and International Sanctions called on states to review these policies, given that they appeared to have had no effect on the elite and disproportionately affected the poor (Prendergast & Sullivan 2008). Perhaps heeding this call, but also taking into account the political situation and the strategic position of Sudan as a partner in their fight against terrorism, the US lifted the harshest trade embargoes in October 2017 after a 16-month review period. While this is good news for the people of Sudan on an economic front, it also brings to an end one of the most serious political sanctions against the country.

4 Regional response to the Darfur crisis

4.1 Role of the African Union in the conflict in Darfur

Apart from the efforts by the global community led by the UN to address the conflict in Darfur, using some of the most 'serious' tools at its disposal, including extensive peace-keeping missions and even going so far as to indict the President of Sudan, the AU was similarly taking action. The AU is the 55-member continental political body formed in 2001 to replace the Organisation of African Unity (OAU). The AU has been actively involved in the peace process in the conflict in Sudan in line with its objective under article 3(f) of the Constitutive Act of the African Union to 'promote peace, security and stability on the continent'. These efforts, however, have not been successful, probably due to the AU's lack of resources and lack of political will by member states (Keith 2007: 153). For example, the AU peace-keeping mission sent to Sudan (African Union Mission in Sudan (AMIS)), did not function adequately and efficiently due to underfunding and understaffing (Keith 2007: 154).

Furthermore, the AU has been disparaged as a 'club of dictators' who do not generally respond to violations of human rights, but rather are concerned with securing the sovereignty of their own states by insisting on the doctrine of non-interference (Gottschalk & Schimdt 2004: 139). Apart from the reasons given by the AU for rejecting the decision of the ICC to indict Al-Bashir, discussed above, one of the reasons often cited why the AU has refused to co-operate with the ICC is that they are 'protecting one of their own'. This attitude is also on display during review processes, such as the Universal Periodic Review (UPR) of the UN, where states are given the opportunity to engage their peers on issues of concern in their countries. It is the custom of African states in this and similar fora not to criticise each other and to 'stick together'. For example, despite the many issues that they may have raised, none of the African states raised any issues during Sudan's UPR process in 2011. This general trend of lack of political will to support processes which may have negative implications for their peers may to some extent explain the failure by heads of state to invoke article 4(h) of the AU Constitutive Act, which gives the AU the mandate to intervene in a member state in respect of grave circumstances such as war and genocide. The failure of the AU to utilise this power, which is one of the key characteristics distinguishing the AU from the non-interventionist nature of its predecessor, has been a contributing factor to the prolongation of some of the most protracted situations on the continent.

Not much diplomatic pressure has been exerted by the AU on Sudan's President Omar al-Bashir to resolve the crisis. The AU went to the extent of allowing Sudan to host its annual summit in 2006 amidst the crisis, despite its rules of procedure that require the summit to take place in a conducive political atmosphere (Udombana 2005: 1188), which only served as an endorsement of his regime. Al-Bashir was also allowed to visit and leave South Africa despite a South African court order for his arrest (Aljazeera 2015). As late as November 2017, a case brought by civil society in Uganda to arrest Al-Bashir when he was visiting the country was dismissed by a Ugandan court on the basis that it was 'unnecessary', since 'Uganda is awaiting sanctions by the UN Security Council for failing to arrest President Bashir in May [2016]' (*New Vision* 2017).

4.2 African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights (African Commission) is the body mandated to promote and protect human and peoples' rights and interpret the African Charter on Human and Peoples' Rights (African Charter). The Commission has played a critical role in the crisis in Sudan, but it can only adopt recommendations, the binding nature of which is disputed as the African Commission is a quasi-judicial body. For example, the Commission undertook a fact-finding mission to Darfur in 2004 and established that there were massive human rights violations committed by armed militias, some of them supported by the government, which included the killing and rape of civilians (African Commission on Human and Peoples' Rights 2004a). The Sudanese government responded to the report by insisting that it was taking all steps possible to protect human rights in the conflict and, as such, it considered the report as reflecting unsubstantiated allegations mainly peddled by the media (Government of Sudan 2005). Despite this reaction from the government and the failure by the AU to implement the African Commission's recommendations, the findings contributed to exposing the situation on the ground to the international community.

The African Commission has also passed a number of resolutions calling upon all parties to the conflict to desist from preventing humanitarian assistance missions to the civilian populations (African Commission on Human and Peoples' Rights 2004b) and urging President Bashir to co-operate with the investigations by the ICC prosecutor (African Commission on Human and Peoples' Rights 2005). It is worth noting that the AU resolved in 2009 not to co-operate with the ICC due to what it considered a lack of consultation by the UNSC when referring the Darfur crisis to the ICC and the threat such action posed to any peace efforts. While the actions of the African Commission are commendable, the effectiveness of its decisions depends upon the AU. In terms of article 59, all measures taken within the provisions of the African Charter remain confidential until such time as the Assembly decides otherwise. This implies that the Commission on its own does not have the power to implement its own recommendations. This can only be done by the AU, which has been described above as lacking the political will.

One of the measures at its disposal which has not been employed by the African Commission is the procedure in article 58 of the African Charter. In terms of this article, the Commission has to refer cases of serious or massive human rights violations to the Assembly of Heads of State of the

AU (Assembly), following which the Assembly can direct the Commission to do an in-depth study of the case. However, to date the Commission has been hesitant to use the procedure under article 58, partly because of the tendency of the heads of African states to show solidarity and not to expose each other's failings.

4.3 African Peer Review Mechanism and the African Court on Human and Peoples' Rights

The African Peer Review Mechanism (APRM) is a mutual and voluntary self-monitoring programme of AU member states aimed at promoting and reinforcing high standards of governance. The mandate of the APRM is to ensure that the policies and practices of participating countries conform to the agreed values in the following four focus areas: democracy and political governance; economic governance; corporate governance; and socio-economic development (New Partnership for Africa's Development 2004). Sudan is a voluntary member of the APRM. The APRM undertook a mission in January 2016 to Sudan upon the invitation of Sudan. However, this had nothing to do with the crisis in Darfur, but was rather a pre-country review mission with the aim of having an appreciation of the National Dialogue currently taking place as part of the APRM procedural phases (African Peer Review Mechanism 2016). The voluntary nature of the mechanism makes it less effective as the APRM heads of state often avoid criticising one another in order to avoid provocation and retaliation.

Sudan signed the Protocol Establishing the African Court on 9 May 1998, but has not ratified the Protocol. While the decisions of the Court are binding on members who have accepted its jurisdiction, the Court has no jurisdiction over Sudan as the latter has not ratified the relevant Protocol. Therefore, the Court cannot adjudicate over the crisis in Darfur.

4.4 Failed AU-UN joint mediation

Negotiations on the Darfur crisis started in 2003 with an AU-UN peace initiative led by the then Chadian President, Idriss Deby, and this process led to a 45-day ceasefire agreement between the government and SLM in September 2003 (Netabay 2009). However, both parties soon violated the ceasefire and problems of impartiality on the side of the mediator led to a failure of the process (Netabay 2009). In 2004 the same mediation team managed to negotiate a ceasefire agreement for humanitarian assistance. A comprehensive mediation process began in 2004 in Abuja, Nigeria, initiated by the UN Security Council which assigned the AU to undertake the negotiations (International Crisis Group 2014).

The AU team was led by the then President of Nigeria, Olusegun Obasanjo. However, because of attacks by the government on Darfur, the rebel groups refused to finalise the negotiations (Netabay 2009). At the same time, the UN and the government of Sudan adopted a Communiqué on Darfur indicating the steps that should be taken by the government (Slim 2004). The Abuja negotiations resumed in June 2005 under the leadership of Salim Ahmed Salim, the former Secretary-General of the OAU, and supported by the UN, the US and the UK. The government of Sudan, the SLM and JEM were initially party to the negotiations, but only the government and SLM signed the May 2006 Darfur Peace Agreement

(DPA) which was the agreement flowing from this negotiation (Nathan 2006: 1).

Far from leading to peace, the DPA led to an escalation of the conflict. First, the negotiations for the DPA did not include all rebel groups or tribal leaders and also did not take sufficient account of the perspectives of civilians (Flint 2010: 14). During the negotiations, there was a split in the SLM, and the leader who signed the DPA was not regarded by all in the rebel group as a legitimate representative, thereby leading to internal conflict in this group (Flint 2010: 9). A second failure of the DPA is that it included deadlines for elections and referenda that were not practical (Nathan 2006: 4). In general, the process of the peace agreement for the DPA was rushed as the EU and the governments supporting the mediation threatened to withdraw support unless an agreement was reached expeditiously (Nathan 2006: 4). Thus JEM, which represents one of the largest ethnic groups in Darfur, rejected the DPA because in an attempt to finish before the deadline, the mediators drafted an agreement without sufficient input from the parties (Nathan 2006: 5). Therefore, the DPA was a fatal agreement that did not settle the conflict in Darfur; rather, it led to the perpetuation of the conflict as the rebel groups that were not represented in the mediation process joined forces and attacked the government and SLM (Taddele 2007).

Another negotiation attempt was launched in 2007 under joint AU-UN leadership (Brosché 2008: 59). These negotiations took place in Libya, and this venue was contested. Other contested issues were the approach to be followed and the team involved as well as the lack of political will to implement agreements (Brosché 2008: 61). This process was postponed due to a lack of participation by main rebel leaders in the peace process (Netabay 2009). In addition, the leaders of the mediation team had different perspectives on the approach to be followed, which led to conflict within the mediation team (International Crisis Group 2014). A new joint UN-AU mediation team was established in June 2008, but was soon followed by the AU establishing a High-Level Panel on Darfur. Thereafter, the UN-AU mediation continued in Doha, Qatar, in 2009. During the mediation the international community facilitated the establishment of an umbrella group for the rebels called the Liberation and Justice Movement (LJM) in order to overcome the fragmentation of rebel groups, but this initiative was rejected by many of the groups (International Crisis Group 2014). Despite this, the Doha Document for Peace in Darfur (DDPD) was adopted in May 2011. On 14 July 2011, the government of Sudan and LJM signed a protocol highlighting their commitment to the DDPD. In September 2012, JEM was split and a splinter group led by Mohamed Bashir Ahmed (JEM-Bashir) was created, which signed the DDPD in Doha in March 2013 (*Sudan Tribune* 2013). However, to date the other JEM faction and the two SLM groups have not signed any agreement with the government of Sudan.

The peace negotiations for Darfur did not persuade the main rebel groups and the majority of the Darfur population, who continue to boycott these processes and initiatives. The peace negotiations thus have failed to address the communal conflict and to build trust among the parties involved in the conflict. More devastating is the lack of implementation of the agreements by the government. This has deteriorated the trust of the

rebel groups as well as the Darfur population and has contributed to the continued intractability of the situation.

On 23 March 2016, the government of Sudan and opposition forces signed an agreement for inclusive dialogue to serve as a practical way forward towards ensuring progress in the negotiations on cessation and permanent ceasefire in the conflict (African Union 2016a). While this is not the same as a peace agreement, and while it was only the first step in a long process towards the resolution of this intractable conflict, perhaps this presents renewed hope for an AU intervention. While in 2016 there were shocking accusations of the use of chemical weapons by the government on communities in Darfur (Al Jazeera 2016), by 2017 the 'level of armed hostilities in Darfur has continued to be significantly lower than in previous years' mainly due to a major military victory of the Sudanese government in September 2016 (Security Council Report 2017). However, the inclusive dialogue process, which came to an end in October 2016, was rejected by a large opposition coalition, including the leader of JEM who stated that this 'inclusive dialogue' in fact excludes some opposition and civil society groups and has resulted in a partial political process (*Sudan Tribune* 2016), again highlighting the ever-divided nature of any processes undertaken in relation to Darfur.

5 Conclusion on Darfur

Following the path of intractability discussed earlier, the conflict in Darfur has passed the eruption, escalation, failed peace-keeping and institutionalisation phases and, as such, continues to be an intractable conflict. The military victory of the Sudanese government over some of the rebel groups in Darfur in 2017 has seen the start of a phase of de-escalation of violence in the area. However, this ceasefire is not the result of sustainable transitional justice, and it thus remains to be seen whether it will be possible to go from there into the recovery phase – the final phase in the resolution of an intractable conflict – or whether it is just a momentary lull, whereafter the rebel forces will regain their strength and the conflict will continue. It is clear from the discussion above that single efforts by individual actors have failed to resolve the conflict, and so have the unco-ordinated efforts of the various actors. Despite the variety of international responses as well as various mechanisms to resolve the conflict in Darfur, the situation remains unresolved. The international responses have failed due to a lack of co-ordination at the regional and global level. Furthermore, the attempted responses have neglected the civilian population, who continue to face displacement and a lack of access to basic services, and who are not fully integrated into the discussions on peace, such as the inclusive dialogue. The international community has thus failed to deliver on its responsibility to protect the population in Darfur (De Waal 2007: 1054). Furthermore, because the current ceasefire is the result of a military victory, this means that one of the main reasons why the conflict arose in the first place, namely, the marginalisation of the people of Darfur as well as scarce food resources, has not been addressed, with the result that most displaced people have not been able to return home. The conflict should be addressed in a comprehensive rather than piecemeal manner (Slim 2004). Therefore, more co-ordination and partnership among the various actors at the regional and global levels is necessary. Further, while it is important that the negotiation should give

priority to ceasefire agreements to end violence, the international community should also focus on strong negotiations that address the root causes of the conflict (Slim 2004). The start of the resolution of this intractable conflict may have taken place with almost a year of vastly lower conflict rates. However, the international community cannot allow itself to be lulled into a false sense of security. The decision by the UN to remove almost a third of its peace-keeping troops at the end of 2017 may upset this delicate balance (Sengupta (2017)). The lack of trust among the opposing groups also remains. How can the international community work together to contribute to sustainable peace in Darfur? It may be possible that valuable lessons may be learnt from the approach of the international community to the conflict in neighbouring South Sudan.

6 South Sudan crisis: A regional and global complementary response

6.1 Historical background to the South Sudan crisis

The history of conflict in South Sudan can be traced to pre-independence Sudan, particularly the sunset years of colonialism (Kebbede 1997: 27). The mostly Christian south, which had been administered separately from Juba during colonial times, expressed fear that unification with the predominantly Muslim Arab north following independence would result in its marginalisation (Peace Direct 2015). These concerns were ignored, and Sudan declared an independent state on 1 January 1956 incorporating the south with no federal arrangement (Kebbede 1997: 20). The southerners were soon vindicated when the new Khartoum government pursued a policy of neglect and exclusion immediately after independence. Thus, the discontent that began on the eve of independence soon escalated to a civil war that lasted until 1972 when the Addis Ababa Agreement on the Problem of South Sudan was signed on 27 February 1972 ushering in a federal arrangement (Shinn 2005: 242). This, however, lasted only 11 years and war again broke out in 1983 when the Khartoum government introduced Shari'a laws in the south, divided the south into three regions and dissolved the regional assembly (Young 2012). This was propounded by the discovery of oil in 1979, and the proceeds were channelled to the north (Kebbede 1997: 7).

This war lasted until 6 January 2005, when the Comprehensive Peace Agreement (CPA) was signed (United Nations Mission in South Sudan 2004) under the auspices of the Inter-Governmental Authority on Development (IGAD), an eight-nation Horn of Africa regional economic community. By the time the CPA was signed, the several rebel groups in the south had coalesced into one formation, the Sudanese People's Liberation Movement/Army (SPLM/A) (African Union 2014a: para 41). In line with the CPA, South Sudan gained autonomy on 9 July 2005 under Dr John Garang as President of South Sudan and First Vice-President of Sudan. However, Dr Garang died in a helicopter crash on 30 July 2005 and was succeeded by his deputy, Salva Kiir, who led South Sudan to independence on 9 July 2011 following a referendum. Dr Riek Machar became the Deputy President.

6.2 Socio-political context of the current crisis

Of relevance to the current crisis is the fact that in 1991, a faction led by Dr Riek Machar split from the SPLM/A and aligned with President Bashir's Khartoum government only to rejoin in 2002 towards the conclusion of the peace process (Akol 2003: 76; Aljazeera 2014). A culmination of the internal ideological wrangles within the SPLM/A that had by this time taken ethnic dimensions between the Nuer and Dinka, this split has been considered as one of the events that left deep scars within the SPLM/A which it carried into independence (The Sudd Institute 2014; African Union 2014a: paras 42-44). This is particularly so since the SPLM/A pecking order had to be rearranged to accommodate Dr Machar's return, a fact that caused a lot of unease (African Union 2014a: para 50). This unease was to pronounce itself progressively after the untimely death of Dr Garang when Salva Kiir became President following the 2010 elections with Dr Machar as his deputy (The Sudd Institute 2014). The relationship between the two is reported to have been frosty with the two factions running something akin to parallel governments (African Union 2014a: paras 50-52). These political divisions sown over the decades have since taken ethnic undertones, thereby creating divisions beyond the political class to the general population.

Commentators have also pointed out that the CPA largely ignored democratisation in the rush to achieve and sustain long overdue peace, resulting in cosmetic peace (LeRiche & Arnold 2013: 36; 132). As a result, the world allowed the government of South Sudan significant leeway when it failed to show commitment to democratic principles for the new nation. The government of Salva Kiir utterly failed to strengthen institutions of democracy (African Union 2014a: para 45). This failure saw historical divisions go unaddressed, and healing and reconciliation take a back seat in the new nation.

Even though the events of 15 December 2013 triggered the violence, feelings of discontent at the government's failure to translate the CPA into a tangible development initiative already were rife amongst the populace (African Union 2014a: para 70). Chiefly, the government miserably miscalculated by failing to initiate a much-needed healing and reconciliation process that would have helped the young nation embrace the past and forge a path to sustainable development (Jok 2015: 8). To compound this failure, the government failed to take advantage of the vast oil resources in the country to address years of marginalisation and underdevelopment resulting in high levels of poverty, unemployment and frustration (African Union 2014a: paras 70-80). Instead, corruption was rife in the young government leading to weak national institutions, mismanagement of natural resources and nepotism with the end result of an inability to provide basic social services (De Vries & Justin 2014: 3). This compounded public frustration which only required a political trigger.

Things took a turn for the worse in July 2013 when President Kiir dismissed Dr Machar together with a number of rivals from his cabinet (Johnson 2014; African Union 2014a: para 63). Violence eventually broke out on 15 December 2013 when President Kiir accused Dr Machar of an attempted *coup* and attempted to arrest him and disarm members of the Presidential Guard from Machar's Nuer ethnic extraction (De Vries & Justin 2014: 6). The AU Commission of Inquiry on South Sudan

(AUCISS), however, has determined that there was no evidence of any such *coup* attempt (African Union 2014a: para 68), which leads to the conclusion that this was a purely politically-motivated decision on the part of President Kiir to remove a democratically-elected deputy from a different ethnic background, and whom, based on the co-operation of his faction with the government of Sudan, he would have seen as an outsider, in an attempt to get rid of possible rivals and opposition to his government.

6.3 IGAD-led peace process

Being custodians of the CPA and out of a sense of responsibility for the new nation's well-being, IGAD swiftly responded to the dismissal of Dr Machar by sending a delegation of its foreign ministers to Juba. The delegation, accompanied by AU and UN representatives, assessed the situation and recommended IGAD-led peace negotiations to commence within ten days and called for the continued support of the AU and the UN (Inter-Governmental Authority on Development 2013a). The UNSC responded to this call on 24 December 2013 through Resolution 2132 (2013) by increasing the overall force levels of the United Nations Mission in South Sudan (UNMISS) to 12 500 to protect civilians at risk and deal with the rapidly deteriorating humanitarian situation. This then shifted the mandate of the mission from providing capacity building to civilian protection. The AU, on the other hand, directed the AU Commission to support the IGAD-led peace process (African Union 2013a). The IGAD Heads of State and Government (IGAD-HoS) resolved on 27 December 2013 to immediately appoint General Lazarus Sumbeiywo of Kenya and Ambassador Seyoum Mesfin of Ethiopia to lead mediation efforts between the rival South Sudan factions and further called upon the AU and UN to complement the IGAD-led peace process and respond to the unfolding humanitarian crisis (Inter-Governmental Authority on Development 2013b). Complementarity in this sense thus means that the initiative and the lead is taken by one body, IGAD, and that other international bodies, instead of attempting completely separate and unrelated processes to address the same conflict, or having multiple organisations who all try to take the lead, support the initiative of a body that is closer to the ground, thus lending legitimacy to the process and also ensuring that the intervention has the available resources to succeed. In this regard, because IGAD is made up out of neighbouring countries, they have a particular interest in the stability of any state in their region, hence the swift and effective response. However, such initiatives can only succeed with the backing, not least financially, of bodies such as the UN and AU.

Despite a difficult start, a Cessation of Hostilities Agreement (CoH) was signed by the parties on 23 January 2014 in Addis Ababa, Ethiopia (Inter-Governmental Authority on Development 2014a) which was to be monitored by a ceasefire Monitoring and Verification Mechanism (Inter-Governmental Authority on Development 2014b). The UNSC, through Resolution 2252 (2015), extended the mandate of UNMISS to 30 November 2014 with an extended mandate to support the implementation of the CoH through, *inter alia*, protecting the Monitoring and Verification Mechanism. The mandate of UNMISS has since been extended severally. Despite the CoH and the subsequent Agreement to Resolve the Crisis in South Sudan of 9 May 2014 (Inter-Governmental Authority on Development 2014c), parties showed very little commitment and

hostilities continued (Crisis Group 2015b). This prompted IGAD to threaten collective punitive action on 10 June 2014 directing the parties to honour the 60-day deadline for a peace agreement (Inter-Governmental Authority on Development 2014d). The AU-PSC supported IGAD's position by expressing readiness to impose targeted sanctions upon IGAD's request two days later on 12 June 2014 (African Union 2014b). IGAD and the AU-PSC repeated these threats two months later, this time providing a 45-day timeline for an agreement for a transitional government on national unity (Inter-Governmental Authority on Development 2014e). However, an agreement was not arrived at within the deadline, and the IGAD-HoS on 7 November 2014 during its Assembly of HoS invited IGAD member states to impose collective asset freezes, travel bans and arms embargos against the warring parties, and called on the AU-PSC and UNSC to help with the implementation.

Jolted by the possibility of regional sanctions, the parties signed the Rededication and Implementation Modalities for the CoH on 9 November 2014, basically reaffirming their commitment to implementing the CoH (Inter-Governmental Authority on Development 2014f). With the process back on track, the parties signed the IGAD-mediated Areas of Agreement of the Establishment of the Transitional Government of National Unity (TGNU) in the Republic of South Sudan on 1 February 2015 (Inter-Governmental Authority on Development 2015a). The momentum, however, quickly dissipated prompting the UNSC to unanimously resolve on 3 March 2015 through Resolution 2206 (2015) to designate those frustrating the peace process for imposition of sanctions. This was followed by IGAD's restructuring of its peace efforts by officially roping in the AU, UN, IGAD Partners Forum, China, the US, UK, EU and Norway to form IGAD-Plus as the new driving force (Crisis Group 2015b). The AU-PSC also formally requested the UN to urgently designate individuals under its Resolution 2206 (2015) for imposition of sanctions (African Union 2015a), which request the UNSC honoured by imposing sanctions on high-ranking officials of the SPLA and the SPLM/A-in-Opposition, three from each side (United Nations 2015).

6.4 African Union Commission of Inquiry on South Sudan

While the peace process was ongoing, a simultaneous and equally vital process was also underway. On 30 December 2013, and for the first time in the history of the AU, and indeed that of its predecessor, the OAU, the AU directed the AU Commission and the African Commission to establish a commission of inquiry, the AU Commission of Inquiry on South Sudan (AUCISS), to investigate human rights violations and other abuses during the South Sudan conflict and to make recommendations for ensuring accountability, reconciliation and healing (African Union 2013a).

The above decision is also significant for the reason that the AU directed the AU Commission to work with the African Commission on this despite the fact that South Sudan was at the time the only AU member not party to the African Charter, which created the African Commission. Had South Sudan been a party to the African Charter, the African Commission would have been in a position to undertake a fact-finding mission to South Sudan such as the one to Darfur discussed above. The Commission would also have been able to entertain communications concerning South Sudan's failure to address the historical human rights violations from the

liberation struggle, the effects of which sowed the seeds for the current conflict. Hopefully, its recommendations would have helped avert the relapse into violence.

The AUCISS, however, stepped in where the African Commission had no jurisdiction, completed its investigations and presented its final report on 24 July 2015 to the AU-PSC (African Union 2015). The AU-PSC felt that it would not be prudent to immediately publish the report in light of the ongoing IGAD peace process. The final report of AUCISS was released on 26 September 2015. It identified the underlying causes of the conflict and implicated both parties in wide-spread and systematic human rights abuses, including massacres, the recruitment of child soldiers and sexual violence against women. Finally, the report recommended addressing the economic sources of the conflict; justice for the victims through institutional reform; reconciliation and holding accountable those with the greatest responsibility for the atrocities; and disarmament, demobilisation and reintegration of the various armed groups

6.5 Peace Agreement on the Resolution of the Conflict in the Republic of South Sudan

On 17 August 2015 the IGAD-Plus mediation produced the Agreement on the Resolution of the Conflict in the Republic of South Sudan (Peace Agreement) (United Nations Mission in South Sudan 2015). The Peace Agreement provides for a transitional government of national unity (TGNU) with President Salva Kiir remaining President and the rebel faction of Dr Machar selecting the First Vice-President, ostensibly Dr Riek Machar. The TGNU was to last for 30 months, at the end of which period elections were to be held. Further, the Peace Agreement established a permanent ceasefire, the unification of forces and a multi-stakeholder Joint Monitoring and Evaluation Commission (JMEC) to monitor its implementation. Significantly, the agreement also provided for the Hybrid Court for South Sudan (Hybrid Court) to be established by the AU with jurisdiction to prosecute those responsible for international crimes committed during the conflict. Both parties signed the Peace Agreement and, to complement its implementation, the UNSC on 9 October 2015 extended the mandate of UNMISS with an enhanced force ceiling of 13 000 through Resolutions 2241 (2015) and 2252 (2015).

The delayed arrival of Dr Machar in the capital, Juba, initially raised concerns over commitment to the peace process and delayed the swearing in of the TGNU. As a result, the UNSC, through Resolution 2280 (2016) of 7 April 2016, renewed the sanctions it had earlier imposed in a bid to increase the pressure on the parties to expedite the formation of the TGNU. Dr Machar eventually arrived in Juba on 26 April 2016 and was sworn in as First Vice-President (United Nations News Centre 2016).

6.6 Healing and reconciliation

As discussed above, the lack of a healing and reconciliation process is one of the underlying causes of the current crisis in South Sudan. In recognition, the AUCISS recommended that for sustainable peace to be achieved in South Sudan, a healing and reconciliation process ought to be undertaken with urgency to address divisions and injustices of the

liberation struggle which have been considerably deepened by the current conflict (African Union 2014a: cap IV).

There are growing AU efforts towards a continental framework on healing and reconciliation as an appropriate transitional justice option for post-conflict states. Thus far, the AU has developed the Policy on Post-Conflict Reconstruction and Development, and commissioned a report on the role of national reconciliation in peace-building and development (African Union 2013b). The AU Panel of the Wise has also documented the use of justice and reconciliation in African (African Union 2013c). The African Commission passed Resolution 235 on transitional justice in Africa on 23 April 2013 in which it considered the Transitional Justice Policy Framework by the AU and tasked a commissioner to prepare a study on transitional justice in Africa, one of the objectives being to determine the role of the African Commission in implementing the AU framework and how the Commission can assist in the transitional justice system in Africa. The study was extended for a further two years through Resolution 278, and the report is due in May 2016 for consideration by the African Commission.

AUCISS recommended the establishment of a truth and reconciliation commission modelled along the AU's recommendation of infusing traditional forms of reconciliation and accountability (African Union 2014a: paras 977-979; African Union 2013b: para 12). This recommendation has been incorporated in the Peace Agreement which provides for the establishment of the Commission for Truth, Reconciliation and Healing (CTRH) to investigate human rights and other violations dating back to a determined period since the Sudan civil war with a view to promoting truth, healing and reconciliation (United Nations Mission in South Sudan 2015: cap V). In this regard, the CTRH is obliged to adopt best practices from Africa and beyond. This peace and reconciliation process in South Sudan, therefore, not only has AU goodwill, but also substantial AU expert material to work with.

6.7 Conclusion on Sudan

As a postscript, it is important to note that the crisis in South Sudan is far from over. Subsequent to the presentation of this paper, Kiir and Machar again fell out in July 2016, leading to Machar again fleeing South Sudan and controversially being replaced by Taban Deng Gai as First Vice-President. These developments have made the situation even more fragile. Fighting between government forces and several armed opposition groups, some loyal to Machar, still rages. Once again, IGAD is leading a process it has dubbed the High Level Revitalisation Forum for the Implementation of the Peace Agreement which aims at achieving recommitment to the 2015 Peace Agreement. At the same time, the IGAD heads of state, the AU and the UNSC have co-operated in marshalling a Regional Protection Force to secure Juba and free up UN peacekeepers to enable them to spread out to the countryside.

The progress made in South Sudan before the event of July 2016 is attributable to the co-operation and complementarity exercised by the IGAD, the AU, the UN and other stakeholders. While this initial success may appear to have been eroded by events post-July 2016, significant hope remains in the IGAD-led process of revitalising the Peace Agreement, backed by the AU and the UN. As this process slowly gains traction, it is

important to note the transitional justice mechanisms provided for under the Peace Agreement and the progress, if any, so far made in their implementation. Notably, the Peace Agreement provides for the establishment of an AU-mandated hybrid court to investigate and prosecute those responsible for international crimes committed during the conflict (United Nations Mission in South Sudan 2015: cap V). The UN Human Rights Office (UNHRO) released a report on 10 March 2016 confirming the massive human rights violations highlighted in the AUCISS report and recommending to the UNSC to consider referring the matter of South Sudan to the ICC should the AU fail to expeditiously establish the hybrid court (United Nations Human Rights Council 2016b). The same concerns have been raised by the Commission on Human Rights in South Sudan established by the UN Human Rights Council in March 2016. The above reports and recommendations are quite significant as they serve to impress upon the AU the urgency of establishing the hybrid court and ensuring its functional efficiency. The AU should not consider this a threat, but should rather embrace the unique opportunity to spearhead an actual African solution towards South Sudan's accountability deficit (Nyagoah 2016). This will serve as a welcome departure from the prevailing state of impunity around the continent to which the AU seems blind. The AU has since made some progress in this regard and drafted the statute for the hybrid court, which statute is currently being considered by the transitional government of South Sudan. However, while the Peace Agreement requires the South Sudanese Parliament to enact the statute, the AU can invoke its powers under article 4(h) of its Constitutive Act and establish the court should South Sudan fail to co-operate expeditiously. The above provision empowers the AU to intervene in a member state in the event of international crimes.

The co-ordination of responses between IGAD, the AU and the UN yielded some degree of success before July 2016. Hopefully, if the same co-operation is afforded to IGAD's latest revitalised efforts, sustainable solutions will be found to South Sudan's complex situation. The continued goodwill of all these actors and the spirit of good faith, mutual respect, co-operation and complementarity are necessary to ensure that South Sudan recommit to the Peace Agreement, co-operates with the hybrid court and ensures the effective operation of the CTRH and domestic traditional justice efforts in order to deliver justice to victims of this senseless conflict and nurture sustainable peace and stability.

7 Conclusion and lessons learnt

The article sought to explore the intractable human rights situation in Sudan and the potential of the current South Sudan crisis to become an intractable human rights situation. In this regard, the article has compared the international interventions and exposed the major points of divergence between the responses in the two situations. While international efforts by different actors, such as the UN and the AU, to solve the Darfur crisis have been largely unco-ordinated, the response to the South Sudanese crisis has been a co-ordinated effort by the sub-regional bloc IGAD, the AU, the UN and the international community in general. The result has been that, while suspicion and a lack of trust between the various stakeholders in Darfur have resulted in the situation becoming intractable with no foreseeable solution, the co-ordination and complementarity in

stakeholders' responses to South Sudan initially resulted in a fragile ceasefire, the formation of a unity government and a shaky beginning of a process to accountability, peace, healing and reconciliation.

Intractable situations, however, can be resolved. While the most effective way is to have preventive policies to prevent the occurrence of intractable conflict, Darfur has long passed that stage. In the case of Darfur, the aim should be to interrupt and try to reduce the intractability. In addressing this, parties should first reach an agreement to permanently end the violence, instead of the current unstable situation where a ceasefire was imposed by the government through military victory. This does not necessarily mean that the situation has been resolved, but it can be reduced while negotiations are ongoing. South Sudan served as a good example of how this could work. A good step in this regard would be for the government of Sudan to stop its support for militia groups taking part in the conflict; to support a demilitarisation of the region and a de-escalation of hostilities. Second, the effort of stakeholders, both inter-governmental and non-governmental organisations, should focus on the development of peace to deinstitutionalise the conflict, that is, to provide an alternative livelihood for those who are the front warriors. In order to address the root cause of the problem and achieve healing, the parties involved in the conflict as well as third parties should aim at policies that can address the grievances that led to the conflict in the first place.

These are processes which to date have not received sufficient attention in the Darfur crisis. The ICC process has been stalled, and even if it were to go ahead, a criminal prosecution may ensure accountability to some extent for those in the highest office, but it would not bring healing and reconciliation to the nation as a whole. The suggestion made above that a comprehensive justice and reconciliation process be set up through the establishment of a special tribunal, in conjunction with a truth and reconciliation commission and a reparations mechanism, may go some way to seeing a consolidation of the dividends of the ceasefire. These efforts, however, can be achieved only if all stakeholders are on board, and given the mistrust which continues to exist between civilians and rebel groups, on the one hand, and the government, on the other, as well as the continued failure of the joint AU-UN initiatives to bring about any real change, this may be a long shot in the case of Darfur. However, a process similar to that in South Sudan, which is led by a sub-regional body with the support of the larger international community, may be the best way to proceed. Such negotiations, however, would have to make a greater effort to ensure that all concerned feel included in the process, and that the outcome results in material improvements for those on the ground.

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Editorial of special focus: Securitisation and its impact on human rights and human security

Anna Krasteva

We are academics who want to change the world.
(Tadjbaakhsh & Cherby 2006: 6)

1 Introduction

No, the articles in this issue of the *Global Campus Human Rights Journal* dealing with securitisation are not a manifesto. If I start the introduction with this provocative statement, it is because it summarises our double aim: theoretical and normative. We have the advantage of not being security scholars. We belong neither to the classic school of thought, nor do we embrace the new conception of security. We quote and share definitions and insights of the Copenhagen School, but do not subscribe to it, nor to its numerous critics. We critically question the securitarian paradigm through the assumed normative lenses of human rights and human security. We understand the critique in a Foucauldian sense as constructing a field of facts, practices and reflections that pose problems to politics and policies.

Why and how – these are the two major lines of the problematisation of securitisation. What are the reasons for the transformation of securitisation into a hegemonic discourse and policy? What are the conditions that made this fundamental change possible and the factors that catalyse and accelerate it? The main focus of the present volume is to examine how securitisation affects human lives and human rights. Human rights are not only the normative 'measure' to assess securitisation, but also to examine the capacity of civil society to produce alternative discourses and mobilise resistance through various forms of civic activism, mobilisations and popular protest. The two lines of research – securitisation and civic resistance – are not structured separately in the special focus part of this issue of the *Journal*, and are interwoven in various case studies.

2 From securitisation as panic politics to the normalisation and hegemonisation of securitisation

2.1 Hegemonisation of securitisation

How does a phenomenon come to be defined as a security phenomenon (Buzan, Waever & De Wilde 1998; Balzach 2016)? Who or what is being

secured and from what (Abrahamsen 2005: 57-58)? Securitisation occurs when an issue 'is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure' (Buzan et al 1998: 23-24). By portraying an issue as a security issue, it removes the issue from ordinary politics to emergency politics or 'panic politics', where it can be dealt with outside the sphere of the rule of law. The constructivist understanding of the very nature of the securitarian fact is crucial for a better understanding of the articles. Our interest is concentrated in two directions: the securitarian turn as the transition from security policy as one public policy among others to its dominant, hegemonic role; and the redefinition of the political by the securitarian turn.

The African article eloquently illustrates the securitarian turn (Appiagyei-Atua et al):

First, during the Cold War era, Africa was inserted into the Cold War politics to fight proxy wars for either the west or the east. As a result, the big powers overlooked human rights and democratic concerns on the continent and focused on promoting their security interests by propping up dictatorial and predatory regimes to do their bidding. The declaration of the 'war on terror' has moved the focus toward a 'risk/fear/threat' project. In response, most African leaders have adeptly exploited this new environment to their advantage by shrinking the political space and criminalising dissent. The securitised environment has done little to solve many of Africa's development problems. Rather, we see the rollback of advances made in human rights, democracy and respect for rule of law.

Several theoretical lessons can be learnt from the African study. The source of securitisation can be different, even opposite – 'from outside' and 'within' – the outcomes and implications are similar and equally negative. The security agenda dominates all other priorities, including development, and thus establishes itself as hegemonic. Human rights, democracy, the rule of law are marginalised. These trends have a larger validity and the study identifies different expressions in various geopolitical regions – from the Balkans to Asia Pacific; and from Latin America to the Arab region.

Hegemonising securitisation establishes itself as the new anti-pluralist ideology. It is anti-pluralist in two fundamental ways. All other policies – migration, integration, labour – tend to be more and more subordinated to the dominant securitarian logic. The classic ideologies – liberalism, conservatism, socialism – coexist peacefully as alternative world views and political values. The hegemonisation of securitisation undermines the ideological pluralism and transforms the very way politics are perceived, understood and managed. The state of emergency and the extraordinary measures lead to the 'the vicious circle by which the exceptional measures attempting to justify the protection of democratic rule are the same that lead to its ruin' (Agamben 2005). The renaissance of Carl Schmitt's (2007) conception of the political testifies of the triple turn: the understanding of politics as politics of enemies; the overproduction of enemies as security threats; the multiplication and strengthening of the borders between 'friends' and 'enemies', conceptualised in the triad Bordering-Othering-Ordering (Houtum & Naerssen 2002).

2.2 Liquefaction of securitisation

Securitisation is the rhetorical strategy of presenting certain issues as security threats in opposition to others (Buzan, Waever & De Wilde 1998). Securitisation as speech act is the most problematised and contested concept (McDonald 2008; Bigo 2002). We do not enter the bipolar theoretical controversy and prefer to interpret it from a different angle. We understand security to become a speech act as theoretical metaphor, marking the transition from 'ontological' to 'liquid' securitisation. Surveillance is the conceptual and political prism for understanding the 'liquefaction' of securitisation.

Lamer examines the interlinkages between securitisation and surveillance in the European context, and argues that the 'implementation of mass surveillance measures in Europe shows that the continent is drifting into a permanent state of securitisation that threatens not only certain human rights, but the very foundation of democratic societies by permanently altering state-society relations'. The surveillance case study illustrates three facets of the transition from 'ontological' to 'liquid' securitisation: the changing object of the security threats; the 'normalisation' of securitisation; the disempowerment of citizens.

'Ontological' securitisation focuses on hard risks and 'objective' threats – wars, war on terror, wars on drugs: 'In 2016, the war on drugs in Mexico became the second most lethal conflict in the world (only surpassed by Syria)' (Lopez). It is characterised by the domination of the most archaic and the most ontological challenge to security – war. The new security threats, such as terrorism and the war on drugs, are also 'translated' into the language of war. In the new epoch of 'liquid' securitisation, everybody could be declared an enemy; everything could be transformed into a security threat; and, hence, surveillance is becoming more and more comprehensive and *en masse*, from one side, and accepted, from another. The changing object of the security threats leads to the *normalisation of securitisation*; to the shift from state of emergency to the normalisation of the exceptional; from 'panic politics' to the nexus securitisation – surveillance and the transition from the 'rule of law' towards the 'rule by law' (Treguer 2016: 7). Previously illegal surveillance practices were increasingly legalised. 'Over time, and repeated often enough, this can create a "new normal"' (Tarrow 2015: 165-166; Lamer). Security is routinised rather than narrowed down to a specific thread that enables emergency measures (McDonald 2008: 570).

Brad Smith, president of Microsoft, sums up the paradox of the surveillance society as follows: 'If you can't plan in private, you can't act in public.' 'People who are watched or who think that they are being watched behave differently from their unwatched selves; they exercise self-control and self-censorship' (Lamer). The permanent state of securitisation threatens the foundation of democratic societies – the civic agency and the sphere of its activity.

The disempowerment of citizens takes a variety of forms: decreasing capacity of deconstructing the securitisation discourses because of a lack of imagination for better alternatives to safeguard human rights while employing surveillance technologies (Dencik & Cable 2017: 778).

2.3 More securitisation – less security

The more securitised the governmental policy, the less security for the citizens. The articles in this issue of the *Journal* exemplify this paradox by a variety of cases. Avetisyan et al provide evidence that the better funded the police is in Armenia, the more crime increases in the country, and conclude that the enhancement and militarisation of police forces are the major challenges to human security.

Two social groups need special protection – vulnerable communities and the activists acting and fighting for the right of all to have rights. The study demonstrates a paradoxical phenomenon: Instead of becoming a privileged target of protection, they are among the most securitised targets.

Hayes et al analyse the impact of securitisation on four marginalised groups in the Asia Pacific: abused children; trafficked women refugees; killed human rights defenders; and harassed lesbian, gays and transgender persons. 'It is difficult to see how the four groups who are attacked by security measures could realistically be conceived as threats given their relative lack of power. Rather, the conclusion must be made that they are attacked through securitisation precisely because of their disempowerment.' Attacking the most vulnerable instead of protecting them is the first paradox that the authors address. The second is the use of illegal or quasi-judicial measures by democratic states: vigilante extra-judicial executions in the Philippines; religious groups' homophobia in Indonesia; and the physical and sexual abuse of children by state security officers in the Philippines.

From the Asia Pacific to the Balkans, Africa and the post-Soviet space, human rights defenders are among the most securitised groups. Krasteva and Vladiljavjevic observe that in South-Eastern Europe, civic and human rights activists are systematically targeted by policies and practices of Othering and Ordering, whereby they are constructed as traitors to national identity and cohesion. The actors of humanitarian activism are ridiculed as promoters of failed multiculturalism and are marginalised in the public space. Lopez concludes that 'in Latin America today criminalisation of human rights defenders is the backlash of bringing complaints against public officials in cases of corruption, or in the context of the investigation of serious violations of human rights, or of international humanitarian law in the context of internal armed conflicts or past democratic collapses'.

If security risks did not exist, securitising agents would have invented them.

Sartre said that if Jews did not exist, anti-Semitism would have invented them. If I paraphrase Sartre, it is to emphasise that securitising agents need security threats in the same intense political and symbolic way as anti-Semitism needs Jews.

The transition from the classic security policy to normalisation and hegemonisation of securitisation is paved by the reversal of the political logic and causality: Security is not introduced in response to a threat, but rather a threat is created to justify the security (Hayes et al). The Asian Pacific case illustrates this major conclusion about the changing nature of legislation and policies: The laws during the Cold War or colonialism are conceived as a response to the threats of communism or self-determination. However, at the end of colonialism or the Cold War, rather

than considering the end of the threat and thus deleting the laws, states went through a process of inventing new existential threats to justify these laws.

The reversed logic of securitisation impacts the beneficiaries: Instead of the state protecting the citizens, the elites start protecting themselves: 'Despite all the funding and serious aid from the Organisation for Security and Co-Operation in Europe (OSCE), the Armenian police have chiefly been focused on ensuring regime survival rather than public order and fighting crime' (Avetisyan et al). The triad of overproduction of threats, authoritarian leaders and elites, and undemocratic regimes constitutes the vicious circle of the hegemonised securitisation. The article dealing with the post-Soviet context illustrates how securitisation techniques are mobilised by (semi)-authoritarian leaders to ensure regime endurance. The article about the Western Balkans examines the populist misuses of security threats and the passage of the populist, nationalist and authoritarian politics from the periphery of the political scene to the mainstream.

3 Are emancipatory alternatives to hegemonised securitisation possible?

'No emancipatory alternative, no critical security studies': Hynek & Chandler (2013) emphasise that a fundamental aim of critical security studies is to elaborate alternatives to securitisation. The authors contributing to the present issue develop them from two perspectives, human security and active citizenship, both emancipated from the securitised state.

3.1 Human security as human right in the epoch of hegemonic securitisation

Securitisation means securitisation. Today tautological statements make headlines.¹ If I paraphrase Teresa May, it is to emphasise that the hegemonisation of securitisation aims at delegitimising alternative discourses, especially those of a normative nature, such as human rights. The choice of human security as a key concept of our study of securitisation is substantiated by three arguments. First, there is a need to adequately develop the language of human rights in the time of securitisation; second, the critical implementation of the concepts to test and verify its sphere of validity; third, it is imperative to set normative standards to security policies.

Human security is the 'translation' of human rights in the context of hegemonic securitarian discourse. Human rights are the normative discourse of the 'end of history', of the non-contested legitimacy of liberal democracy, and of the globalisation of democratisation. Today, securitisation, mainstreaming of populism, elected authoritarianism and illiberal democracies are the new games in town. For a normative discourse to be accepted in the new political arena of hegemonic

1 Teresa May: 'Brexit means Brexit.'

securitisation, it should incorporate ‘security’ in the main message (Annan 2000):

Human security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfill his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human – and therefore national – security.

Human security conceptualises our approach to security from below, ‘bottom-up’, from the perspective of citizens: ‘Security is not about how a threat is conceived by a state, nor about the capacity and legitimacy of the security forces, but it is about the people who suffer the consequences’ (Hayes et al).

The second perspective of our constructive problematisation of the human security concept is to test it in different contexts (Avetisyan et al):

The Belarusian case is especially interesting as it testifies against the optimistic assumptions that human development and human security are mutually reinforcing. Belarus has the highest HDI in the post-Soviet space and literally is knocking at the basket of “Very High Human Development”. The achievements in economic security, accessible healthcare and education wrapped in President Alexander Lukashenko’s socially-oriented economy building (Belta 2017) is willfully opposed to civil-political freedoms.

The third dimension is the citizens’ empowerment through human security as normative standard (Appiagyei-Atua et al):

The shift in focus from the state to the individual affirms the recognition of the latter as possessing legal personality in international law, unlike previously where they could only act on the international plane through their states, as enunciated in the concept of diplomatic protection. Through this extension of legal personality in international law, the individual is equipped to bring action against his or her own state as well as other states.

3.2 Citizenship – Emancipated from the securitised state

A second perspective of the citizens’ empowerment for civic resistance to securitisation is through the concept of citizenship. The study unfolds in two steps. The first is the critical deconstruction of the concept of audience in the securitisation theory: ‘The audience does more than merely sanctioning a securitising move. The audience can actually fulfill different functions, namely, providing moral support and supplying the securitising actor with a formal mandate (such as a vote by the legislature), without which no policy to address the threat would be possible’ (Balzacq et al 2015: 500). The authors of the present study do not subscribe to this homogenised understanding of audience for two reasons: It transforms the citizenry into passive spectators of securitisation; and it undermines the capacity of civic resistance to hegemonised securitisation. The active understanding of citizens in their capacity of imagining and creating alternatives is conceptualised through citizenship and studied comparatively by distinguishing contestatory and solidary citizenships (Krasteva).

4 Conclusion

With 17 countries, and seven geopolitical regions – Latin America, Western Europe, South-Eastern Europe, both the Western and Eastern Balkans, Africa, the Asia Pacific and the Arab region – the coverage is global, and the articles in this issue collectively satisfy any hunger for geopolitical diversity.

Just as security has to be understood as a process of securitisation/insecuritisation/desecuritisation, so has freedom to be understood as a process of freedomisation/unfreedomisation and defreedomisation (Bigo 2006: 38).

The authors of the human security share the dynamic logic of hegemonisation of securitisation, but opt for refreedomisation, for the empowerment of human rights defendants and active citizens for deconstructing and resisting securitisation, for imagining alternative discourses and policies. Because we are also academics aspiring to change the world.

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Introduction to Global Classroom on Securitisation

Manfred Nowak*

To provide human beings with the possibility to live in security is the overarching goal of the international order, as established by the United Nations (UN) and other international organisations in reaction to the Great Depression, two World Wars and the Holocaust. It also constitutes the basis of the international human rights regime. The human right to social security obliges states to create a system of social justice which enables human beings to live in freedom from want and poverty.

In the 'Agenda 2030', the heads of state and government of all member states of the UN have solemnly proclaimed 17 Sustainable Development Goals, above all to eradicate poverty and to leave no one behind. The human right to personal security requires states and the international community to create an environment in which all human beings can live in freedom from fear and violence. The UN Charter prohibits any use of military force against another state, and entrusts the UN Security Council with the exclusive power to prevent armed conflicts and to react with all available means to any threat or breach of international peace and security. Within their own borders, states have been entrusted with the monopoly of the use of force in order to protect their own populations against violent crime, terrorism, domestic violence, natural disasters and other threats to their human and personal security and safety. However, states have to take into account that any measures taken to protect the right to personal security must comply with other human rights, above all the rights to privacy, personal liberty and integrity, as well as the freedoms of movement, speech, assembly and association.

Since the end of the Cold War, and in particular since the terrorist attacks of 11 September 2001, we have been witnessing a dangerous trend towards securitisation and militarisation which seriously threatens and violates many human rights. In the name of fighting real or perceived threats to our security, states increasingly take measures that disproportionately restrict and undermine human rights. One of the root causes of this development is the globalisation driven by neoliberal economic policies. Radical policies of deregulation, privatisation and minimising the role of the state have led to global economic and financial crises; climate change; failed states; economic inequality; corruption; organised crime; armed conflicts; terrorism; and other forms of violence which create a feeling of economic, social and personal insecurity among many sectors of our societies.

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The rise of private military and security companies (PMSCs) is a direct consequence of far-reaching privatisations, which have even reached the administration of justice, prisons, the police, military and intelligence agencies. PMSCs have a vested interest in spreading a feeling of insecurity among the population in order to offer their services for profit. Armed conflicts, organised crime and terrorism are real threats, but responding to these threats by disproportionate and military means increases the level of violence and human rights violations rather than addressing the underlying causes. Experience shows that the 'war on drugs', first declared by United States (US) President Richard Nixon and later re-enforced by other political leaders, including President Duterte of the Philippines, has led to a rise in drug-related crime. Similarly, the global 'war on terror' declared by US President George Bush has not only led to serious human rights violations, including arbitrary detention, disappearances, excessive surveillance and torture, but it also stimulated terrorism instead of defeating it. The same can be said about any attempts of fighting criminality by a 'war on crime' rather than by combating the underlying social causes.

The Global Classroom on 'Securitisation and the Impact on Human Rights and Democracy: Human Security in a Time of Insecurity', organised by the Institute for Human Rights and Peace Studies at Mahidol University in Bangkok from 22 to 26 May 2017 as an activity of the Global Campus of Human Rights, brought together professors, experts and students from seven Master's Programmes in Human Rights and Democracy from all world regions with the aim of analysing and discussing the phenomenon of securitisation from a global and different regional perspectives. The participants agreed that there are real threats to our security, such as armed conflicts, organised crime and terrorism. However, addressing the root causes of these phenomena might be a better strategy than simply fighting the symptoms by means of securitisation and, thereby, contributing to the vicious circle of rising violence. In addition, many case studies provided by students, experts and professors confirmed the theory that states also react to perceived or constructed threats by means of securitisation, such as criminalisation, excessive surveillance, restrictions to mobility and migration, arbitrary detention, increased presence of security forces, restricting the space of civil society and the freedom of journalists and other human rights defenders. A typical example of perceived threats leading to securitisation are migrant workers and refugees in Europe, the United States, Australia and many other states, including in the Asia-Pacific region. Examples from Latin America include the perceived threat by indigenous peoples, who defend their ancestral lands and their indigenous culture against the extractive industries, land grabbing and other interference by transnational corporations. Many case studies show that securitisation primarily is an excuse of states to fight perceived threats and limit human rights in order to defend business interests in the global economy. Often, vulnerable groups, such as refugees and migrants; indigenous peoples; minorities; the lesbian, gay, bisexual, transgender, intersex and questioning (LGBTIQ) community; and poor people, are most directly affected by securitisation and are used as scapegoats to stimulate fears.

The participants of the Global Classroom agreed that securitisation threatens human rights and leads to an erosion of democracy. What is needed, instead, is to start a process of de-securitisation in order to break

the vicious cycle of increasing violence, to address the root causes of real threats and to return to a more rational discourse regarding perceived and constructed threats to our human right to security.

State security, securitisation and human security in Africa: The tensions, contradictions and hopes for reconciliation

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Abstract: External actors have predominantly driven the securitisation agenda in Africa with the architecture traceable to Africa's immediate post-independence past. This article theorises about a double-faced securitisation process in Africa – 'securitisation from outside' influencing 'securitisation within'. The theoretical framework is used to identify three phases of securitisation in Africa. The first phase started during the Cold War era when Africa was inserted into the Cold War politics to fight proxy wars for either the west or the east. As a result, the big powers overlooked human rights and democratic concerns on the continent and focused on promoting their security interests by propping dictatorial and predatory regimes to do their bidding. The second phase connects with the fall of the Berlin Wall, which brought hope of ending the securitised environment in Africa with its attendant expansion of the political space for civil society and political party activism to flourish. This development resulted in the emergence of the African Union to replace the Organisation of African Unity and to introduce principles that shifted from a state-centred to a human-centred security focus. However, the human security project could not work due to tensions with the securitisation of the development agenda being promoted by the donor community. The third phase is the declaration of the 'War on Terror' which has moved the focus toward a 'risk/fear/threat' project. In response, most African leaders have adeptly exploited this new environment to their advantage

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by shrinking the political space and criminalising dissent. The securitised environment has done little to solve many of Africa's development problems. Rather, we see the rollback of advances made with regard to human rights, democracy and respect for the rule of law. The theoretical framework is also employed to do a case study of securitisation in three African countries – Uganda, Nigeria and the Democratic Republic of the Congo.

Key words: securitisation; security; human rights; human security; sovereignty

1 Introduction

The issue of securitisation generally has been analysed from a security, political science and international relations perspective (McSweeney 1996; Baldwin 1993). The present project seeks to add an international law/international human rights dimension to the discourse and apply it in the African context. It analyses securitisation within a Hobbesian framework of state sovereignty as well as the use of force, legal personality and human security.

The article first examines the traditional understanding of security and places the discussion in the context of interstate and intrastate use of force. This is followed by a discussion of securitisation in which it is contended that this may be divided into two categories, at least in the African context. That is, 'securitisation from outside', which connects with interstate security/use of force; and 'securitisation within', relating to intrastate security/use of force. The article argues that securitisation from outside influences, generates or complements securitisation in most African countries and in most securitisation scenarios. The next segment of the work deals with sovereignty, which is also grouped into the internal and external and is linked to interstate/securitisation from outside and intrastate/securitisation within, respectively.

The Hobbesian framework describing the dire conditions in the state of nature, the social contract made by the citizens to transfer all rights to the Leviathan and the absolute notion of sovereignty granted the Leviathan are utilised to depict the contentions made by securitising governments against the existing human rights framework and, by extension, democratic governance.

This is followed by a practical narrative of the situation of securitisation that has engulfed Africa from the time of independence, through colonial rule to the present and the impact of securitisation from outside on securitisation within. The article focuses on Africa generally through a discussion of the Organisation of African Unity (OAU) and its successor, the African Union (AU), followed by specific case studies on three African countries – Uganda, Nigeria and the Democratic Republic of the Congo (DRC). The work finally turns to human security as providing the panacea for securitisation in Africa.

2 Traditional security

The conventional idea of national security has centred on the state as the referent object with the military as the sector. The assumption is that the realisation of state security guarantees the security of its citizens. It relies,

among others, on the absolute sovereignty of the state to counter threats from outside sources (that is, other states) (Morgan 2007: 13; Lin 2011).

This traditional understanding of security enmeshes with the realist perspective on international relations which gives primary consideration to states, as the dominant actors in the international arena, that compete for power and security as a means to promote their self-interests, in the face of anarchy (the absence of a centralised form of governance on the international plane) (Morgenthau 1978; Waltz 2008). To attain security, states seek to increase their power and engage in power-balancing acts to deter potential aggressors (*Stanford encyclopedia of philosophy* 2010). In this scenario, there is little room for morality (Machiavelli 1985).

Some of the weaknesses inherent in the realist approach to security studies are exposed by the critical security studies school which sees security as a socially-constructed concept. The critical school also concludes that the state itself and its armed forces are a potential source of insecurity, rather than a guarantor of security (Krause & Williams 2003: 33).

Equally important to mention is Buzan's reconceptualisation of security to cover a broader, more holistic framework (Buzan 1991: 20) to incorporate concepts such as regional security, or the societal and environmental sectors of security and how people 'securitise' threats. By these means, Buzan is able to identify critical issues that affect security, such as political, military, economic, societal and environmental factors (Buzan 1991). He also seeks to establish the intricate and complex relationship that exists among these variables, which involves the individual, the society and the state. He argues (Buzan 1991: 432-433):

Security is taken to be about the pursuit of freedom from threat and the ability of states and societies to maintain their independent identity and their functional integrity against forces of change, which they see as hostile. The bottom line of security is survival, but it also reasonably includes a substantial range of concerns about the conditions of existence. Quite where this range of concerns ceases to merit the urgency of the 'security' label (which identifies threats as significant enough to warrant emergency action and exceptional measures including the use of force) and becomes part of everyday uncertainties of life is one of the difficulties of the concept.

Adding to this, the article contends that national security does not concern itself solely with interstate but also with intrastate conflicts (for example, civil wars). Further, the execution of external aggression is not limited to states alone but also involves non-state actors such as the Taliban, Islamic State in Iraq and Syria (ISIS), Al Shabab and Boko Haram (Gandhi 2001).

Further, the traditional understanding of security focuses on the use of force which, under article 2(4) of the United Nations (UN) Charter, is limited to the use of military force by one state against another. However, in the article 'use of force' is applied in the broad sense to cover not only the use of military force, but also economic force or other methods of non-military coercion, as contended in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Declaration).

Paragraph 1¹ of the Declaration provides that ‘armed intervention *and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements*’ are in violation of international law.

The Declaration (1970: para 2) further provides that

[n]o state may use or encourage the use of economic political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

In the context of the article, use of force is applied to generate, heighten or supplement internal securitisation. That is what constitutes the exportation or externalisation of securitisation, which has become the norm in Africa, occasioned by its dependence on the donor community which, in turn, has compromised the freedom to control the designing and implementation of their domestic/foreign policies. That is the essence of securitisation from outside or externalisation of securitisation in Africa. This postulation deviates from the Copenhagen School’s understanding of securitisation which is portrayed as purely generated within the borders of the state. The article seeks to bring both sources of securitisation to light, while emphasising that the two are interlinked but separate processes.

Intrastate use of force, on the other hand, is described as sustained political violence that takes place between armed groups representing the state, and one or more non-state groups (Byman & Van Evra 1998: 24). It could be civil war, political instability, vigilantism, and so forth. In the context of securitisation, this represents the struggle of civil society to challenge the excesses of the state in order to preserve and expand the existing democratic space from being captured or recaptured to protect the predatory machinations of the state.

3 Securitisation

The securitisation model adopts a Hobbesian approach to solving the security problem in a country. It equates the affairs of the state as having degenerated to that which existed in Hobbes’s anarchic ‘state of nature’. In this situation, because of the absence of law and order through the enjoyment of the ‘right to all things’, an endless ‘war of all against all’ (*bellum omnium contra omnes*) ensued (Warrender 2002). The result, in the words of Hobbes, is that the life of man has become ‘solitary, poor, nasty, brutish and short’ (Hobbes 1909-1914). To save this situation, the members of the polity agree to establish a civil society, through a social contract based on the surrender of all rights to an absolute sovereign, the Leviathan (who may represent one man or an assembly of men), in return for security. Although the sovereign’s edicts may well be arbitrary and tyrannical, Hobbes saw absolute government as the only alternative to the terrifying anarchy of a state of nature (Goldie & Wokler 2006: 347).²

1 Under the theme ‘The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter’ (our emphasis).

2 A few scholars have conducted a discussion of Hobbes in the context of securitisation. See Baldwin (1997) and Taureck (2006).

Applying this realist model of anarchy to the securitisation architecture, the securitising state uses force to deal with the imagined threat through a Levianthic approach – the promotion of human rights through a denial of human rights, covering both military and non-military uses of force.

Thus, juxtaposing the Hobbesian approach to the Copenhagen School's view of securitisation, this School describes security as 'speech acts' that designate particular issues or actors as existential threats requiring emergency measures and justifying actions outside the normal bounds of political procedure (Buzan, Waever & De Wilde 1998). This situation then justifies emergency actions to do whatever is necessary to 'remedy' the situation (Okolie & Ugwueze 2015: 28). In their view, security practices are specific forms of social construction which narrowly address the question of 'who or what is being secured, and from what' (Abrahamsen 2005: 57-58). In the words of Buzan, Weaver and De Wilde (23-24):

Security is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics. Securitisation can thus be seen as a more extreme version of politicisation. In theory, any public issue can be located on the spectrum from non-politicised (meaning that the state does not deal with it and it is not in any other way made an issue of public debate and decision) through politicised (meaning that the issue is part of public policy, requiring government decision and resource allocation or, more rarely, some other form of communal governance) to securitised (meaning the issue is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure).

The Copenhagen School's securitisation thesis focuses largely on the intrastate use of force by a state to supposedly promote or guarantee the security of the state. Referring to Buzan, this means that the issue is internally generated. Therefore, national security, at least with reference to the case study, is seen as 'state security', and 'state security' is seen as the security of those who hold political power (Afeni 2016: 115). Somewhere in that mix, individual security and human rights are forgotten.

Thus, it is the authors' opinion that securitisation is a redefinition of traditional security to foster the agenda or security interests of a particular political or economic elite in order to perpetuate themselves in power or enable the achievement of a particular objective which is against or is not in the larger interests of the state. Yet, this narrow, self-interested objective is camouflaged as a national security issue in order to gain legitimacy from the citizenry.

4 Sovereignty

Security, especially in the context of non-intervention and use of force, is strongly related to sovereignty. Thus, just as there are interstate and intrastate dimensions of security, so there are internal and external aspects of sovereignty.

The contention of securitising governments to have a hands-off approach to deal with internal disorders leans towards the application of the absolute internal sovereignty approach, as expressed by Hobbes, for example. In his *Leviathan*, Hobbes identifies 12 principal rights accruing to the sovereign which include, first, that the fact that a successive covenant

cannot override a prior one, and the subjects cannot (lawfully) change the form of government (Hobbes 1909-1914). The second principle according to Hobbes is that because the covenant forming the Commonwealth results from subjects giving to the sovereign the right to act for them, the sovereign cannot possibly breach the covenant and, therefore, the subjects can never argue to be freed from the covenant because of the actions of the sovereign.

Article 2(4) of the UN Charter affirms the absolute state sovereignty principle expressed in the classical definition (of sovereignty) by Kantorowicz (1957) as the exercise of '*supreme authority within a territory*'. This understanding of sovereignty subsumes popular sovereignty under the rubric of state security and is responsible for promoting securitisation.

The concept of sovereignty in international law also connotes external sovereignty which establishes the basic condition of international relations (Prokhovnik 1996: 7). This position seems to reflect Vattel's view on sovereignty as observed by Beaulac (2003: 237), namely, that '*Droit des Gens attempted the externalisation of power, which was transposed from the internal plane to the international plane*'.

Yet, internal and external aspects of sovereignty are not mutually exclusive. They coexist and reinforce each other. It means that sovereign authority, although exercised within borders, by definition is also exercised with respect to outsiders, who may not interfere with the sovereign's governance. Internal sovereignty equals jurisdiction which is defined by Shaw as concerning

the power of the state under international law to regulate or otherwise impact upon people, property and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs.

It is about the freedom that a state has to operate within its boundaries but within the bounds of international law.

The traditional notion of securitisation, as propounded by the Copenhagen School, thrives in the context of intrastate use of force which connects with the application of the absolutist notion of internal sovereignty. However, in the context of the article, there is also external use of force to influence or generate securitisation from within which compromises the external sovereignty of the state. Thus, at least in the African context, one can talk of internal and external securitisation working together, the one influenced by the other.

5 Human rights and security

International human rights law provides a carefully-calibrated framework designed to enable governments to balance national security and human rights. For that matter, human rights are not absolute rights but are framed in a manner that the rights holders (individuals and other non-state entities) are limited in the ways they can enjoy their rights. Therefore, every right provided for is subject to general and specific limitations. At the same time, the balance is designed in such a manner as not to place an undue burden on the duty bearer (the state) in seeking to perform its duties to respect, protect and fulfil human rights for their citizenry. The

following structures, measures and processes have been inserted to give the state some flexibility in going about its duty of protecting rights: the recognition of claw-back clauses; the rights of state parties to a treaty to issue reservations; the application of the concept of margin of appreciation; the derogation of some rights during periods of emergency; and the progressive realisation of some economic, social and cultural rights.

Yet, securitising governments would contend that the human rights framework as it exists is a stumbling block to maintaining the security of the state because the balance is tilted in favour of human rights over national security. Therefore, the fetters placed on the state should be relaxed so that individuals and other non-state actors will not be able to hide under the cloak of human rights to commit various atrocities (Ubutubu 2005: 105). Thus said, the securitising state should be given more flexibility or unlimited fetters to place the state under permanent or prolonged pseudo-states of emergency which will allow for the clampdown of even non-derogable rights (McGoldrick 2004: 380).

However, the idea of a state of emergency being clamoured for by the securitising state is different from what obtains in international or constitutional law. States have five conditions to meet to justify derogation from their obligations during periods of emergency:

- (1) The state party must have officially proclaimed a state of emergency.
- (2) The emergency must threaten 'the life of the nation'.
- (3) The measures should be limited to those 'strictly required by the exigencies of the situation' and should 'not [be] inconsistent with its other obligations under international law'.
- (4) The measures should 'not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin'.
- (5) There can be no derogation from articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18 of the International Covenant on Civil and Political Rights (ICCPR).³

Derived from customary norms in international law, these are principles common to the doctrine of necessity; the principles of exceptional threat; the non-derogability of fundamental rights; and proportionality (Oraá 1999: 413). However, the securitising state wishes to have these limitations watered down or simply removed.

Interestingly, in the context of the African Charter on Human and Peoples' Rights (African Charter), there is no derogation clause. In other words, even during periods of emergency, all rights are to be fully respected. Therefore, in the case of *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,⁴ it was held that 'even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter'.

3 These are the right to life (article 6); protection against torture or cruel, inhuman or degrading treatment or punishment (article 7); slavery, slave-trade and servitude (article 8); imprisonment on the ground of inability to fulfil a contractual obligation (article 11); non-retroactivity of criminal laws (article 15); the right to recognition as a person before the law (article 16); and freedom of thought, conscience and religion (article 18).

4 (2000) AHRLR 66 (ACHPR 1995).

Yet, these basic criteria most often are not met because the standard is lowered to cover every disturbance or catastrophe as a public emergency which threatens the life of the nation, or the threat is imagined or exaggerated or sometimes artificially manufactured by the ruling government to justify the application of emergency powers. Even if it meets the strict test of an emergency, the restrictions required to be observed in order to protect life and property are not respected.

6 Securitisation and human security

Apart from the reference in the UN Charter to national security in article 2(4), it also refers to human security which is expressed, among others, in article 1(3), namely, that one of the purposes of the UN is

to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

The notion of human security introduces a new and important dimension to the security and human rights/democracy and development debate. It places the emphasis on the individual, as opposed to the state, as the referent and the sector as non-military. The threats posed to the individual in the human security framework include diseases; environmental problems; the violation of human rights; and bad governance. The security of the state depends first on the security of the individual. In other words, human security holds the key to national security. Therefore, popular sovereignty holds the key to ensuring state sovereignty. The human security discourse is supported by Buzan's broadened conception of factors that go into security (Buzan 1991)

7 Securitisation within the Organisation of African Unity

According to Tiekou (2007: 26), the OAU, which was adopted in May 1963 by then independent African states, 'focused primarily on legitimising and institutionalising statehood in Africa. [Therefore] protection of states and governing regimes in Africa became the referent of pan-Africanism' (Tiekou: 26). Consequently, they sidelined human rights and democracy on the grounds of there being obstacles to forging national identity, stabilising the fragile nation-state and attaining rapid development (Obaid & Appiagyei-Atua 1996: 819).

Keba M'Baye, the father of the African Charter, for example, wrote (M'Baye & Ndiaye 1982: 599):

Thus, the African governments appear clearly to have sacrificed rights and freedoms for the sake of development and political stability. This situation can be explained and even justified. In mobilising the masses in order to secure economic and social development, everyone's attention is directed exclusively towards the prospect of improved standards of living. Inaction or idleness thus came to be regarded as an infraction and the exercise of certain freedoms, even in the absence of any abuse, an attack on public order.

The 'securitised' environment thereby created provided fertile grounds for the insertion of Africa into the Cold War politics to fight proxy wars for

either the west or the east, that used the securitisation as a tool to achieve a particular ideologically-inclined foreign policy objective. This is where the extranationalisation of securitisation (securitisation from outside) comes into play, resulting in the breach of the internal sovereignty of African states and orchestrating or complementing the institutionalisation of intrastate securitisation (securitisation within). Consequently, the 'big powers' overlooked human rights and violations of democratic principles on the continent and focused on promoting their security interests, which involved supporting dictatorial governments, and relying on predatory regimes to do their bidding.

8 AU and securitisation in the globalisation era

The collapse of the Soviet Union and the creation of a unipolar world following the fall of the Berlin Wall led to the demise of the OAU and the coming into being of the AU in 2002. The end of communism ushered the securitisation project in Africa into a new phase when the west sought to project its capitalist triumphalism over communism to export its 'instant capitalism, instant democracy, instant prosperity' agenda to Africa and elsewhere (Appiagyei-Atua 2002). As noted by Clinton (1994), for example, 'the best strategy to ensure our security and to build a durable peace is to support the advance of democracy elsewhere'. It sought to secure this arrangement by tying assistance to the pursuit of this goal, thereby securitising (from outside), democracy and development in Africa (Van Graan 2013; Atwood 2013).

While some achievements were made through the re-introduction of democracy and human rights in most African countries, it did not take long for African leaders to find ways around the limitations placed on constitutional governance. This phenomenon underlies the securitisation without influencing securitisation within. The result has been a dip in the continent's democratic credentials with the growing increase in unconstitutional changes of government – resurgence in military *coups* (Barka & Ncube 2012: 1); the doctoring of constitutions to allow for third or indefinite terms; the refusal by incumbents to step down after losing elections; and election fraud to favour incumbents (De Walle & Butler 1999). As Appiagyei-Atua (2015) argues:

Many citizens of the global south now have an ensemble of rights and freedoms enshrined in their national constitutions, yet rights violations are rife. In many countries of the global south, for example – and especially in Africa – governments resort to vote rigging, vote buying and altering the constitution to extend their stay in power.

Democracy has further been undermined after the events of 11 September 2001 by a shift to a paradigm of security first aid conditionality (Donnelly 2007). Through this securitisation project, dealings and interactions with Africa have shifted from the category of 'development/humanitarianism' to that of 'risk/fear/security' (Abrahamsen 2005: 56). For example, in its National Security Strategy document, released after the September 2001 attacks, the United States of America (US) identified Africa's underdevelopment and instability as threats to counterterrorism. In an effort to change the status quo, the new securitisation from outside agenda focuses on strengthening and establishing state structures to combat terrorism. As an example, the Millennium Challenge Account (MCA) was

established a year after the September 11 attacks to 'allocate aid based on previous good performance criteria and on presumed efforts by recipient countries in the war on terror' (Cammack et al 2006: 33). The focus now is on traditional security concerns and state capabilities at the expense of other national needs (Van Wyk 2007: 39; Aning 2007: 7).

Thus established, Africa's securitised space thrives on the collaborative-antagonistic relationship with the US (and its allies) whereby the donor community, on the one hand, would seem to support democracy and human rights, but at the same time give out military assistance and other support to dictators and human rights violators (Appiagyei-Atua 2015).

The rest of the work now focuses on some case studies of Uganda, Nigeria and the Democratic Republic of the Congo (DRC). These case studies affirm the thesis that the securitisation project in Africa is externally driven and involves the externalisation of securitisation from abroad to generate, heighten or supplement internal securitisation.

9 Securitisation in Uganda

Uganda gained independence from Britain in 1962. After periods of political instability and military dictatorship, the National Resistance Army (NRA) ultimately captured power in 1986 through a military coup and metamorphosed into the National Resistance Movement (NRM). Responding to the wind of democratic change that blew across Africa after the fall of communism, the NRM established a no-party system of governance in Uganda in 1996 by holding the country's first presidential elections in many years, which was won by its leader, Yoweri Museveni. Finally, in 2005 Uganda transitioned into multiparty politics through a referendum held on 28 July (Daily Monitor 2016). Museveni has since then won all presidential elections held, the most recent being in February 2016.

The ability of the NRM to hold on to power is attributed to its capacity to exploit the weak security architecture that Uganda has inherited since independence and its focus on repairing and improving it to ensure peace and development in the country. Thus, the 'speech act' that posed a supposed existential threat to Uganda was a lack of security. This is exemplified by Alice Lakwena and her Holy Spirit Movement and later Joseph Koni and the Lord's Resistance Army, which fought brutal civil wars in Northern Uganda (Behrend 2000). The NRM adeptly executed this agenda by trumping security that must be fought for, maintained and guaranteed over and above human rights. Consequently, the coercive arm of the state has been strategically positioned and continually strengthened to maintain its hegemonic influence over the people (Gramsci, Hoare & Smith 1971). By these means, security has become the smoke screen, with the support of a Constitution that is often breached to perpetrate and perpetuate corruption, nepotism, legal predation, and so forth, to keep the NRM in power.

Consequently, the government's military budget has been substantial and their operations shrouded in mystery. The Ministry of Defence Forces withdrew approximately US \$740 million from the Bank of Uganda without parliamentary approval to purchase military equipment from Russia. The Ministry's Permanent Secretary, when summoned before the

Public Accounts Committee of Parliament, offered no explanation for the purchase, citing 'orders not to talk about that particular transaction' (The East African 2011). The President justified the purchase to members of the NRM caucus as important for the country to strengthen its defence forces and protect itself from terrorism (Daily Monitor 2011). The budget for defence in the 2017 budget saw an increase in defence spending by over sh400b (27 per cent) from sh1.5 trillion to sh1.9 trillion. At the same time, the budget for health was slashed from 1.8 trillion (8,9 per cent) allocated in the previous financial year to 1,2 trillion (5.7 per cent), a figure almost 200 per cent lower than the minimum 15 per cent African governments committed to provide in their budgets for health in the 2001 Abuja Declaration and Frameworks for Action on Roll-Back Malaria (Mulondo 2017).

In Uganda, securitisation has been used as a powerful tool to 'facilitate' democracy for those in power. For example, during the run-up to the 2016 elections, in violation of the Constitution and the Uganda Police Force (UPF) Act, the UPF recruited a volunteer force called 'crime preventers' to complement the police in monitoring and reporting incidents of crime under the framework of community policing. However, these 'volunteers' were no more than party foot soldiers appointed to facilitate the return of the NRM to power. They are reported, among others, to have 'acted in partisan ways and carried out brutal assaults and extortion with no accountability, according to Human Rights Watch' (Human Rights Watch 2016).

Securitisation allows security forces to utilise wide powers to search, detain and arrest in order to preserve state security. In 2013, officials from the military police service raided the office of General David Sejusa and removed computers and files, among other objects. The raid followed General Sejusa's letter alleging that there were plots to assassinate some military officials opposed to President Museveni's plans to hand over power to his son, Brigadier Muhozi (known as the Muhozi Project), and that these plots ought to be investigated.

In connection with the Muhozi Project, the police force raided the premises of the Daily Monitor newspaper in search of a copy of General Sejusa's letter, describing the premises as a crime scene. According to Aljazeera (2013), the Minister for Information at the time, Mrs Mary Okurut, supported the raid on the basis of national security:

The General's utterances had unfortunately stirred national anxiety, tended to generate public disaffection against some officers in the UPDF [Uganda People's Defence Forces], as well as the First Family. This anxiety has the negative consequence of undermining national security.

The Ugandan authorities have also targeted human rights, democracy and governance civil society organisations as security threats, labelling them as partisan and supporters of 'regime change'. To restrict and control their activities, Uganda's Non-Governmental Organisations Act (2016) was enacted. Section 44(d) of this Act states that '[a]n organisation shall not engage in any act which is prejudicial to the security and laws of Uganda'. However, acts prejudicial to the security of Uganda are not defined, leading to fears that the ambiguous wording of the section may be used to restrict association rights (Human Rights Watch 2012). One human rights defender in Uganda reacted that the law promotes 'the erroneous view of

the sector as a security threat rather than a development sector' (Fallon 2016).

In addition, in 2013, Parliament enacted the Public Order Management Act (POMA) to regulate the conduct of public meetings. This Act was used by the police force, during the run-up to the February 2016 general elections, to violently arrest and or disperse opposition protests with the excuse that they did not meet the requirements under section 5 and posed a threat to national order.

The US counterterrorism war has been extended to Uganda (Fisher 2012: 404). Uganda entered into a bilateral agreement with the US on fighting terrorism, resulting in the 2002 Suppression of Terrorism Act which carries a mandatory death penalty for terrorists. The Act was amended in 2015 to broaden the definition of terrorism to include 'any act prejudicial to national security or public safety'. However, the Act does not define national security or the prejudicial acts. Due to this ambiguity, it is prone to abuse (Daily Monitor 2016). In addition, counterterrorism has been used to justify a crackdown on dissent, and arresting members of political parties. Dr Kizza Besigye of the Forum for Democratic Change party has on numerous occasions been arrested on terrorist-related charges. In 2005, he was charged with terrorism for allegedly being linked with the rebel Lord's Resistance Army (The Guardian 2005).

In conclusion, contrary to the principles of the rule of law, the Ugandan government does not adhere to legal processes, principles of accountability and the protection of human rights where it alleges that its actions are in the interests of national security. The Ibrahim Index of African Governance (2016) in its 2016 Report revealed a decline in the rule of law in Uganda, and this could be attributed to securitisation.

10 Securitisation in Nigeria

In 1960 Nigeria gained independence from British colonial rule. It experienced two *coups d'état* in 1966, culminating in the Biafran War in 1967 in which members of the Igbo ethnic community unsuccessfully sought to secede from the rest of Nigeria (Kirk-Green 1971; Madiebo 1980). This insurgency movement has generated others of its kind throughout the political history of Nigeria, all these situations having been securitised. One may mention, in more recent times, the rebellion in the Niger Delta and the Boko Haram insurgency mostly centred in the north-eastern part of Nigeria. However, as noted by Okolie & Ugwueze (2015: 33):

Prior to the Boko Haram threat, several issues had been securitised as [the] security situation in Nigeria continued to deteriorate. The perceived marginalisation of the south-east geopolitical zone was securitised, as MASSOB became a potent security threat. Again, the south-west geopolitical zone is equally nursing the feeling of unfair treatment. Hence the militant wing of Odua People's Congress (OPC) had been on the prowl. Also, following the annulment of the June 12, 1993 presidential election believed to have been won by late Chief MKO Abiola, the Yoruba political elites used the umbrella of NADECO to unleash unmitigated attacks on the military junta led by late General Sani Abacha. The state was heavily challenged as the survival of the Nigerian state hanged in symphony.

Okolie & Ugwueze (2015: 29) contend that the cause of insecurity in Nigeria may be attributed to 'agony, poverty, malnutrition, malnourishment, alienation and suffocation'. This, in essence, is non-military use of force by the government or its surrogates which ends up in poverty production (Appiagyei-Atua 2008: 4). Okolie & Ugwueze (2015: 33) contend that insecurity in Nigeria can also be situated

[w]ithin the character of the political elite[s] that control ... state power and the quest to use such power for material accumulation; in doing so, anything goes ... including formation and empowering of ethnic militias (by politicians) who ipso facto would be the vanguard for actualising what was impossible in a civilized process through a backdoor act.

These factors are responsible for generating 'reactionary and rebellious counter-reactions' which manifest themselves in 'unprecedented crimes and in the emergence of insurgent groups' (Okolie & Ugwueze 2015: 29).

There is also the role of multinational corporations in promoting or provoking insecurity as part of the securitisation from outside network. In this regard, the activities of Shell is worth mentioning. Apart from covering up oil spills, the company also is implicated in a billion-dollar bribery scandal over its 2011 acquisition of a vast undeveloped but lucrative Nigerian oilfield off the coast of the Niger Delta (*Quartz Africa* 2017). In this regard, one may mention the famous SERAC case in which the Nigerian government was found liable for various violations of rights against the Ogoni people in the Niger Delta.⁵ In reaction, various rebel movements, such as Movement for the Emancipation of the Niger Delta (MEND) and the 'Avengers' have emerged to pose security threats in the area (BBC 2016), which has also provoked a securitised response from the military (International Crisis Group 2007).

The activities of these insurgent groups at one time or another have led to the death of thousands of Nigerians, and the loss of properties and homes. In response to this, the Nigerian government utilised its security forces to bring the situation under control. This phase represents the militarised use of force.

In this situation, the fight against insurgent groups is securitised. One result of this securitisation is corruption occasioned by the huge financial outlay that is channelled to the military and other security agencies to fight the insurgency (BBC 2016). Another impact are rampant human rights violations being perpetrated by the soldiers on the ground. Consequently, the government and the military are not in a rush to end the insurgency (*The Telegraph* 2015).

Thus, spanning several administrations the Nigerian government has repeatedly turned a blind eye to the various acts of arbitrary executions, detentions and torture carried out by various security forces in a bid to protect the security of the country in the fight against insurgency.

5 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

With respect to the Boko Haram crisis,⁶ which is concentrated in the north-eastern part of the country, the government set up numerous joint task forces (JTFs) comprising the police; intelligence personnel; the air force; the state security service; and the navy, but mostly the Nigerian army (Odomovo 2014: 49). The JTFs have been brutal in their bid to restore order and advance state security, prompting Amnesty International (2016: 6) to report that '[t]he vast majority of arrests carried out by the military appear to be entirely arbitrary, often based solely on the dubious word of a paid informant'. These arrests usually were made during search missions by the JTF or at the aftermath of a recaptured Boko Haram territory. Anyone not readily identified by the CJTF as a member of the recaptured territory was marked as a 'suspect' and taken into military custody until further notice (Amnesty International 2015: 40-41).

Between January 2012 and July 2013, the military, in the name of state security, arrested 4 500 civilians whom they considered 'suspects' (Amnesty International 2015: 75). By 2015, it had been recorded that since 2011 the JTFs and CJTF had arrested 'at least 20 000 people' (Amnesty International 2016: 9). However, no proper record exists of the exact number of detainees. By March 2016, Giwa military barracks had at least 1 200 detainees, including boys between the ages of five and six (Amnesty International 2016: 5). Arbitrary arrest, detention, death and ill-treatment simply were seen as acts of 'sacrifice and contribution towards the return of peace to our country' (International Centre for Investigative Reporting 2016).

The Nigerian army is equally responsible for numerous other serious atrocities, including the gruesome acts of extra-judicial killings perpetrated on 12 to 14 December 2015 in Zaria, Kaduna State of Nigeria, which claimed the lives of about 350 members of the Islamic Movement of Nigeria (IMN) (JUDCOM 2015; Amnesty International 2016: 5). A number of panels immediately were set up to investigate the incidents. These include the Nigerian Senate; the National Human Rights Commission; and the Kaduna State Judicial Commission. A report by the Kaduna State Judicial Commission held that '[t]here appeared to be a disproportionate use of force by the NA (Nigerian army) to deal with the situation, hence the Nigerian army used excessive force'. Yet, to date no member of the Nigerian army has been held responsible for the atrocities committed.

Another example of a securitised situation relates to the brutal manner in which the Nigerian army has sought to quell the resumed agitation for self-determination by the Indigenous People of Biafra (IPOB) organisation, albeit done in a peaceful manner (Ojukwu & Nwaorgu 2016: 1). The combined actions of the Nigerian security forces in reaction to this demand have claimed the lives of more than 150 peaceful pro-Biafra

6 Boko Haram was started in 2002 by Mohammed Yusuf who garnered popularity for his radical teachings about Islam. In no time, he gathered followers and this grew into the movement called *Jama'atu Ahlis Sunna Lidda'awati wal-Jihad* (People Committed to the Propagation of the Prophet's Teachings and Jihad), also called *Boko Haram*, meaning Western education is forbidden. Yusuf was arrested and subsequently shot and killed by the military on the streets of Bornu State on 29 July 2009 following some rioting with the police. In July 2009, the more radical Abubakar Shekau took over the leadership of Boko Haram and it evolved into a deadly terror group. See 'Boko Haram: Behind the rise of Nigeria's armed group' Aljazeera Special Series (2016).

protesters across Nigeria between August 2015 and August 2016 (*Premium Times* 2016).

11 Securitisation in the Democratic Republic of the Congo

The DRC gained independence from Belgium in 1960. In 1967, a *coup d'état* brought Mobutu Sese Seko to power and ushered the country into a 32-year dictatorship with fundamental rights and freedoms absent from his agenda. During his presidency, Mobutu securitised the country to the extent that the state and his personality became the main components of national security. Mobutu was overthrown in 1997 by Laurent Kabila. After his mysterious death in 2001, his son, Joseph Kabila, succeeded him. Peaceful, free and fair elections were organised in 2006, following the promulgation of a new Constitution. The main concern of Joseph Kabila was to strengthen institutions and re-establish peace and national unity all over the country, yet the situation on the ground did not change and still has not changed.

Mobutu and his predecessors were able to secure and cling onto power due to the support the US and other Western states have given to such regimes in exchange for accessing the huge mineral wealth that the DRC possesses (BSR 2010). The securitisation project has been used to justify numerous legal and administrative measures to limit the enjoyment of human rights and fundamental liberties guaranteed by the DRC 2006 Constitution.

One example is the limitation placed on the exercise of freedom of expression and the right to information by establishing procedures for the exercise of freedom of the press. One piece of legislation that has been used to clamp down on the freedom of the press in the name of promoting national security ironically is named Freedom of the Press Act 96/002 of 22 June 1996. Among others, the rationale for this enactment is limiting the freedom of journalists, political opponents and civil society activists who may use the media to express dissent (Democratic Republic of Congo 1996: art 78).

Also, freedom of assembly is enjoyed subject to the granting of permission by the local authorities who often exercise their prerogative to deny the opposition the right to demonstrate for security reasons (Democratic Republic of Congo 2006: art 26). For example, in October 2015, the Mayor of Lubumbashi (in the former province of Katanga) forbade public protests for an undefined period (Amnesty International 2016: 32). In December of the same year, demonstrations were forbidden in the province of Tanganyika to ensure that the year ended smoothly. Although the organisers or every citizen have the right to challenge these decisions that are inconsistent with the Constitution before the Constitutional Court, the current configuration of the Court does not provide sufficient grounds of impartiality. The Constitutional Court is made up of nine judges. Three are directly appointed by the President; three by parliament, where the President holds a majority; and three others are chosen by the Council of Magistrates. Some other rights, such as the freedom of thought, religion and conscience, are exercised subject to respect for the law.

Different presidents in the DRC have relied on personal military units to secure themselves in power. Concurrent reports from Human Rights Watch (2008), the United Nations Joint Office on Human Rights and a few other national organisations reveal that the unit has been involved in extra-judicial killings or the disproportionate use of lethal force against demonstrators and political opponents.

In 2003 a national intelligence agency (ANR) was established to cover national security and public safety (Democratic Republic of Congo 2003: art 3). The law has been used, among others, to keep an eye on people who are suspected of conducting activities 'of the nature harmful to public national security'. Political opponents, civil society activists and pro-democracy militants have frequently been arrested and detained in the legitimate exercise of their fundamental liberties (Human Rights Watch 2008: 115). This Act was designed in such a way that the behaviour of ANR officials hardly can be challenged in the courts.

In the former mining province of Katanga, the national government has deployed soldiers and the presidential guards for national security purposes (Omanyundu 2016) simply because the province is considered a bastion of the opposition leader, Moïse Katumbi.

Activities of different pro-democracy organisations have been restricted or forbidden countrywide. This is aimed at reducing the power they had in mobilising mostly young people to protest against the ruling party. For example, two famous pro-democracy movements of the country, namely, *Lutte pour le Changement* (Lucha) and Filimbi have been forbidden in all 26 provinces of the country by a letter signed by the Vice President and Minister of the Interior.

12 Conclusion: The end result of securitisation in Africa

The article has sought to undertake a critical review of securitisation in Africa. The theoretical underpinning of the concept of securitisation is broadened to fit the African context. It asserts that securitisation is not simply an internal matter, but is also connected to 'larger politics' emanating from outside the confines of its territorial space and located in the Western capitals and, more recently, China and India. Among its findings is that securitisation is not a recent phenomenon in Africa. Rather, it is traced to the continent's post-independence past and reflected in the OAU Charter and the practice of African socialism.

The 'securitised' environment in Africa has done little to solve many of the continent's developmental problems. Rather, we see the roll-back of advances made in human rights, democracy and respect for the rule of law.

The continent's democratic credentials also have suffered a dip in fortunes with the growing increase in unconstitutional changes of government, exemplified in a resurgence in military *coups* (Barka & Ncube 2012: 1); the doctoring of constitutions to allow for third or indefinite terms; the refusal by incumbents to step down after losing elections; and election fraud to favour incumbents (De Walle & Butler 1999). Since the early 1990s, 24 presidents in sub-Saharan Africa have initiated discussions in an attempt to stay in office for more than two terms. In 15 countries,

presidents started the process of actually amending the constitutions. In 12 of these cases they succeeded.⁷

At the same time, corruption is on the increase. It is estimated that on average African politicians are richer than their counterparts in the developing world, while the number of ordinary Africans living on under \$1,25 a day has risen from 358 million in 1996 to 415 million in 2011. Conflicts have not abated, with its attendant negative impact on long-term development. Twenty-three African countries were involved in one or another form of conflict between 1990 and 2005, costing Africa \$284 billion (an average of \$18 billion a year), based on the analysis that on the average, armed conflict shrinks an African nation's economy by 15 per cent (IANSA, Oxfam & Saferworld 2007).

13 Recommendations

While the concept of human security is expressed in the UN Charter, it was not popularised until around the time of Kofi Annan's inauguration as Secretary-General of the UN. In one of the various definitions on human security attributed to him, Annan (2000) remarks:

Human security, in its broadest sense, embraces far more than the absence of violent conflict. It encompasses human rights, good governance, access to education and health care and ensuring that each individual has opportunities and choices to fulfil his or her potential. Every step in this direction is also a step towards reducing poverty, achieving economic growth and preventing conflict. Freedom from want, freedom from fear, and the freedom of future generations to inherit a healthy natural environment – these are the interrelated building blocks of human – and therefore national – security.

Annan also points out that restrictions of rights that undermine human security are made by human beings who possess a certain amount of power.

The shift in focus from the state to the individual affirms the recognition of the latter as possessing legal personality in international law, unlike previously where they could only act on the international plane through their states, as enunciated in the concept of diplomatic protection (Leys 2016). Through this extension of legal personality in international law, the individual is equipped to bring action against his or her own state as well as other states. This significant development also has altered a move away from the absolutist concept of sovereignty to one that gives room for the recognition of popular sovereignty.

The evolution of sovereignty as initially residing in God and finally located in the people came full circle in Jean-Jacques Rousseau's contention that sovereignty is inalienable and indivisible and that it 'always' remained with 'the collectivity of citizens', in other words, 'the people', the only ones who could exercise it. Interestingly, the notion of popular sovereignty is captured in the constitutions of all African countries. A few examples will suffice. Article 5 of the Constitution of the

7 These are Burkina Faso, Burundi, Cameroon, Chad, Gabon, Guinea, Namibia, Niger, Rwanda, Senegal, Togo and Uganda.

DRC provides that [n]ational sovereignty belongs to the people. All power emanates from the people who exercise it directly by way of referendum or [by] elections and indirectly by their representatives.’ Also, according to article 1(3) of the Ugandan Constitution, ‘[a]ll power and authority of government and its organs derive from this Constitution, which in turn derives its authority from the people who consent to be governed in accordance with this Constitution’.

Incidentally, in line with its policy of representing a major shift from its predecessor, the Constitutive Act of the AU of 2002 adopts a human security-centric approach to economic development, peace and security by adopting the principle of non-indifference, as opposed to the OAU’s acceptance of non-interference as sacrosanct, in order to protect ordinary people in Africa from abusive governments.⁸ Also, article 3(h) commits member states to a path where they will ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’.

However, in practice the situation is that the will to commit to this compact does not exist. This is because of a conflicting agenda from external sources which tacitly or otherwise endorses autocracy in Africa to safeguard its economic interests. In response, African leaders are manipulating aid and the threat of terrorism to bolster their illiberal regimes (Carmody 2011). For a solution to this quagmire, one must turn back to the Declaration which expresses the conviction

[t]hat the strict observance by states of the obligation not to intervene in the affairs of any other state is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security.⁹

8 The AU human security agenda in the areas of peace and security is clearly expressed in art 4(h) of the Constitutive Act of the AU, which empowers the AU to intervene in the affairs of a member state in order to ‘prevent war crimes, genocide and crimes against humanity’. See Tieku (2007).

9 Preamble para 7, para 16(c).

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The 'mantra of stability' versus human security in the post-Soviet space

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Abstract: This article provides an understanding of current human security challenges in the post-Soviet space. Cognisant that such studies are rare, we hope to provide a stepping stone for further theoretical and empirical research. Drawing on comparative case studies of Armenia, Belarus, Ukraine and Kyrgyzstan, the article argues that while securitisation techniques deployed by authoritarian and/or semi-authoritarian regimes vary in scope, degree and targeting, they share two important commonalities with the overarching aim of ensuring regime endurance. First, the exogenous threats, whether real and/or willfully constructed by the ruling regimes, provide a convenient context in the Balzaquian sense to construct effective securitisation acts. Closely related to the first point, the external environment and internal deliberation by ruling elites fuel a specific narrative-constructing strategy of illiberal state-building ideology, which normalises anti-human rights policies in the specific countries. Concurrently, we problematise the traditionalist approach and treat the 'audience' as a monolithic and passive entity. Making use of Bourbeau and Vuori's work on resilience, we demonstrate that securitisation is not a straightforward bottom-up process, but also is filtered through societal resistance.

Key words: human security; securitisation; democratisation; illiberal state-building

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1 Introduction

This article has a dual ambition. On the one hand, it aims to unravel the complex securitisation techniques used by authoritarian and semi-authoritarian leaders in the former Soviet Union, to ensure regime endurance. On the other hand, it aims at demonstrating the pockets of resistance to such practices and assess the societal ability to organise itself when facing securitisation. There are abundant studies on authoritarianism in the post-Soviet context. However, the linkage between securitisation, human security and regime protection remains under-explored. In an attempt to fill this vacuum, the article draws on the comparative case studies of Armenia, Belarus, Ukraine and Kyrgyzstan, with the aim of identifying the overall structural challenges to human security posed by their respective governments. The logic behind this approach is informed by Kenneth Booth's contemplation (Booth 2007: 108-113) that security is an instrumental concept in the hands of the ruling elite and that there is a need to reverse this approach, by embracing an emancipatory approach in one's conceptualisation of security. This, of course, is easier said than done in a region where geopolitical thinking remains prevalent against the backdrop of protracted conflicts and mutual threat perceptions of states. In this context, conceptualising humans as referent objects of security is a challenging, yet promising, direction (Simão 2013). While the case selection has largely been determined by the research profile of the participants, it also provides a geographic and thematic representative outlook on the region.

Before proceeding with the theoretical framework, it is important to chart the terrain – the post-Soviet space – upon which this study will be constructed. First, the demise of the Soviet Empire has left Russia (then the central state) with a perceived special status and capacity to intervene in the internal affairs of former member states of the Soviet Union (USSR). The rapid disintegration of the USSR removed central control mechanisms, allowing the eruption of armed conflicts in the Caucasus, Moldova and Central Asia. The recent conflict between Ukraine and Russian-backed separatists in the Ukrainian Donbas and Luhansk regions, as well as the earlier annexation of the Crimean peninsula by Russia, confirms the volatile geopolitical situation in the region. Second, the initial promise of democratisation in the region proved illusionary. As noted earlier by Ambrosio (2014), and confirmed by Freedom House (2017), two things have taken place: the rise of populism and authoritarian consolidation. Two of our four case studies, Belarus and Kyrgyzstan, are categorised as consolidated authoritarian regimes (with respective Freedom House scores of 6,61 and 6,0 out of 7); Armenia is ranked as a semi-consolidated authoritarian system (5,39); and Ukraine is still understood as a hybrid regime (4,61). Third, but also connected to the second point, over the past 25 years the countries in the post-Soviet space have developed competing foreign policy preferences, pursuing integration with Russia or the European Union (EU) and the west, in general, which, in turn, may account for regime outcomes (Nodia 2014).

Following the theoretical framework, four case studies are presented, and for each the categories of generator of risks, dealers of fear and risk managers, are identified. Moreover, these case studies will also demonstrate the specific typology of the human security challenges in the

respective countries. After the four case studies, the article concludes with an overview of the current state of human security in the post-Soviet space, and suggests some recommendations and traces further avenues of research.

2 Theoretical framework: Making sense of human security in post-Soviet space

Since the notion of ‘human security’ was introduced during the United Nations Development Programme (UNDP) human development report by Mahbub ul Haq, the concept has gained currency among practitioners and academics. The report spelled out two underlining philosophies for constructing the ‘human security’ paradigm – the ‘freedom from fear’ and ‘freedom from want’. It went on to specify seven interrelated dimensions of the ‘human security’ concept – economic security; food security; health security; environmental security; personal security; community security; and political security (UNDP 1994: 24-25). The concept of ‘human security’ was introduced as an aspiring paradigm for constructing the post-Cold War security architecture. It reflected the common revolutionary *zeitgeist* of critical security studies. At the same time, the concept reflected the philosophies enshrined in two pillar international agreements: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Lastly, it should be noted that in the post-Soviet space, the focus on human security is not really a novelty. Since the conclusion of the Helsinki Final Act of 1975 at the Conference on Security and Co-operation in Europe (CSCE), which envisioned a common security architecture for transatlantic and communist countries, the human dimension has been enshrined in all pivotal documents.

Furthermore, when the CSCE was converted into the Organisation for Security and Co-operation in Europe (OSCE) in 1995, the human dimension basket attained more institutional characteristics. All four countries used as case studies are members of OSCE and partake in this security co-operation. While some progress has been made in respect of the human dimension, the overall security philosophy of the OSCE remains rather state-centric (Adler 1998: 147-149). While the OSCE’s human dimension remains an important regional mechanism for advancing democracy and human rights protection, it nevertheless falls short of the same political and philosophical vigour that the concept of ‘human security’ entails. To be sure, since the term was introduced in the UNDP Human Development Report of 1994, the frantic academic debates have not abated. A group of scholars argued for the ‘narrow approach’ to human security, viewing state violence as a foundational element, while the other camp argued that since the humans are referent objects, non-state driven issues such as natural disasters should also be included (Owen 2004).

Despite the fact that academic debates are continuing to date, on the policy level ‘human security’ has gained significant ground. Under the aegis of the UN Trust for Human Security, the Human Security Unit (HSU) had completed projects ranging from peace-building, supporting agricultural projects to reducing the risks in the nuclear site (UN Human Security Unit 2009). Despite significant policy achievements, the lack of

conceptual clarity about human security resulted in uncertainty about the different dimensions of human security. The moving target of addressing the most pressing threats to human security has up to now perhaps been the only strategy of policy makers. It resonates with the attempt of Michael Owen (2004) to reconcile the 'broad' and 'narrow' perspectives on human security. As a first step, Owen suggests that the 'broad' concept of security should be measured against a 'threat threshold' to determine in which direction each case should be prioritised.

In our research, the threat threshold approach is used to map out the pressing issues of human security in the post-Soviet space. The problem with this approach is who, and which threats to human security are being assessed. As Acharya (2001) has demonstrated, states tend to highlight those aspects of human-related security that are in harmony with their national security strategy. Notwithstanding this, Owen's approach to balance the inclusiveness of the concept and attempt to operationalise it is valuable. While the human security concept has been challenged (Buzan 2004; Paris 2001), there have been attempts to conceptualise human security, for example by King and Murray (2001). Floyd (2008) has argued that human security holds an important normative value, but falls short of the analytical edge that conventional securitisation theories offer. At the same time, it should be noted that this early redundant approach to human security was due mostly to the studies of resilience that were developing in fields other than security studies (Bourbeau & Vuori 2012).

Hence, a more harmonised approach should be adopted, following the theoretical framework of Balzacq (2005). Drawing on an earlier research framework developed by the Copenhagen School and ameliorating it further, he divides securitisation into three categories: the securitising agent; the context; and audience. The categories that Balzacq suggests can be adjusted: The 'generator of risks' can be matched with the 'securitising agent' category; the fear dealers facilitate the perception of the 'context' within the wider population; and, lastly, the 'risk managers' can be found in the category of 'audience'. This is where our work takes issue with the reading of the 'audience' through a passive lens. Making use of the 'risk managers' category, we view the audience as a reactionary entity. In this way, we preserve the normative coherence of the conventional theory but suggest a further avenue to challenge it.

This having been said, securitisation is not only achieved through a discourse-based enterprise, but can also be attained through routine practice without a securitising agent making a specific claim of a special situation. Bourbeau explains that the path to securitisation does not lie solely through the declaration of an exceptional situation by the securitising agent/s, but also through the routine exercise of control by the state agent, where bureaucracy and technology play a pivotal role (Bourbeau 2014: 189-190). He further contends that these two logics do not necessarily exclude each other but can, on the contrary, complement each other (Bourbeau 2014: 196). Indeed, it would be erratic to look merely for some exceptional discourses that do or do not create the process of securitisation, as the mundane, systematic and target practices by authorities can also create successful securitisation. In these types of cases, considering resilience networks is valuable given that although some of the routine-based securitisation may take place in the shadows of state

secrecy, the relative freedom of access to information in modern polities provides a sufficient argument for societal mobilisation.

To summarise our theoretical deliberations, a two-pronged approach becomes evident. On the one hand, we proceed with the suggestion by Owen (2004) to apply a threshold of pressing threats on human security dimensions; on the other, the study will proceed with both discourse-based and routinised securitisation techniques. The Human Development Index (HDI) is a useful tool for narrowing our approach to the most pressing issues of human security. While the UNDP (1994) clearly demarks two concepts, the overlap is significant. The HDI includes 12 components that include health; education; income; inequality; gender poverty; employment; human security; trade; mobility; the environment; and demography. The HDI covers the first four dimensions of human security spelled out in the UNDP 1994 report, except the categories that fall under the 'freedom from fear' basket, namely, personal, communal and political security.

Our focus on these dimensions is driven by three things. First, there is an understanding that human security is an emancipatory concept and is aimed at nourishing human dignity. Second, from the theoretical perspective, given that three of the four cases under review resort under the high human development category,¹ with only Kyrgyzstan in the middle human development range,² the narrowing towards freedom from fear is justified. Lastly, as the study is primarily concerned with the way in which securitisation techniques are used to ensure regime endurance, the stress on civil-political dimensions cannot be avoided. To be sure, we are not attempting to be dismissive of other crucial dimensions that human security entails. To the contrary, we attempt to bring in the useful aspects that are defined to be interrelated with HDI (UNDP 1994). Both the Belarus and Kyrgyz cases prove that the socio-economic politics of the states can also be securitised. At the same time, huge military spending in the cases of Armenia and Ukraine deteriorates the socio-economic fabric of the state, which in turn affects human security.

3 Armenia: The enhancement and militarisation of the police forces as human security challenge

As underlined in our theoretical framework, the protracted conflicts remain the most potent challenges to human security in the post-Soviet space. The dispute over the Nagorno-Karabakh region with neighbouring Azerbaijan has driven the country to extreme militarisation. According to the Bonn International Centre for Conversion (BICC), in 2016 Armenia was the third-most militarised country in the world and had been in the top ten since 2005 (Mutschler/BICC 2016). It has been noted by scholars of authoritarianism that the external insecure environment of Armenia has translated into a build-up of internal strong coercive apparatus (Hess 2010). The BICC index also calculates all garrisoned units per capita,

1 Armenia is the 85th, Belarus is the 50th, Ukraine is 81st in the world in the 2014 UNDP HDI report <http://hdr.undp.org/en/composite/HDI>.

2 Kyrgyzstan is the 120th in the UNDP HDI report <http://hdr.undp.org/en/composite/HDI>.

which includes the state's police force. It is thus logical to claim that the key area of securitisation in Armenia remains the militarisation of the police, which in turn exerts pressure on the other baskets of human security, both by denying resources for development of other institutions, by limiting civil-political freedoms in the country.

While the exact number of personal police remains a state secret, the oppositional media argued that per 100 000 inhabitants in Armenia, there are 1 000 police officers (Gevorgyan 2015). Thus, analysing how the growth of the internal repressive mechanism is affecting the human security dimensions is a natural step. The increase in the coercive force often falls into the logic of the routine-based securitisation, and at the same time includes discourse-based elements, which allows the tracing of our categories (Bourbeau 2014).

Armenia's post-independence trajectory of statehood has been marred by political violence. The post-electoral and/or popular protests were stifled with excessive and disproportional force in 1995, 2001, 2003 and 2008. In 2015, the police dispersed the supporters of 'Electric Yerevan', who protested against a 17 per cent electricity price increase. The police deliberately targeted journalists and arrested 200 people on bogus charges (Human Rights Watch 2016). The investigation into police violence by a Special Investigative Service (SIS) did not reveal any tangible outcome (A1+, 2016). Most recently, in July 2016, the police heavy-handedly responded to a peaceful protest that had gathered in solidarity with the armed group, Sasna Tsrer, which captured riot police headquarters in Yerevan. The police fired stun grenades into the peaceful crowd, causing first and second-degree burns and injuries. As in 2015, there was a deliberate intent to target journalists covering events, many of whom were arrested on charges of 'organising mass disorder' (Human Rights Watch 2017b).

Reflecting upon Burobeau's recommendation (Burobeau 2014: 194-195) to look for critical junctures and eventually path-dependency, when dealing with routine-based securitisation, it becomes apparent that in Armenia it starts with the post-election rallies in 2003 and crystallises in 2005. According to the Chairperson of Helsinki Citizen's Assembly of Vanadzor, Artur Sakunts, the first step in institutionalisation of 'the police state' was when the Ministry of Internal Affairs was restructured into the police attached to RA government. In this way, it was removed from parliamentary oversight and turned into guardians of the regime (Interview with Artur Sakunts 2017). Coupled with routine-based securitisation, the limitations of civil political rights, especially those related to freedom of assembly, are justified through a construction of securitisation speech acts. The Nagorno-Karabakh conflict provides a ready-made context in a Balzaquian (2004) sense to do this. For example, the 2008 March first post-electoral violence, which left 10 people dead and where an estimated 150 opposition activists were arrested (Human Rights Watch 2009), was rhetorically legitimised as a preventive step to ensure Armenia's internal as well as external security. By the same token, during the 'Electric Yerevan' protests, the head of the Armenian police was attempting to pacify the protesters by shouting 'Wake up, this is a small country that people have died for' (Aravot 2015).

It only remains to conjecture on how the rhetorical construction of a linkage between internal stability and external security plays out within

the wider public. However, rhetorical devices such as ‘making our borders safe, and ‘guaranteeing security of our soldiers’ are especially sensitive for the population due to the universal draft (of males) in Armenia. The events of 2008 highlighted to the authorities the importance of social media manipulation. An influential network of bloggers and media professionals, often linked to state agencies, have been actively engaged as fear dealers, with the deliberate agenda to highlight security issues, especially during the political protests. As Simão (2013: 143-142) argues, the elites in the post-Soviet space tend to use the securitised situation to further their grip on power and to accumulate resources. The year 2008 served as a second critical juncture for boosting the state-coercive apparatus, when then Prime Minister Serzh Sargsyan ascended to presidency. His formative experience of serving in almost all security agencies of Armenia and Nagorno-Karabakh clearly had transcended into the body politics of Armenia. Thus, increases in police funding and powers during his tenure should not strike one as unusual.

Table 1: Total budget of Armenia; funding of police and crime rates

	Total Budget Expenditure in USD	Expenditures on Public order and security ^a	Crime Rate ^b
2005	813 608 541,65	37 497 130,10	*
2006	994 214 252,58	46 992 296,08	*
2007	1 151 911 473,40	57 235 386,60	*
2008	1 694 957 481,03	67 966 489,48	9 271
2009	1 949 380 969,07	80 526 101,44	14 339
2010	1 928 916 668,04	71 658 515,46	15 477
2011	2 064 029 432,99	75 916 993,40	16 572
2012	2 152 947 679,38	78 112 185,57	15 776
2013	2 376 535 990,93	95 568 081,65	18 333
2014	2 569 974 045,36	108 198 410,31	17 546
2015	2 691 957 781,44	127 405 743,30	17 043
2016	2 839 160 908,25	129 568 946,80	18 764

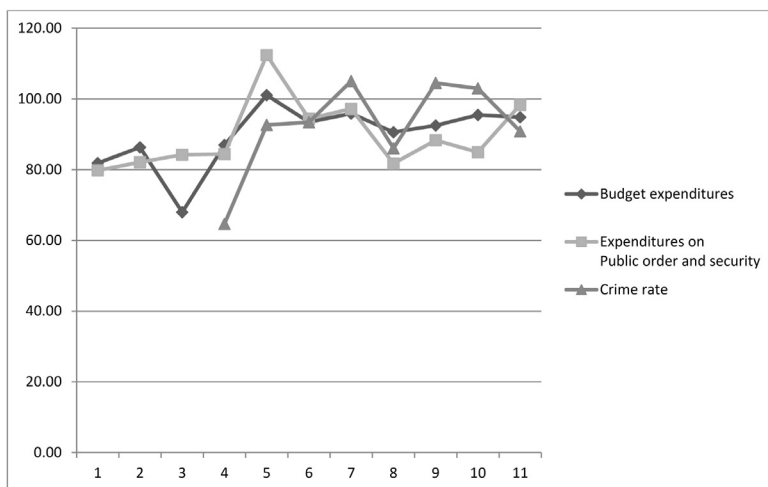
a. In the official budget reports of Republic of Armenia the spending category of ‘Public Order and Security’ include three components— the funding of the Police, the National Security System and the Justice system. As this study is concerned primarily with the growth of the Police, which is marked as ‘Maintaining of Public Order’, it is not considering the spending on the National Security System and spending on Judiciary.

b. The data on the crime rate (number of crimes) presented by the RA Police starts only in 2008. While we acknowledge that the omission of crime rate from 2005-2007 is problematic, it nevertheless does not invalidate the overall logic of the securitisation presented here.

The increase in police force numbers occurred under a veil of secrecy, and despite Armenia’s international obligations, as foreseen by the European

Convention for the Protection of Human Rights and Fundamental Freedoms, and reinstated in a 2012 Constitutional Court decision to ensure freedom of information requested to state agencies, the police still is not transparent (Interview with Artur Sakunts 2017). Lastly, typical of routine-based securitisation, the presence of a self-perpetuating mechanism is important. According to investigative journalists, the state police benefits from extra budget funding, stemming from the closed-circuit television traffic surveillance of Armenia. In 2011, the police received around US \$24 million; in 2012 US \$27 million; in 2013 US \$41 million; and in 2014 US \$42 million (Barseghyan 2014).

Table 2: Calculated without taking into account 'extra budget funding' due missing of the data from year 2008 to 2011 and 2014 for 2016



Despite all the funding and significant aid from OSCE, the Armenian police have chiefly been focused on ensuring regime survival rather than public order and fighting crime. The general crime numbers have more than doubled since 2008. There were 30 crimes per 100 000 inhabitants back in 2008 when the police was receiving half the amount of budgetary allowance of that of today, while the number has since continually increased and, by 2016, had reached 63 crimes per 100 000. Furthermore, as confirmed by international researchers (Pearce et al 2011) as well as domestic monitoring (Helsinki Citizen's Assembly of Vanadzor 2017), the general public remains highly mistrustful toward the police given that they are seen as a politically-motivated body.

Despite all these developments, the increase in the police force has not gone unnoticed. Investigative journalists exposed the true logic behind public spending on the police, and the issue eventually was elevated to the political agenda. While this resilience has not reversed the policy, it nevertheless has highlighted the costs of further increasing police funding.

In any event, if the logic of the increase in police funding was to stifle the civil-political movements in the country, in some instances it has failed. For example, the ‘Electric Yerevan’ protests in 2015 eventually resulted in the reconsideration of the tariff plan and an external audit was called for the company that was managing Armenia’s electricity networks. Moreover, while the ‘context’ of the protracted Nagorno-Karabakh conflict is often instrumentalised in domestic politics, it also puts the ruling regime in a vulnerable position to societal mobilisation. When the armed group captured the riot police station in Erebuni in July 2016, they received considerable societal support in terms of protests. This was mostly due to the fact that there was a high degree of mistrust towards the government, after the ‘April War’ of 2016, when Armenian forces in Nagorno-Karabakh clashed with the Azerbaijani offensive, resulting in a high death toll due to the mismanagement of defence policies. The ‘risk managers’ in Armenia, notwithstanding the increase of the coercive apparatus in the country, were able to organise mass societal mobilisations. While these cases are not typically effective at reversing or causing the adjustment of the state securitisation policies according to the resilience theory, they nevertheless are indicative of a societal potential to deflect securitisation policies.

4 Belarus: Divorcing human development from human security

The Belarusian case is especially interesting as it testifies against the optimistic assumptions that human development and human security are mutually reinforcing. Belarus has the highest HDI in the post-Soviet space, closely approximating the level of very high human development. The achievements in economic security, accessible healthcare and education wrapped in President Alexander Lukashenko’s socially-oriented economy building (Belta 2017) is willfully opposed to civil-political freedoms. To be sure, this strategy has so far been successful, but is increasingly challenged by the worsening economic situation in the country. At the same time, prioritising a certain dimension of human security over others should not be surprising, as governments tend to leave out the political dimension of human security in their security blueprints (Acharya 2001).

Table 3

Human Development Index	Legatum Prosperity Index	Ease of Doing Business Index
Poland (39)	Poland (34)	Lithuania (17)
Lithuania (41)	Lithuania (43)	Latvia (24)
Latvia (44)	Latvia (48)	Poland (45)
Belarus (50)	Belarus (58)	Belarus (63)
Russia (55)	Russia (61)	Russia (92)
Ukraine (78)	Ukraine (64)	Ukraine (112)

Table 4

Economic Freedom Index	Freedom House Index	Press Freedom Index
Lithuania (21)	Lithuania (free)	Poland (19)
Latvia (42)	Latvia (free)	Lithuania (32)
Poland (50)	Poland (free)	Latvia (37)
Russia (92)	Ukraine (partly free)	Ukraine (127)
Belarus (150)	Belarus (not free)	Belarus (157)
Ukraine (155)	Russia (not free)	Russia (148)

In Belarus, the key areas of securitisation are those relating to freedom of assembly, criticism of the government, enhancement of the police force and state-surveillance. While Belarus is a member of OSCE and participates in European Eastern Partnership framework, it is not a member of Council of Europe (CoE), hence the European Court of Human Rights, unlike Armenia and Ukraine. Hence, despite its proximity to the EU, the normative pressure on Belarus to improve its human rights records is timid. The authoritarian regime led by the charismatic President Lukashenko has been in power for 23 years and through these years has developed an extensive coercive apparatus and a monopoly over the economy. Furthermore, the Western-led regime changes in the post-Soviet space, particularly in Georgia (2003), Ukraine (2005) and Kyrgyzstan (2004), have been interpreted as security threats to the country's stability (Korosteleva 2012). To counter Western influences, a state ideology has been developed since 2003, with pervasive special departments across the country. Although there are elements of communism in this ideology, it is in many ways more sophisticated due to its strong bureaucratic structure and large social support base (Usov 2009: 99-102).

The enforcement of the unique Belarusian model of development entails both discourse-based (Balzacq 2004) and routine-based (Bourbeau 2015) characteristics. Given the charismatic profile of President Lukashenko, the securitisation through narrative has been common place, which should not obfuscate the bio-political techniques of mass-surveillance and the growth of a strong police force. The overall securitisation logic in Belarus is aimed at ensuring regime endurance. In doing so, a two-step strategy of control over economic activity and political dissent is used. While the latter is self-explanatory, the control over economic activity allows for resource centralisation and redistribution, through which government safeguards its support. It also serves as a disenfranchisement mechanism: denying free mobility to the citizens; and channels for alternative funding opportunities for any political activity.

Against the backdrop of the worsening economic situation in the country since 2009 (Usov 2009), President Lukashenko has steadily securitised the work force issue. In 2014 Lukashenko introduced a new law that prohibited *kolkhoz* workers (approximately 9 per cent of the total work force) from leaving their jobs at will; a change of employment and living location now required permission from governors. The discourse that Lukashenko has deployed in relation to this new law clearly demonstrates that he stands as a securitising agent (generator of fear) (Charter 97 2014):

I put this question straight, because I have the decree, which I've spoken about, on my table. I was handed it over in connection with, let's put it straight, 'serfdom'. We'll give all powers to governors. You cannot quit. You may remember that I said it in my address to the nation. Start working so that people cannot say: you press on us, but you don't work properly. The government agencies will receive all powers in the nearest week. Don't expect unlimited freedom any more.

Similar regulations were introduced for the forest industry earlier in 2012 (Onliner 2012).

Although these decrees somehow were bearable for Belarusians, given the specific context of the Global Economic crisis of 2008 out of which Belarus has been more successful than other post-Soviet states. The

'Ordinance Number 3: On Preventing Freeloading', which effectively was aimed at taxing those clustered as 'under-employed' with 250 dollars, was met with strong societal resilience. Thousands went to protest in Minsk and other cities of Belarus and, as a result, around 400 people were detained while the order was frozen for a year but not scrapped (BBC 2017). While the Bill was not reconsidered, societal mobilisation was able to re-adjust the securitisation policy, something that has been argued (by Bourbeau & Vouri 2012). The risk managers, in this case the scattered oppositional parties and members of civil society, were able to rally significant popular support on the socio-economic issue and challenge the state's continuous monopolisation of economic life. Again, this did not result in overall structural changes in the economic life or at least full reconsideration of the Bill. However, this event is indicative of the fact that state policies can be reversed, and one should be cautious to treat 'audience' as a neutral and monolithic entity.

The routine-based securitisation of the economic activity is facilitated through well-funded law enforcement bodies, for example, the police and the KGB, as well as the pro-regime youth organisation, the Belarusian Republican Youth Union (BRYU). These state-supported agencies may be considered fear dealers. While the former is tasked with dealing with dissent in the country through enforcement, the latter plays an ideological role in supporting the regime's policies. The crackdown on political dissent and serious limitation of oppositional activities have been the rule of thumb in Belarus. Opposition activists, journalists, writers and political scientists critical of the government have become prisoners of conscience or have had their freedoms largely limited. No political party has been registered since 2000 (Human Rights Watch 2017a).

As in Armenia, Belarus has one of the strongest and largest police apparatuses in the post-Soviet space. According to international observers, the police-to-person ratio in Belarus is the highest in the post-Soviet space, and is six times higher than the Soviet level ever had been. Belarus has 1 442 law enforcement officers per 100 000 people. The world average is 300 police officers per 100 000 people, while the UN officially recommends 222 police officers per 100 000 people (Charter 2013: 97). Last year, Amnesty International reported that the Belarusian governmental structures used mobile networks to monitor free speech and dissent (Charter 2016: 97). There was no visible resilience against these developments as the social contract where Belarusians have affordable living standards but do not engage in civil-political movements for some part holds.

Concurrently, BRYU provides an ideological sanitary line for the regime. When on 25 March 2017, the symbolic Freedom Day, Belarusians led demonstrations against the rule of the current regime, the BRYU with the communist party tidied Kuropaty – a wooded area on the outskirts of Minsk, Belarus. During the Great Purge (1937-1941), vast numbers of people were executed at this location by the Soviet secret police, the NKVD (Tut.by 2017). In this way, the regime is trying to deny the opposition any mobilisation against the communist ethos in the country. However, this narrative, based on stability and a socialist way of life, has continuously been challenged by opposition youth groups. Since the early 2000s, youth organisations such as 'Malady Front', 'Zubr' and others, have challenged state narrative by appealing to the national symbolism of

Belarus (stifled by the regime), the prospect of EU integration, and the need for free and fair elections (Nikolayenko 2015). While these mobilisations were not successful, their emergence and continuity are indicative that even in repressive countries such as Belarus, the risk managers still maintain the capacity to challenge the government.

It may be concluded that in Belarus the securitisation process involves both routine and discourse elements with the overarching aim of guaranteeing regime stability. While the high HDI undoubtedly is an accolade for the Belarusian authorities, this is achieved through tight state regulation of labour activities and the stifling of political dissent. At the same time, as the increase in tax has proved, the state-building philosophy merely anchored on social protection remains vulnerable to the economic shocks.

5 Kyrgyzstan: The 'state-sponsored' Islam versus 'foreign' Islam as human security challenge

Often viewed as the most liberal country among the five Central Asian states with the partial transparency of the government, a strong civil society, freedom of association and expression, and a relative freedom given to non-governmental organisations (NGOs), Kyrgyzstan has gone through a challenging transition since the fall of the Soviet Union in 1991. In 2010 Kyrgyzstan's interim government (established after the Tulip Revolution in 2005) was removed after violent clashes in the southern city of Osh, and in 2011 Almazbek Atambayev assumed the presidency. Since then, the religious-ethnic cleavage largely dormant has been weaponised by central authorities against ethnic Uzbeks (14 per cent of the overall population), mostly residing in the southern part of the country. The external security challenges, including the country's proximity to Afghanistan, and foreign-sponsored religious activity including ISIS recruitment attempts, provide the ruling authorities with a convenient context (Balzacq 2005) to securitise religious and ethnic diversity in the country.

The key areas of securitisation include, but are not limited to, the increased powers of security agencies, empowerment of hate groups to spread misinformation, and the re-interpretation of religious minority rights. The securitisation models that Kyrgyz authorities (generators of fear) deploy are mostly discourse-based, where the state-sponsored version of Islam is promoted through fear dealers: state loyal clergy and social media groups, as the only true way of development. There is a wilful denigration of the other versions of Islam labelled as 'foreign', 'backwards', and often intertwined with discrimination against local Uzbeks. Moreover, Kyrgyzstan's HDI is the lowest in the post-Soviet space, namely, 120th out of 180 countries.³ Although the country has moved economically from a 'low-income' country to the 'lower middle-income' category, according to the World Bank in 2014, poverty and economic inequality remain prevalent. The combination of external religious influences with the drastic economic situation makes fertile ground for further radicalisation.

3 Human Development Report: Kyrgyzstan', UNDP, 2016, http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/KGZ.pdf

Lastly, routinised security operations with little civil society oversight are carried out against the ethnic Uzbek population.

It should be noted that after 70 years of secular Soviet rule, the Kyrgyz founding government opened the door for Islamic influences supported by the Saudi Arabians in an attempt to regain the concept of nationhood (Policy The American Foreign Council 2017). At the same time, when the religious activity in the country attained political momentum, the authorities were quick to label these activities as attempts to destabilise the country by promoting the Muslim clergy and members of fundamentalist groups to assume state power. One of the most prominent Islamic groups in the country, Hizb-ut-Tahrir (HuT), came to Kyrgyzstan from Uzbekistan and Tajikistan in the early 1990s. It has evolved into a political opposition movement providing an Islamic alternative to regime corruption (Policy The American Foreign Council 2017). While the goals of the HuT are problematic, such as the establishment of a 'caliphate' through peaceful means, the authorities have drummed the actual threat that this organisation poses and categorised it as a terrorist organisation in 2003. The ideology of HuT is very popular in the cities of Osh and Jalal-Abad, especially among ethnic Uzbeks (De Lossy 2016). Uzbeks primarily reside in the southern part of the country, Osh, and have always been deemed religious and conservative. Another alarming development is that around 600 fighters from Kyrgyzstan joined the Islamic State (ISIS), 70 per cent of whom are ethnic Uzbeks (Putz 2015).

Apart from being religious, the rationale behind Uzbek radicalism is also associated with their unjust treatment by the state coercive apparatus. The apogee of discrimination against the ethnic Uzbek population were violent clashes in 2010 between Kyrgyz and Uzbeks in Osh. As a result, 420 people were killed (International Crisis Group 2012). It has been reported that since these events, Uzbeks have been subjected to illegal detentions and abuse by security forces and have been forced out of public life. Members of the Uzbek minority report that they are marginalised by the Kyrgyz majority, forced out of public life and their professions; most Uzbek-language media outlets have been closed; and prominent nationalists often refer to the Uzbek minority as a diaspora, emphasising their separate and subordinate status in the country (International Crisis Group 2012). Indeed, based on a report released by Amnesty International in 2015, the ethnic Uzbek population of Kyrgyzstan continues to be subjected to physical attacks based on their ethnic origin. State authorities refrain from considering or fully investigating these as hate crimes, and instead classify the activities as 'petty hooliganism' (Amnesty International Report 2014-5).

The societal resilience to this tragedy was understandably timid in its immediate aftermath. At the same time, due to the relentless work by human rights organisations, especially Bin Duino (risk manager) as well as strong international pressure, the Kyrgyz central government was obliged to address the issue. The progress is dubious, even after seven years, as the authorities tend to target only the ethnic Uzbek minorities, and the issues with involvement of the security apparatus is not duly considered (International Crisis Group 2016). Some progress in addressing the root issues of the conflict was made, through community-building projects and improvement in local governance in the region (Civil Union-Safer World 2014).

At the same time, even with the Osh tragedy in the background, the Kyrgyz government continues its efforts to monopolise religion in the country. Parallel to coercive measures, such as counter-terrorist measures aimed at monitoring the inflow of Kyrgyz nationals and the arrest of several individuals based on their alleged connections to terrorist organisations, including those linked to HuT by the State Committee of National Security (United States Department of State 2016). All major religious gatherings are under close surveillance by the State Security Committee. In addition, nearly all religious authorities in the country, including all but the top two members of the Spiritual Board of Kyrgyzstan's Muslims, the country's central religious authority, will be subjected to special screenings. Most significantly, the power of the 'grand mufti' will be significantly reduced, leaving his authority only over the Spiritual Board (Radio Free Europe 2011). The change is meant to diffuse the absolute authority of the grand mufti's post while ensuring that critical decisions, such as the appointment of new imams, remain channelled through a single body.

Furthermore, a special information campaign has been launched with the objective of securitising 'foreign Islam' and dissuade its spread through the population. Billboards were raised in major cities, where one image showed a Kyrgyz woman in traditional dress and another with a woman fully covered in a *hijab* with the caption 'Poor people, where are we heading to?' After the religious sections of the population criticised this approach, the President went on to a press conference stating: 'When we erected banners some smart people appeared and started pointing at miniskirts. Our women have been wearing miniskirts since 1950s, and they never thought about wearing an explosive belt.' He also added: 'No one should impose a foreign culture on us under the guise of religion'.

In addition to these measures, the government position is supported by the expansion of channels of communication. The *Facebook* platform 'We Are for Secular and Democratic Kyrgyzstan' (originally in Russian), which has more than 20 000 followers, is an arena to discuss and present personal arguments against the extensive penetration of religion in the lives of the people, and criticises the form of clothing that religious women and men are expected to wear. Judging from the large number of followers on this online platform, it becomes apparent that the securitisation practices mounted by the authorities were successful with some parts of the audience. However, the religious layers of society condemned this campaign, and the resilience to this securitisation act was launched through an alternative social media campaign – the *Elechek* (the traditional hat worn by Kyrgyz women) group where they were criticising the government-led campaign. This instance again corroborates our concern of conceptualising the audience as a monolithic entity.

When analysing the current security situation and the ways in which the government has responded to it, a number of human rights protected by major international documents could be observed. Indeed, the International Covenant on Civil and Political Rights (ICCPR), to which Kyrgyzstan is a party, requires state parties to respect and protect the rights of the people residing in the territory of that country. This includes the right to life; freedom of religion; freedom of speech; freedom of assembly; electoral rights; and rights to due process and a fair trial. Kyrgyz authorities initially did not view religion as a threat to national security.

However, this changed when religion was used for political means. Addressing the continuous fragmentation of religious and political identities is not only important human security issue, but remains a pressing issue for the national security of Kyrgyzstan.

6 Ukraine: Unconventional warfare as human security challenge

The tug of unconventional warfare that Ukraine is currently facing remains the most pressing issue for human security in the country, but also entails security ramifications for the post-Soviet space at large. Since President Yanukovich was removed from power through popular protests in the winter of 2013-2014, Euromaidan, after he had made the controversial decision to reverse Ukraine's Association Agreement with the EU, Ukraine has found itself in an unequal battle with Russia. Russia's President Vladimir Putin and his entourage presented the popular revolution as a *coup d'état* against the lawful President of Ukraine and deliberately securitised the rights of the Russian-speaking population largely residing in the eastern regions and Crimean Peninsula. The revolutionary context was exploited by Russia to swiftly occupy Crimea and support a separatist war in the Donbas and Luhansk regions of Ukraine.

The military intervention and destabilisation in the east were cloaked in ambiguous legal rhetoric coupled with intense diplomatic and media campaigns (Allison 2014:1258). Furthermore, the warfare Russia launched, often dubbed as a hybrid or limited war, entails a serious strand of propaganda which aims not only at the persuasion of the Russian-speaking population in Ukraine (now largely under Russian control or the puppet states Donbas and Lugansk Republics), but also cautions against any Western support for Ukraine. In addition to the huge humanitarian crisis involving more than 1 700 000 internally-displaced people (Internal Monitoring Displacement Centre 2016), the conflict puts pressure on the social and political dimensions of human security. There has been a sharp increase in the militarisation of Ukraine, effectively consuming 5 per cent of the country's gross domestic product (GDP) (Trading Economics 2017).

The key areas of the securitisation, namely, the growth of state surveillance powers; terrorism laws; limiting rights to associate, assemble and criticise the government; and cyber-security regulations and informal empowerment of the hate groups to spread misinformation, are intertwined processes justified by the situation of active war. At the same time, Ukraine's membership of the Council of Europe and its European aspirations provide the West with the necessary levers to counteract such measures. Interestingly, even under the condition of the war, as will be demonstrated, the societal resilience remains strong. Similar to the Armenian case, the ongoing conflict in Ukraine, although serving as convenient context for mounting securitisation policies, also restrains the capacity of the central government capacity for such actions. Both strong international attention and rather vibrant civil society are able to cooperate at critical moments to pressure the government.

The securitisation techniques used by Ukrainian authorities involve both discourse and routine-based paths. However, it should be noted that routine-based securitisation is rather a new phenomenon in Ukraine,

mostly connected to context of the conflict. Identifying the generators of fear, fear dealers and risk managers is challenging in the Ukrainian case given the fragmentation of the state. One clear direction is to look at the Ukrainian government as fear dealer. At the same time, this is true about the authorities of the self-declared Donetsk and Luhansk regions, which will be discussed briefly. At the same time, the category of the context of Balzacq (2005) – the Russian aggression against Ukraine is useful, while the audience, as in other cases, will not be treated as a singular phenomenon.

One of the most pressing issues in Ukraine is freedom of information. The countermeasures that Ukrainian government sought to respond to the Russian information war are problematic. In 2014, all Russian television channels were banned in Ukraine. In the same year, the Ministry of Information Policy was established which, along with the Ukrainian SBU and military, exerted pressure on the Ukrainian media, especially when reporting on the war or government activities. Furthermore, according to a Reporters Without Borders report, Ukrainian and foreign journalists were targeted in a defamation campaign by the *Mirotvarets* (Peacemaker) website which published the personal data of 4 086 journalists who visited the separatist regions with the help of Ukrainian hacker groups (Reporters Without Borders 2016). In 2016, 159 criminal proceedings were launched on attacks against journalists, which is 29 per cent higher than those of 2015 (Office of the United Nations High Commissioner for Human Rights 2017: 28-30). In 2015, a cyber police unit was established to combat cyber-security threats. The SBU activities against information technology companies were allegedly conducted illegally, and a petition was launched to create an e-ombudsman in Ukraine (President.Gov.UA 2016). The SBU inspected the telecommunication company Intertelecom, where they searched the premises and seized equipment, accusing Intertelecom of having provided communication services to LNR and Crimea.

Ukrainian authorities' attempts to monopolise the information challenge were met with significant resilience (Mapping Media Freedom 2014-2016). After cyber, a petition was sent to President Poroshenko's office to establish the e-ombudsman in the country. Furthermore, in organising this resilience, the Ukrainian media community was able to rally international support. The Parliamentary Assembly of Council of Europe (PACE) included in its resolution that the Ukrainian government should address the situation with the journalists (Srećko 2014). As a result of international and domestic pressure, the Ukrainian authorities had to adopt one of the most liberal media legislations, where institutional guarantees were enshrined to ensure the safety of the journalists, the libel was decriminalised, and so forth (Freedom House 2016). This example illustrates that not only the reading of the audience is problematic in traditional securitisation studies, but also that the international pressure on the state is not taken into account. In the same way as the 'de-communication law' was cited by the Ukrainian court to prohibit the Communist Party in Ukraine, the Venice Commission recommended that the law be amended as it violates freedom of expression, speech, association and electoral rights (OHCHR 2017: 34).

The war naturally also increases the militarisation both in Ukraine and in the rebel-controlled Donetsk and Lugansk Republics, and gives security services free reign to conduct illegal actions. There are recorded series of

unlawful detentions, interrogations and threats to peaceful protesters by police officers, the SBU, as well as DNR/LNR armed groups in territories under their control. In the DNR and LNR, the practice of severe control over information coupled with ideological activities is carried out through youth organisations that act as dealers of fear. One example is the *Mir Luhanshchin* (Peace for Luhansk), which is created by armed groups with mandatory membership for the youth (OHCHR 2017). It would be too optimistic to imagine opposition to such practices in the rebel-held territories at this stage. However, over the time such possibilities might emerge.

Lastly, the war exposes the most vulnerable groups, IDPs, to even more danger. The IDP influx from separatist-controlled regions has been securitised by Ukrainian authorities. The OHCHR monitoring of the human rights situation in Ukraine from February 2016 to February 2017 recorded hate speech and inflammatory language towards IDPs and Roma people in Ukraine, visible in the media and among public figures. In his recent public statement, the Minister of the Interior, Arsen Avakov, attributed the huge increase in the number of the crimes committed to the influx of IDPs that came from the eastern regions of Ukraine, a statement repeated by his deputy (Bezruk 2016). While Ukraine's HDI remains largely unchanged, ranked 81st in the world,⁴ the basic human needs of those directly affected by the conflict remain severe. With the worsening of the economic situation in the country, scapegoating strategies are likely to further target IDPs.

In this context, the ability of human rights NGOs (fear managers) to act in a co-ordinated manner and appeal to the public with signal voice, coupled with international support, drove the successful resilience. The strategy of early detection of hate speech and directly addressing the Minister's speech did not allow the securitisation speech to attain endorsement by the audience. In strictly theoretical terms, one may say that thus far there have been no significant changes in state policy, hence no re-adjustment of the securitisation. At the same time, the influx of IDPs did not meet the threshold of securitisation, and so the *status quo* was maintained.

The Ukrainian crisis remains the most pressing issue that continues to affect the human security of millions of people in the post-Soviet space. The pervasive conflict with a strong informational component remains a breeding ground for discourse-based securitisation. At the same time, routinised securitisation is slowly but steadily evolving, and the extent of its scope and endurance remains an open question. Despite these challenges, the instances of resilience vis-à-vis the securitisation of freedom of information as well as the inflow of IDPs demonstrate that even in a situation of war, the resilience can take place. Of course, this had to do with the weakness of the Ukrainian central government but, at the same time, this alone cannot explain the resilience. It is also about the quality of civil society, its organisational capacities and international support.

4 [hdr.undp.org](http://hdr.undp.org/en/countries/profiles/UKR). (2017). Human Development Reports Ukraine. <http://hdr.undp.org/en/countries/profiles/UKR>

Despite the failure of the two Minsk agreements, the peace talks continue to date. However, the prospects of reaching an agreement are slim (Sasse 2016). Hence, the humanitarian support for Ukraine is paramount, and at the same time, the Ukrainian authorities should be held accountable for the continuous protection of fundamental freedoms. The promise of further Western integration should follow a normative path rather than embrace the narrative of victimhood. Freedom of information, often the first victim of war, should be guaranteed and supported by international partners. This, in turn, will allow more ownership of a peace perspective for common citizens. Lastly, while the operations of state security in the context of war are understandable, these should be based on legal grounds and court orders.

7 Conclusions and recommendations: Searching human security in the post-Soviet space

The analysis of the above cases indeed casts a pessimistic shadow on the prospects of human security in the post-Soviet space. Geopolitical thinking remains prevalent in the broader region, and despite the limited success of security co-operation between the states under the OSCE umbrella and other regional organisations, the cleavages of divergent state-building strategies have become more pronounced. The earlier conflict in Nagorno-Karabakh and the recent conflict Ukraine attest to the fact that, while it is believed that gross violations of human rights result in conflicts (Human Security Unit 2009), the reverse is also true. At the same time, one should not be timid and should not consider all aspects of national life, especially when sections of the population live under conditions of war (Booth 2007: 105-106). The Ukrainian as well as the Armenian cases prove that in certain scenarios, even in the case of protracted conflicts, the citizens are able to organise and challenge securitisation policies and protect their way of life.

Our two-pronged approach, where we make use of the securitisation theory of Balzacq (2005), but also problematise the reading of the 'audience' as a monolithic category (Bourbeau and Vuori 2012), proved a viable theoretical move. This is not to say that 'human security' is not a problematic concept to operate with. Indeed the theoretical and methodological issues connected to this term remain unaddressed. However, to remedy some of these shortcomings, we employed the 'threshold approach' (Owen 2004), to capture the most pressing issues. At the same time, this alone is not sufficient, and new avenues of theoretical work should also be charted. The question of ownership of the human security concept remains open. While the notion is often regarded as 'Western-centric', there is enough evidence to suggest that there is a significant Eastern (Asian) dimension to the term (Acharya 2001). The further advancement of the human security agenda should additionally address this issue.

The securitisation techniques and targets varied across the cases. As mentioned above, they share one commonality, namely, to ensure the continuation of unchallenged authoritarian rule in the respective countries. In the same way our cases differed in terms of human security challenges, so the capacity of civil society to deal with them differs. According to the Freedom House 2017 ranking, the civil liberties (the higher the score, the weaker the civil liberties) of Armenia is 4 out of 7; in

Belarus 6 out of 7; in Ukraine 3 out of 7; and in Kyrgyzstan 5 out of 7. This broadly characterises the openness of the respective societies. Another dimension to consider is the degree of commitment of the states to uphold human rights and democracy under international obligations. All four states are parties to the ICCPR, and the ICESCR, and also participate in the OSCE, which involves human dimension co-operation. However, only Armenia and Ukraine are members of the Council of Europe and the European Court of Human Rights, which allows more tailored mechanisms to ensure the protection of human rights.

The different levels of the civil-political freedoms in our respective case studies are indicative of the fact that resilience was stronger in Ukraine and in Armenia as compared to Belarus and Kyrgyzstan. At this stage, it seems certain that both 'strong' resilience and 'weak' resilience are not only due to a state's coercive capacity, but also to the ability of the 'fear managers' to organise successful civic campaigns. Our work reflected the philosophy of Booth (2007) that the genuine emancipation of citizens is possible only if they challenge the state's monopoly over knowledge on security.

Indeed, as our case studies reveal, most of the human rights abuses fall within state secrecy initiatives or, after they have been committed, they tend to be relegated in that direction. Ensuring freedom of and access to information, even in cases of emergency, is the first step towards constructing human security. In the Armenian case, there have been discussions as well as investigations by civil society members as to why the police force is receiving so much funding, when the fight against criminality is not fulfilled to the best standard. Concurrently, there should be a willful approach of challenging narrative that internal stability and external security are inseparable. Although internal stability is important, the means of its achievement should be through nourishing human security and not through state coercion. The nexus between human development and human security can be appealing for the authorities. State violence always entails an international price; while channelling state funding to improve Armenia's HDI would not only ameliorate the well-being of the citizens, but it would also ensure long-term stability in the country.

In Belarus, civil society is not as vibrant as in Armenia or Ukraine, given the tighter grip of authorities. At the same time, the high HDI is achieved in contrast to human security. While this strategy has so far been successful, with the current economic downturn internal stability in the country is at risk. Civil society actors should negotiate the careful engagement of civil-political rights in the rather successful human development strategy of Belarus, which should also be supported by the international community. One pressing issue that civil society should focus its efforts on is the establishment of the institute of the Ombudsman as in other post-Soviet states. The gradual move from human development to human security would help the Belarusian authorities to improve its relations with its immediate Western neighbours, the European Union, which could bring more prosperity to the country.

In the case of Kyrgyz, the human security dimension can be achieved through human development. As the case study exhibits, the radicalisation of the Uzbek population is not only due to ideational contours, but entails strong poverty-driven aspects. The NGOs in Kyrgyzstan who work on

human rights issues are important, but they should also be accompanied with advocacy for larger representation of ethnic Uzbeks in political life. The increase in human development would allow the Kyrgyz authorities to ensure immunity to external penetration of radical religious elements. The genuine dialogue between religiously conservative groups and those that are inclined towards the state version of Islam or secularism would bring more internal stability to the country.

Lastly, the conflict in Eastern Ukraine remains the most pressing human security challenge in the post-Soviet space. The war effort and resurgent nationalism puts limitations on the freedom of information (Luxmore 2016), and provides a pretext for the growth of surveillance in the country. Furthermore, gross violations of human rights, especially hate speech, can be detected in both Ukraine and the rebel-held territories. The international effort should be directed at boosting freedom of the media in Ukraine, which remains largely under the control of oligarchs. The shift towards human security for Ukraine should be encouraged, as it will allow avenues of transitional justice to develop and become a condition for humanitarian assistance in the country.

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Securitisation versus citizenship in the Balkan states: Populist and authoritarian misuses of security threats and civic responses

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Abstract: The objective of this article is threefold: to identify the main security threats in the post-conflict and (post)-crisis Balkans; to analyse the emergence and strengthening of authoritarian and far-right tendencies as both a response and catalyst to securitarian policies and politics, as well as their variation across the region; and to examine the capacity of civil society to produce alternative discourses and mobilise resistance through various forms of civic activism and popular protest. The analysis is structured in three parts. The first part introduces three country cases – Bulgaria (mainstreaming of populist securitisation); Macedonia (ethnic securitisation in a deeply-divided society); and Serbia (democratic backsliding and populist authoritarianism). The three case studies reveal an important variation in the dynamics and outcomes of a broader populist and authoritarian trend that swept across the region. The three countries illustrate various types of civic resistance and contestatory citizenship. The two other parts are comparative: They enlarge the countries' coverage and identify major regional trends from two perspectives: populist and authoritarian misuses of security threats and authoritarian trends; and emergence and diversification of forms of citizenship as expression of civic resilience. Nationalist, populist and authoritarian politics have moved from the periphery of the political scene to the mainstream. The trend takes a paradoxical form: on the one hand, a promotion of the EU agenda and regional co-operation; on the other hand, securitisation, construction of political opponents, ethnic, religious and cultural Others, and civic activists as threats to national security and national identity. The civic resistance and human rights responses to populist authoritarianism and mainstreamed securitisation are analysed through the theoretical lenses of citizenship. It expresses the transition from the engineering project of building civil society in post-communist countries to the emergence of new forms of civic agency. Three types of citizenship are studied comparatively – green, contestatory, and solidary.

Key words: securitisation; authoritarianism; populism; citizenship; civic mobilisations; Bulgaria; Macedonia; Serbia; the Balkans; South-Eastern Europe

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1 Introduction

A transition from post-totalitarian and authoritarian regimes to a democratic liberal society, a prosperous market economy and a vibrant civil society. This was the project and the promise of the post-communist transition at the beginning of the 1990s. Twenty-seven years later the situation is quite different: A rise in and mainstreaming of national populism; authoritarian trends; the façade of illiberal democracy; and an uneven capacity of civil society to resist the erosion of democracy characterise the Balkan states. Authorities in these states have increasingly justified their populist and authoritarian policies by reference to growing security threats. These policies have had a negative impact on the protection of individual and collective rights in the region, and have threatened to undermine pluralism and free and fair elections, thus also the very foundations of democracy. The objective of the article is threefold: to identify the main security threats in the post-conflict and (post)-crisis Balkans; to analyse the emergence and strengthening of authoritarian and far-right tendencies as both a response and catalyst to securitarian policies and politics, as well as their variation across the region; and to examine the capacity of civil society to produce alternative discourses and mobilise resistance through various forms of civic activism and popular protest.

There are two major divisions and crises that – perceived as security threats – provide the context for this authoritarian and populist trend in the region. One of them largely originates from the migration crisis and its mismanagement by the European Union (EU), within a broader context of attempts to deal with the economic crisis and its consequences, which is principally reflected in the recent experience of Bulgaria and, to a smaller extent, also in other countries. The other draws on the legacy of the nationalist conflict in the former Yugoslavia, and is illustrated in the different examples of Macedonia and Serbia.

The analysis is structured in three parts. The first part introduces three country cases – Bulgaria (profiling mainstreaming of populist securitisation); Macedonia (ethnic securitisation in a deeply-divided society); and Serbia (democratic backsliding and populist authoritarianism). The three case studies reveal an important variation in the dynamics and outcomes of a broader populist and authoritarian trend that swept across the region. Bulgaria's democracy score according to the Freedom House is the highest among the analysed countries: 80 (out of 100) – 'free', and a lower figure for freedom of the press – 'partly free'. Macedonia is at the opposite pole with 57 – 'partly free' and 'not free' press. Serbia stands between the two poles: 76 – 'free' and 'partly free' press¹ and backsliding. According to the latest report of Freedom House,² the three countries vary in their European profile: Bulgaria has been a member of the EU since 2007; Macedonia and Serbia both are candidate countries. The three countries illustrate various types of civic resistance and contestatory citizenship. The two other parts of the article are comparative: They enlarge the countries' coverage and identify major regional trends from two perspectives: populist and authoritarian misuses

1 <https://freedomhouse.org/report/freedom-world/freedom-world-2017> (last visited 11 July 2017).

2 As above.

of security threats and authoritarian trends; and the emergence and diversification of forms of citizenship as an expression of civic resilience.

The theoretical background of the study is built around three axes: securitisation; authoritarian trends; and citizenship. *Securitisation* is conceived, in the perspective of the Copenhagen school, as a discursive construction of the threat and the transformation of a challenge into a security problem (Buzan & Wæver 2006; Buzan, Wæve & De Wilde 1998). The article borrows particularly from the critical sociological approach of Thierry Balzacq: 'Processes of securitisation could happen even in the absence of explicit discourse and, often, of identifiable audience' (Balzacq 2016: 204). The visible and invisible processes of securitisation will be analysed in the Balkans with an emphasis on their 'fundamental aim – preserving the regime' (Balzacq 2016: 207). Our major disagreement with the securitisation theories is the understanding of the relevant audience: It is conceived in terms of acceptance and agreement that is necessary for the intersubjective construction of the security threat (Balzacq 2005; Balzacq 2016: 195). This homogeneous and passive understanding of the audience limits the possibilities for resilience; therefore our preference for the concept of citizenship with its strong theoretical potential for dealing with agency and activities.

A major *authoritarian trend* has in the last few years swept across post-communist and other European states, undermining democracy and human rights. There has been a wide variation in outcomes of this trend across the continent due to different historical, institutional and political contexts of various countries. While growing authoritarian and populist currents in Western Europe negatively affected the quality of democracy, the same trends threatened the very foundations of democratic regimes in post-communist states in the Balkans. One of the main sources of this trend in the latter states has been the populist and authoritarian misuses of security threats by both the far-right and mainstream political parties, which undermined individual and collective rights, even political competition.

The choice to conceptualise civic resistance and responses to authoritarianism and populism through the theoretical lenses of *citizenship* is substantiated by three reasons. During communism, citizenship was understood as belonging and identity, as integration into the state; one of the democratic discoveries of post-communism is citizenship as participation, activism, and contestation. The second reason is the theoretical richness of the concept which distinguishes different types of citizenship – green, contestatory, solidary, digital, creative (Krasteva 2013; Krasteva 2016a) that could explain the diversity of mobilisations. Citizenship expresses the transition from the non-governmental organisations (NGOs) to 'acts of citizenship' (Isin & Nielsen 2008); from the engineering project of building civil society to the emergence of a new form of civic agency.

2 Bulgaria: Mainstreaming of populist securitisation

The Bulgarian case is characteristic of three trends in South-Eastern Europe (SEE): securitisation by above and by below; mainstreaming of national populism; and securitisation of civic activists. National populism

is – and often wants to be – a paradoxical phenomenon (Krasteva 2016). Here, we summarise its Bulgarian version in three paradoxes and two periods.

2.1 First period: Late emergence of far-right extremism but firm establishment in the political scene

National populism³ emerged in the form of a democratic paradox: In the 1990s, democracy was fragile, but there were no influential extremist parties; once democracy was consolidated, extremist parties appeared and achieved success. In 2005, Volen Siderov literally burst out of his television show ‘Attack’ into parliament with his new party ‘Attack’ (ATAKA). Radical nationalism happened to be not a comet-like phenomenon. Even after the decline of some of its pioneers, nationalism has not shrunk like shagreen, but has demonstrated resilience and established a lasting presence on the Bulgarian post-communist political scene (Krasteva 2016).

The second paradox is the surprising nexus between far-right populism and domestic crises. Generally, they are conceived as interconnected. The Bulgarian case shows a different picture. The ‘usual suspects’ – severe economic crises; political instability; waves of refugees – will come later and cannot be held responsible for the genesis of the first radical party (Krasteva 2016). The love for crises is inherent to national populism and is conceptualised by Krasteva as follows: ‘If crises did not exist, populism would have invented them’ (Krasteva 2017).

The third paradox is that the diversification and multiplication of extremist nationalist political parties⁴ do not increase the nationalist electorate. The unification of the three main ‘patriotic’ parties for the presidential elections in 2016 and parliamentary elections in 2017 shows similar electoral results.⁵ This paradox is positive – the proliferation of nationalist leaders and parties does not increase the number of nationalist voters.

What is crucial for our analysis is the symbolic cartography of national populism. It was initially designed by Volen Siderov for ‘Attack’ and remains fundamentally the same for the nationalist coalition today, independently of the leadership decline of Siderov himself. Authoritarianism, populism and nativism are the three pillars of radical far-right parties (Mudde and Kaltwasser 2013: 497). All are present in ATAKA’s symbolic universe. The latter, however, could be better understood via another triad: identitarianism; post-secularism; and statism (Krasteva 2016). The identitarian pole concentrates on the overproduction of ‘Othering’ and expresses its politics of fear. Religionisation of politics is a fundamental post-communist trend of the political instrumentalisation of religion. It is even more central in the nationalist symbolic map, acting as its second pillar. ‘Orthodox solidarity’ has been the name of ATAKA’s programme at several elections and is crucial for the post-secularist

3 For the purpose of the study we use national populism and far-right populism interchangeably.

4 For details on internal divisions, splits, new nationalist parties, see Krasteva (2016).

5 The candidate for president of the ‘United patriots’ in 2016 received 573 000 votes or 14,97%, which is less than the support for Volen Siderov in 2016 – 649 387 votes or 24,05%.

message. Bringing the state back into politics, and revitalising it against the neo-liberal weakening is the core of the third pole of statism and the politics of sovereignty. The people – the *sine qua non* of any national populism – are in the centre of the three-pole map. The radical demophilia is defined and defended through radical anti-elitism (Krsteva 2016). The symbolic universe could be summarised with two characteristics: the overproduction of ‘Others’ and enemies; and the transformation of ‘Others’ into a security threat. The most emblematic ‘Other’ transformed into enemy are the Roma, conceived not as a vulnerable social group, but as a threat to the national identity and public order.

2.2 Second period: Mainstreaming of populist securitisation

The presidential campaign of 2016 exemplified the hegemonisation of populist securitisation of migration. The far-right candidate, Krassimir Karakachanov, built his campaign on anti-refugee and anti-EU migration policy and attained a significant increase in votes.⁶ The left-wing candidate and current President, Rumen Radev, presented refugees as a security threat and raised severe criticism to the EU migration policy (Krsteva forthcoming). Once elected, in the beginning of 2017, the President asked the interim government he had appointed to annul the national strategy for integration of refugees.⁷

The second period differs from the first in four significant ways. First, the new emblematic figure of the ‘Other’ is the refugee constructed not as a humanitarian problem, but as a threat to national security and national identity. Second, the major difference is that the overproduction of securitarian threats comes not only from the far-right pole of the political scene, but also from the mainstream. The third difference is discursive: The impact of the discourses, themes and diagnoses of populist securitisation succeeded in framing the media, public and political discourses, making their political influence much more pronounced than their electoral support. Fourth, the populist securitisation from above could not but stimulate securitisation from below – vigilante, ‘hunters’ of refugees have been mediatised and heroised.

2.3 Civic activism in situations of mainstreaming of securitisation

This issue is summarised by two contrasting trends: the emergence of new forms and actors of civic activism; and the securitisation of civic actors by populism. For the purpose of this short case study, we use the example of a new civic actor of the wave of solidarity at the beginning of the refugee crisis: ‘Friends of Refugees’. This is a volunteer citizen movement, spontaneously created in June 2013 as a response to the refugee crisis and the inability of institutions to manage it appropriately. A small group of committed citizens succeeded in an impressively short time in attracting several other very different types of civic, humanitarian, business, numerous small human rights groups and a large number of individual citizens. They concentrate on three activities: humanitarian help; mobilisation against extremism and the increasing number of xenophobic attacks against refugees; and the symbolic fight for words: Nationalist

6 From 32 236 in 2011 to 573 016 in 2016.

7 A new slightly reformulated strategy has been adopted, also as a response of a strong media and civic criticism.

actors and some mainstream politicians constantly sought to impose the term 'illegal immigrants' while human rights activists fought for the legitimacy of the term 'refugee' (Krasteva 2016). Today Friends of Refugees has lost its public visibility and functions as a digital network of engaged activists sharing practices of solidarity.

The contrasting trend is the securitisation of the civic activists themselves – they are ridiculed and marginalised by populist actors and numerous media outlets, and presented as national traitors, financed by foreign donors, promoters of 'failed' multiculturalism and liberalism. This is a general trend in the entire Balkan region, and has been particularly exacerbated during the migration crisis.

3 Macedonia: Ethnic securitisation in a deeply-divided society

In the last three decades Macedonia and Serbia experienced turbulent political change, repeatedly shifting between authoritarianism and democracy. Just like in other parts of the former Yugoslavia, the legacy of violent nationalist conflicts – a massive restructuring of international and internal borders/boundaries, changing ethnic composition and political institutions – keeps resurfacing and threatens to eradicate gains in economic and democratic development achieved in the 2000s. National identities hardened during conflicts and thus provided a springboard for exclusionary policies towards ethnic and other minorities within and 'rival' groups beyond international borders. Like Bosnia, Macedonia is a plural society in which political institutions are designed to closely follow and manage ethnic divisions. At independence, Macedonia introduced a soft, informal power-sharing arrangement of representatives of the majority of Macedonians and of a large minority of ethnic Albanians (about a quarter of the population). Power-sharing coalitions in government were formed by a Macedonian party – the Social Democratic Union (SDSM), who were refurbished communists, or the conservative Internal Macedonian Revolutionary Organisation (VMRO-DPMNE) – and their ethnic Albanian partners. Ethnic antagonisms remained, as well as unresolved issues with neighbouring states, including Greece (over the country's name resulting in its international recognition as the Former Yugoslav Republic of Macedonia – FYROM); Bulgaria (language/national identity); and Serbia (Orthodox church), so that the United Nations (UN), the Organisation for Security and Co-operation in Europe (OSCE) and major Western powers became involved early on in an attempt to prevent a breakdown of the state.

The transition from communism ended in a hybrid regime and not in democracy. Newly-introduced multi-party elections were not free and fair, and freedom of speech, the press, association and assembly were frequently and systematically violated by power holders. Such an arrangement, in which opposition parties are permitted to contest elections but are severely constrained by incumbents in the process, is called 'competitive authoritarianism' (Levitsky and Way 2010). The SDSM initiated this authoritarian cycle and justified restrictions to the democratic process by state building and related security threats. International pressure in the following years led to more open elections and government turnover, but still within the context of hybrid regime. In 2001, a large group of ethnic Albanian rebels initiated an uprising, modelled on the

Kosovo Liberation Army (KLA), confronting the state's security forces and undermining an already weak and insecure new state. The conflict ended in a peace agreement brokered by extensive international intervention, which turned Macedonia into an increasingly formally institutionalised (almost bi-national) consociational/power-sharing state with proto-national territorial autonomies at the local level. The 2001 uprising, however, remained a major source of tension as many ethnic Macedonians kept referring to it when supporting the mainstream parties' securitising discourse and policies. The rebels acquired popular support and replaced established ethnic Albanian parties in government coalition. While subsequent elections were more open and press freedom advanced due to international pressure, many citizens felt left out as their living standards and economy tumbled, and clientelism and corruption remained extensive.

In 2006, the VMRO returned to power, this time with a technocratic and anti-corruption programme. However, as popular support for the rival SDSM collapsed in successive elections, their rule turned increasingly nationalist, populist and authoritarian. As Greece vetoed Macedonia's accession to the North Atlantic Treaty Organisation (NATO), the nationalist 'antiquisation' project, aimed at transforming Macedonian national identity from that embedded in Slavic Orthodox heritage into identity based on alleged ancient Macedonian roots. A major construction project in the capital Skopje and other cities involved the building of hundreds of 'ancient' monuments, triumphal arches and buildings where none existed before, while facades of communist era buildings were renovated in the baroque and neo-classical styles. The monumental publishing projects, focusing largely on literature and history, which aimed to demonstrate historical continuity with ancient Macedonia, unfolded in parallel (Georgievska-Jakovleva 2016). Ruling parties built a large clientelist network in the public sector and gained control of the media by undermining the public broadcaster and relying on privately-owned pro-government newspapers and television networks. Elections also turned increasingly unfree and unfair.

Since the emergence of Macedonia as an independent state in the wake of Yugoslavia's break-up to 2014, civil society has remained weak and marginalised. Non-state initiatives had long included only a small, highly professionalised NGO sector. This is not surprising as most plural societies tend to shun popular politics and focus on elite co-operation to achieve political stability (Lijphart 1977). In this case, the elite focus was boosted by international intervention as the EU and the US officials preferred to deal with party leaders and avoid less predictable civil society activists. A major authoritarian shift since 2008 then provoked response from civil society. In 2014, student protests, including the occupation of universities, stirred discontent among public sector employees against authorities. Students provided a horizontal, committee-style organisation model to others and, despite initially focusing narrowly on higher education and student welfare, had a broader political impact (Vankovska 2016).

In 2015, a wire-tapping scandal erupted as the opposition leaked audio recordings of government officials who suggested that thousands were under government surveillance, including opposition leaders, judges, civil society activists and journalists, and provided ample evidence of corruption and electoral fraud. The opposition (SDSM) leader was indicted for 'espionage' and agitating to 'overthrow the constitutional order'. After

peaceful protests, violence erupted on the streets of Skopje as the riot police suppressed protests in the wake of one of the leaks. Then, civil society protests (*#Protestiram*) and opposition demonstrations unfolded in parallel, culminating in a massive protest on 17 May. The ruling party organised a counter-protest to demonstrate its considerable popular base. In parallel, violent clashes occurred between a group of ethnic Albanians and security forces in North West Macedonia, in which several police officers died. The government exploited this event to boost its security agenda and to shift public focus away from pro-democracy protests.

Under pressure from the EU and US officials, the mainstream parties agreed to organise early parliamentary elections and to investigate the wire-tapping scandal through the interim government. As the VMRO reneged on parts of the agreement, tens of thousands protested for two months, demanding free and fair elections, and opposing authoritarian and nationalist policies. In turn, the VMRO organised large pro-government rallies. Ultimately, the parliamentary elections proved inconclusive as the two major Macedonian parties did not receive a clear majority, making the ethnic Albanian parties the king-makers. Still, the latter lost a major share of the minority group's vote as many apparently voted for the opposition SDSM – in contrast to previous elections. As the ethnic Albanian party started negotiations with the SDSM, the President refused to offer the coalition in the making a formal mandate to form government, and the VMRO orchestrated rallies of its supporters, including a mob attack on parliament that injured several opposition leaders. Both unconvincingly cited security concerns, such as a potential 'division' of Macedonia due to demands of ethnic Albanian parties – until recently their coalition partners. Eventually, the VMRO withdrew under strong international pressure, leading to a government turnover. In summary, Macedonia is an example of broad and effective mobilisation of opposition parties and civil society in reaction to authoritarianism and attempts to securitise politics and ethnic relations.

4 Serbia: Backsliding democracy and populist authoritarianism

The nationalist legacy of the former Yugoslavia is also important when it comes to explaining the government's securitisation strategies and authoritarian trends in contemporary Serbia, although in a somewhat different way than in Macedonia (and Bosnia). Serbia and Croatia emerged from the Yugoslav conflicts as increasingly mono-national and nationalising states in which – at least some – ethnic groups find themselves at the receiving end of nationalist governments. While the position of minorities, including the protection of both individual and collective rights, has improved considerably since the war, it still depends heavily on the mainstream party competition and bilateral relations between states. The end of communism in Serbia resulted in a hybrid regime. Slobodan Milošević, an energetic communist functionary, employed nationalist appeals to gain popular support at a time when communism became unpopular, and exploited state resources to build a competitive authoritarian regime. Despite recurrent popular mobilisation against authoritarian rule, Milošević managed to stay in power, partly due to extensive authoritarian manipulation and partly because of fragmented opposition. Still, the regime grew increasingly exclusionary and repressive, and gradually lost its social base. In 1999, NATO intervention in Kosovo

effectively created a protectorate run by the UN representatives and NATO-led military forces, while Serbia lost control over its autonomous province. A year later, a massive popular mobilisation removed Milošević from power as he refused to leave power after the opposition's election victory (Vladisavljević 2016).

The new democratic ruling coalition introduced democratic elections, economic reforms and promoted regional co-operation and EU integration. While government coalitions changed and debated about EU integration, Kosovo's secession and economic reform persisted, democratic parties from the anti-Milošević coalition remained dominant until 2012. Elections now were fully free and fair, and press freedom advanced considerably, as well as political stability. Simultaneously, the executive kept encroaching upon the power of the legislature, the judiciary and agencies of horizontal accountability, such as the Central Bank, the Ombudsman, the Public Information Commissioner and the Anti-Corruption Agency. The growing economic crisis since 2008 revealed a large clientelist system across the public sector as ruling parties abused state resources to employ their activists, supporters and friends (Vladisavljević 2011). A sharp fall in living standards then made the ruling Democratic Party (DS) unpopular, which made a turnover in power possible. The Serbian Progressive Party (SNS), which originated from the far-right Serbian Radical Party (SRS), the main carrier of exclusionary nationalism and chauvinism since the early 1990s, was the main beneficiary as leading SRS politicians turned moderate and suddenly started promoting the agenda of EU integration, good relations with Serbia's neighbours and economic reform, aiming at international actors and undecided voters. After winning the 2012 elections, the SNS-led coalition gradually consolidated its power as the DS collapsed, leaving the country without an effective opposition.

The first casualty of Aleksandar Vučić, an increasingly popular Prime Minister, was press freedom. He systematically undermined the public broadcaster and most influential newspapers, while using pro-government tabloids and TV networks to criminalise opposition. Vučić pursued a somewhat schizophrenic but effective political strategy. It involved the extensive promotion of the EU agenda, regional co-operation, economic reform and anti-corruption initiatives for which he received praise by international players and those local NGOs involved in post-conflict reconciliation – formerly his fierce critics. The SNS also discussed the 'normalisation' of relations with Kosovo's government, risking a popular backlash since many of its supporters opposed such policy. Simultaneously, however, the SNS tried to criminalise opponents by way of the tabloid media, which became mouthpieces of the government. The media frequently employed hate speech and led chauvinist campaigns against 'rival' ethnic groups – in line with the ruling party's roots in the extremist SRS – and with the implicit (and sometimes explicit) support of the prime minister. The government rhetoric of regional co-operation occasionally turned sour and antagonistic towards Croatia, Kosovo, Bosnia and Macedonia, where it found 'worthy' associates. Actual and potential security threats, originating from both the legacy of nationalist violence of the 1990s and the recent migrant crisis, served as a foundation for attacks on government opponents within and beyond the country's borders. Elections remained competitive but not free and fair, with highly asymmetrical resources of ruling and opposition parties and little access of the latter to the electronic media (Vladisavljević, Krstić & Pavlović 2017).

While campaigning on an anti-corruption ticket, the SNS considerably expanded corruption and clientelism levels.

The authoritarian turn remained largely unopposed, not only because of weak and fragmented opposition parties but also the silence of civil society. In the 1990s, massive repeated waves of popular resistance to authoritarian rule in Serbia were an outlier among post-communist authoritarian states (Vladisavljević 2016). In the early 2000s, however, many civil society activists moved to the public sector while key NGOs became highly professionalised. A more diffuse part of civil society demobilised as free and fair elections provided an opportunity to pursue various agendas within democratic institutions. After 2012, Vučić initially bought off sections of civil society by the rhetoric of reconciliation and regional co-operation. An effective challenge initially came from the Ombudsman, who investigated cases of abuses of power by government, hate speech in the tabloid media and government restrictions on the independent media. Civic resistance slowly started to grow, principally from local initiatives that focused on local issues, such as environmental problems, unlawful construction projects and corruption.

The most visible protest emerged in the capital Belgrade in response to a major government-initiated but privately-run construction project labelled the 'Belgrade Waterfront' (Borić 2017). A group of urban development activists, supported by influential architects, civil society organisations and intellectuals, initiated a protest campaign. They demonstrated against massive violations of existing urban development plans; the looming major damage to Belgrade's central, most prized but still undeveloped riverside area; the great potential for corruption in suspicious government deals with foreign investors; as well as the irresponsible, authoritarian and unlawful behaviour of both Serbian state and city authorities. The small initiative soon turned into a major popular challenge to power holders. As precincts closed on the night of the 2016 parliamentary elections, bulldozers entered the Belgrade Waterfront area to demolish a number of remaining buildings. Guards and passers-by were removed by masked men in unregistered vehicles, while the police repeatedly refused to send officers to investigate the cases. The Ombudsman's investigation later revealed that various state agencies colluded to aid the illegal clearing of land that authorities had targeted for the Belgrade Waterfront. In response, the civil society initiative grew considerably stronger, repeatedly attracting thousands (occasionally tens of thousands) of people to its protests against severe violations of individual and property rights and growing authoritarianism. A coalition of local civil society initiative gradually emerged, setting the stage for the expansion of popular mobilisation. After the unfair 2017 presidential elections, students and other citizens protested for weeks, occasionally drawing large crowds. Overall, Serbia involves both successful populist appeals of authoritarian incumbents and growing popular resistance to authoritarianism and securitisation.

5 Populist misuses of security threats and authoritarian effects

Contemporary misuses of security threats in the Balkans are rooted, at least partly, in political legacies of the second half of the twentieth century. The Cold War sharply divided the region, not only into communist and anti-communist parts, but it also separated Yugoslavia from the Soviet

bloc, and Albania from both, providing an excuse to governments to treat various issues in economic and political development as undercutting or enhancing national security. The 'national question' also facilitated securitarian responses, principally in highly-complex and multinational Yugoslavia, but also in Bulgaria regarding its Turkish minority in the 1980s and in Greece with regard to the Greek-Turkish conflict within and over Cyprus. Finally, both communist regimes and the anti-communist military regime in Greece largely treated potential and actual informal political opposition as enemies of the state and dealt with them accordingly, systematically violating the human rights of their citizens. In the 1990s, new authoritarianism in the former Yugoslavia was driven, and justified, by state-building and security issues. Real and imagined security threats, exploited by authoritarian rulers, resonated well with large sections of the electorate and reduced the appeal of pro-democracy parties and movements.

In the early 2000s, nationalist and chauvinist claims were largely pushed towards the margins of mainstream politics throughout the Balkans, as democratising trends shifted elite and popular energies of mainstream parties to democracy, economic development and EU integration. In turn, this trend relaxed ethnic animosities in and between new states, provided more rights and protection for ethnic minorities and supported regional economic and political co-operation. In Bulgaria, the Turkish minority party entered a governing coalition. In the former Yugoslavia, authoritarian parties, such as the Socialist Party of Serbia (SPS), the VMRO and the Croatian Democratic Union (HDZ) changed leaders, accepted the democratic rules of the game, facilitated the integration of their countries into the EU and included ethnic minority parties into government, while far-right parties and movements had limited access to the media. In Bosnia and Macedonia, which were gradually recovering from violent conflicts, even nationalist parties softened their positions somewhat hoping to gain from the prospects of EU accession. The electoral rise of ATAKA in Bulgaria is an exception to this trend.

Nevertheless, major external shocks – such as the increasing global focus on terrorism and related security threats, the financial and economic crises and, more recently, the migrant crisis and its mismanagement by the EU – undermined genuine achievements in democratic and economic development and regional co-operation. A spread of the economic crisis to the region ended growth and boosted socio-economic inequalities, and undermined economically-ineffective democratic governments, which had become increasingly clientelist and corrupt. The trends provided ample space for populist, authoritarian and exclusionary politics, this time at the hands of governments and mainstream parties, which also led many citizens to withdraw from political participation. While rhetorically promoting the EU integration agenda and economic reform, the populist parties and governments increasingly deployed securitarian discourses, partly borrowing from the securitarian rhetoric of Western governments focused on fighting terrorism and partly drawing on their parties' baggage of nationalist and chauvinist rhetoric. Implications of this trend for democracy and individual and minority rights have been considerable.

This trend unfolded across the Balkans but produced different trajectories, illustrated by our case studies, due to their different structural,

institutional and political contexts. In much of the Balkans after communism, the far-right parties are the main source of the return to securitisation of ethnic relations. As in Central Europe, the far right has drawn heavily on the nationalist legacy, including hostilities to ethnic minorities and 'rival' neighbouring states, and not on opposition to immigrants as in Western Europe (Minkenberg 2015). In Serbia and Croatia, extreme nationalist and populist parties have been a permanent fixture on the political stage since the war but with declining electoral support, which kept them largely on the political margins. Occasional successes, such as the electoral rise of the SRS in the mid-2000s due to a sudden change in leadership and programmatic moderation, were followed by a swift return to the political margins as moderate factions split up. In Bulgaria, by contrast, the electoral rise of the far-right party did not occur before 2005 when ATAKA campaigned against the 'political privileges' of the Turkish minority. In Greece, the rise of immigrant numbers simultaneous with the beginning of the financial crisis brought about a major increase in voter support for the Golden Dawn, a neo-Nazi and anti-immigrant party.

However, regardless of the electoral success, populist and far-right parties managed to preserve a broad repertoire of nationalist and chauvinist themes, principally related to hostility to ethnic and sexual minorities and 'rival' neighbouring states, and to adapt it to a different political context of new democracies, while creating new constituencies, such as sections of the youth. They worked in parallel, and sometimes together, with football hooligans, skinheads, neo-Nazi and racist groups, who often deployed hate speech online and offline and violence against ethnic and sexual minorities and their activists. The principal impact of the far right went well beyond elections and non-institution action, such as protests. It involved the framing of the public discourse and public-policy agenda in exclusionary fashion and shaping party competition. The far-right repertoire of exclusionary national themes to some extent shaped mainstream politics even in the 2000s, but more recently became more resonant among the public and mainstream parties. While hostility to ethnic and sexual minorities remained the main source of populist securitisation in Yugoslavia's successor states, the anti-refugee and anti-EU migration policy proved to be more important in Bulgaria and Greece. In any event, the public focus shifted away from individual and minority rights and democratic procedures. Populist ruling parties increasingly exploited the situation to take control over influential print and electronic media and to undermine their opponents from opposition parties and civil society.

A different trajectory unfolded in plural societies after violent conflict, such as Macedonia and Bosnia, where far-right parties had less space to develop and prosper, as mainstream parties (or their important factions) harboured populist and nationalist agendas. The ethnic and institutional complexity of these countries facilitated the rise of competing securitising discourses that blamed 'rival' groups' political platforms for undermining national security, state institutions and EU accession. Multi-ethnic coalitions only rarely resembled democratic power-sharing arrangements in pursuit of collective rights and autonomy and of economic development, based on the rule of law. They looked more like vehicles designed for a division of spoils between distrustful partners that ruled their communities in authoritarian fashion, with ample clientelism and

corruption, tolerating each other in government. Occasional changes in government would only alter the personal composition of the networks, with little impact on the informal rules of the game. In the last few years, weak democracies transformed into hybrid regimes, with rapidly-diminishing press freedom, the abuse of state resources by ruling coalitions on a grand scale, including massive surveillance of actual and potential political opponents, increasingly exclusionary nationalist agenda and little space for legitimate political opposition, and with rival securitising nationalist discourses, especially in times of crisis.

Overall, nationalist, populist and authoritarian politics has gradually moved from the political wilderness of the 2000s towards the political mainstream. While few enjoyed electoral success, the far-right parties influenced mainstream politics in different, potentially more damaging ways, by framing public discourse and shaping policy agenda in several countries in the region. In plural societies, radical factions of mainstream parties served the same function. While failing to successfully manage existing crisis and security threats, populist ruling elites produced new crises and threats, not least by adopting and pursuing far-right populist rhetoric and policies. Therefore, populism is both a consequence of security threats and an active producer of securitisation. While populist and far-right strategies were similar across the board, their outcomes varied considerably due to different political contexts in different states.

6 Post-communist citizenship as a civic resistance to populist securitisation and authoritarianism

I do not like how media, people and even some friends of mine speak negatively of refugees. I have been working as a volunteer with refugee children for already a few years. I feel, I really feel I can change the world.⁸

We start this part of the discussion with the interview above, with a Bulgarian teacher who professionally works with children, but who volunteers for refugee children in her few free hours, because of three strong messages: the domination of populist securitisation of refugees in the public sphere and attitudes; the resilience of humanitarian solidarity; and the transformative power of civic agency. All three messages are crucial for the article, which aims to analyse the (in)capacities of civic activism to counter the authoritarian and securitarian trends. The research tries to understand if populist securitisation weakens the role of citizenry or, on the contrary, catalyses civic discontent and protests.

The three cases – ‘Don’t Drown Belgrade’ in Serbia, the ‘#I protest’ in Macedonia and ‘Friends of Refugees’ in Bulgaria – refer to overlapping, yet differing forms of mobilisation and activism, illustrating the trend that movements of the 2010s are even more diverse than the ones of previous decades (Della Porta & Mattoni 2014: 9). Two conceptions compete in explaining mobilisations: the diffusion model of social movements (Della Porta & Mattoni 2014); and contestatory citizenship (Pettit 1997; Krasteva 2016a). We borrow from Della Porta and Mattoni the diffusion model – the variety of ways in which dissident ideas, practices and tactics have

8 Interview by A Krasteva with a Bulgarian volunteer working with refugee children, 13 July 2017.

diffused across borders and adapted to local contexts (Della Porta & Mattoni 2014). Despite the theoretical debt to the social movements approach, we prefer the conceptualisation of mobilisations in terms of citizenship (Pettit 1997; Krasteva 2016a) for three reasons. The first is connected with the relation exogenous – endogenous in the source and ‘authorship’ of civic activism. In the beginning of the post-communist transition they were predominantly exogenous – the democratic engineering project to build civil society as part of the triple democratisation together with market economy and representative democratic institutions. This article deals with mobilisations from inside and below. The differences are so substantial that we distinguish first and second generation mobilisations which differ also in respect of the type of actors – NGOs for the first generation; citizens for the second. The former are more efficient and professionalised, but rather think tanks than civic actors; the latter are more spontaneous, ready to make mistakes, to experiment and innovate (Krasteva 2009; 2013; 2016a). The second reason for our preference for citizenship is that it subtly conceptualises agency. The third reason is the political innovation in the understanding of citizenship: If during communism it meant allegiance to the state, today it increasingly means criticism of captured states, contestation and protest.

The political context in which civic activism unfolds and aims to transform has also changed: The first generation of civic activism develops against a background of fragile, but consolidating democracy and, more importantly, trust in democratisation; the second generation mobilisations face the emergence of post-democracy (Sauer, Krasteva, Saarinen 2017) in which populism has ‘transformed the transformation’ (Minkenberg 2015). For the purpose of the article, we analyse three trends of civic resistance to mainstreaming of securitisation, state capture and authoritarian leaders: greening of activism; Occupy mobilisations, humanitarian solidarity, conceptualised respectively in green citizenship, contestatory citizenship, and solidary citizenship. They are present in the three analysed cases and in most of the countries of the region with varying temporality and intensity.

6.1 Greening of citizenship

Gizi demonstrations proved how the ecological cause for saving a park from a small initial protest by green activists has been transformed into a mass contestatory mobilisation (Uncu 2016). ‘Don’t Drown Belgrade’, a campaign against megalomaniac urban and architectural projects mobilised, is one of the largest anti-government protests in Serbia after the fall of Slobodan Milosevic (Borič 2017). Green initiatives and protests for saving a park, beach, forest and wild nature mobilise the Balkan youth everywhere in the region. Environmental protests are ‘the patent’ of post-communist youth. Eco-mobilisations are the activism of a generation that does not identify itself in terms of the communism/anti-communism polarity. The struggle for preserving the *purity of the environment* is a struggle against the *pollution of politics* (Krasteva 2016a).

‘The greening of the Self’ (Castells 2010) marks the most distinctive transformation of contestatory agency (Castells 2010: 168):

If we are to appraise social movements by their historical productivity, namely, by their impact on cultural values and society’s institutions, the environmental movement has earned a distinctive place in the landscape of

human adventure ... Two-thirds of Europeans consider themselves environmentalists; parties and candidates can hardly be elected to office without 'greening' their platform ...

The greening of the protesters' Self in South Eastern Europe has a double expression: environmentalists are among the most active protesters; and a significant majority of the protesters are environmentalists (Krasteva 2016a).

The green values and ideas inspire the Balkan youth more than any other cause or challenge. Poverty, discrimination and inequalities do not have the mobilising potential of mountains, forests and wild nature. The green mobilisations in the Balkans are also the most globalised in the sense that among all the other protests they stand the closest to the transborder inspiration for a radical participatory democracy, deliberative and participatory democratic practices (Della Porta & Mattoni 2014: 5; Krasteva 2016a).

6.2 'Occupy' Balkans or contestatory citizenship

'Do not expect the system to change. Try yourself.' This appeal by Kristian Takov, professor of law, one of the leaders of the protests in Bulgaria during 2013, who passed away during the week we were finalising this article, expresses the spirit and ambition of Occupy mobilisations.

'Don't Drown Belgrade' offers a beautiful semantic polyphony with its two meanings – taken literally, it has an environmentalist meaning and, more general and more political, 'Don't give [them] Belgrade'. This shift from environmentalist to anti-elite and anti-authoritarian claims marks the new mobilisations from Gisi in Istanbul to Belgrade. They are conceptualised in the article by two types of citizenship – green and contestatory – which interfere with and reinforce each other.

The Balkans entered the Occupy mobilisations later than the global wave, but are experiencing high peaks over the last years. Triggers and temporality vary from country to country. The Bulgarian protest in the summer of 2013 started on the day an oligarch with a particularly negative reputation was appointed director of the governmental agency for national security – the same day tens of thousands of people gathered in downtown Sofia, and these protests lasted an entire year (Krasteva 2016a). The issue that triggered the protest in Sarajevo was of a completely different nature and concerned at first glance an administrative issue – the registry of citizens (JMBG). Because of the ethnopolitisation of the issue,⁹ newly-born children were not issued with JMBG and found themselves in the situation of full rightlessness (Arendth 1973). The protest started with a small demonstration by about a hundred citizens, and over next days the number of protesters had risen to several thousand (Mukic 2016). The 'Colourful' revolution in Macedonia mobilised thousands for countering the oppressive and corrupted political elite (Petkovska 2017).

Despite the variety of causes, the Occupy mobilisations are aimed not so much at one or another public policy but at the very core of politics – both *against* a particular elite and *for* another type of politics: 'They are against

9 The Bosnian Serb political leaders insisted it should designate the ethnicity of the citizen.

social injustice and the system that produces laws and political structures that maintain their hegemonic privileges and hierarchy' (Mukic 2016: 217). 'The problem isn't in people; it's in the system'; and 'We've had enough of hierarchy. We want direct democracy.' These slogans from the June 2013 protests in Sofia summarise the high ambitions both of rejecting the existing model and inventing a new model. The impact is so crucial that Krasteva (2016a) defines it as a 'second democratic revolution'. It did not transform society but transformed civic agency. In the first post-communist revolution of the elites, citizens were assigned the role of applauding and attending the democratisation process; they were second-class actors. In the second revolution, it is the citizens who experiment, innovate, and re-found democracy. This fundamental role has transformed their status, asserting them as first-class actors. By protesting online and offline, the citizens have taken democracy into their own hands in order to experiment with new forms of participation, engagement and responsibility. The key word is experimentation: In Occupy mobilisations one sees more aspirations than results, more utopia than politics. Occupy is the watershed marking the transition from party politics to contestatory democracy. Contestability is more important than consent (Pettit 1997; Braithwaite 2007; Krasteva 2016a): 'Political protest has become an integral part of the way of life: Protest behaviour is no longer used as a last resort only, but employed with greater frequency, by more diverse constituencies, to represent a wider range of claims than ever before' (Kriesi 2014: 371).

6.3 Humanitarian solidarity as 'act of citizenship'

Group 484 was founded in Belgrade in 1995 to support 484 families who had found refuge in Serbia after fleeing the violence of post-Yugoslav wars. Today Group 484 is a policy-based organisation specialising in the migration policy and refugees from other wars and conflicts. It illustrates the shifted target of humanitarian solidarity – from refugees from local wars to refugees from distant conflicts. 'Friends of Refugees' in Bulgaria is typical of the emergence of civic organisations and initiatives, spontaneous and often ephemeral, in a situation of a migration crisis. Young lawyers have been particularly active with legal assistance to asylum seekers and refugees, such as the Macedonian Young Lawyers Association; the Voice in Bulgaria Foundation; and the Bulgarian Lawyers for Human Rights. The local branches of Caritas and Red Cross are among the main actors for humanitarian assistance. The Divac Foundation in Serbia, created by a famous former basketball player, is an exception, but illustrates the wave of civic solidarity at the beginning of the refugee crisis. The humanitarian campaigns of solidarity could be summarised in four characteristics: the capacity of civil society to respond positively to the refugee crisis by impressive humanitarian mobilisation; the transformation of citizens without an NGO or other militant experience into activists; the emergence and massification of volunteers, as both an expression of the vitality of civil society and a catalyst for its innovation and dynamisation; and the fast rise, but also the relatively rapid decrease of the wave of solidarity. The longer the crisis, the less the civic enthusiasm for humanitarian help. Today, some of these groups, such as 'Friends of Refugees', are loose networks functioning predominantly through the social media.

The humanitarian initiatives are less organised and less professionalised and introduced the figure of volunteer – citizen 'amateur' devoted to the

protection of a vulnerable group, restoring the idea of civic activism as a cause. This new generation of mobilisations may be conceptualised through Isin and Nielsen (2008) 'acts of citizenship'. They fight at two fronts – humanitarian and securitarian. 'Help on the road' is the apt title of a human rights report summarising the battle for the defence of refugee rights and of their right to have rights (Macedonian Helsinki Committee 2017). The second battle resembles the biblical battle of Goliath – the giant machinery of securitisation of refugees and the young courageous David of human rights activism. The victory of the human rights David is not taken for granted.

The three types of mobilisations – green, Occupy and humanitarian – vary in size and target. The humanitarian mobilisations are the least in number, the more sporadic and the least publicly influential; the green mobilisations vary considerably from one protest to another, but they are by far the favourite 'voice' of the Balkan youth today; Occupy is the largest and the most visible. The targets also vary: The humanitarian mobilisations address the securitisation of refugees; the green and the Occupy mobilisations contest state capture, urban and environmental degradation, corruption and authoritarian trends.

Paradoxically, what these mobilisations have in common is that they all are targets of securitisation – civic and human rights activists are systematically targeted by policies and practices of Othering and Ordering, constructed as traitors to national identity and cohesion. The negative impact of securitising civic activism varies. The actors in humanitarian activism are ridiculed as promoters of failed multiculturalism and marginalised in the public space. The securitisation of mass protests is not only less effective, but, on the contrary, fuels and catalyses the mobilisations.

7 Concluding remarks or the Balkan Janus of securitisation and citizenship

The Balkans today is a Janus with two faces: populist and authoritarian, on the one hand, and civic, on the other. The conclusion delineates this ambiguous profile by two trends – an authoritarian turn and a revitalisation of the citizenry.

7.1 Authoritarian turn and mainstreaming securitisation

Nationalist, populist and authoritarian politics have moved from the periphery of the political scene to the mainstream. The trend takes a paradoxical, almost schizophrenic form: from one perspective, the promotion of the EU agenda, regional co-operation and economic reforms; from another perspective, the tabloidisation of the media, securitisation of both opponents and others. Authoritarianism, populism and securitisation interfere and form mixtures with considerable variations across the region. 'Politics of enemy' (Schmidt 2007) frames the political and media discourses. The study demonstrated two different targets transformed into a security threat to the national identity and national security: ethnic and religious minorities and migrants/refugees, on the one hand; and civic and human rights activists, on the other. While failing to successfully manage security threats and crises – economic, refugee-driven, identity-based,

populist elites produce new ones. As dealers of these crises, these elites capitalise politically on the fears induced by them. Populism is both a consequence of security threats and an active producer of securitisation.

7.2 Civic resistance to authoritarianism and securitisation through innovation and vitalisation of citizenship

Civic resistance started to grow slowly, initially from local initiatives on environmental issues, unlawful construction projects and corruption. Their temporality varies from country to country: Occupy mobilisations started in Bulgaria in 2013 and later in Bosnia in 2013 to 2014. 'Don't Drown Belgrade' in 2015 and *#I Protest* in Macedonia in 2017 continued the Occupy wave. The greening of claims and mobilisations is on the rise almost everywhere in the region. The wave of solidarity with refugees reached its peak a few months after the refugee crisis. The three types of mobilisations – green, Occupy and humanitarian – differ in targets, intensity and efficiency. The civic mobilisations remain profoundly asymmetrical: The clusters of intense mobilisations are formed by the green and the anti-oligarchy, anti-corruption, anti-authoritarianism ones; acute social and humanitarian problems such as poverty, inequalities, and refugees cause weaker – rare, few in number, relatively unpopular – mobilisations, such as anti-racism, anti-xenophobia, and anti-extremism marches and initiatives. Some protests succeed in achieving their goals rapidly and with a relatively small number of mobilised participants (such as some environmental protests). Other protests – lasting for a long time and with a larger number of participants – fail to achieve their initial demands. The effectiveness of the protests is variable.

In this analysis, we are less interested in their efficiency than in their double positive impact. Civic resistance is a counterforce to securitisation and authoritarianism, particularly crucial in a period of mainstreaming of populism. The second impact is less visible and equally fundamental: the creation, experimentation and innovation of new forms of citizenship as participation, contestation, and activism. The classic concept of citizenship as belonging defines it from the top down; the other from the bottom up. In the first, the state is key: It sets the framework into which individuals fit or evade, or opt to 'exit'. In the case of citizenship as engagement and contestation, the framework is set not by the state but by the activity of citizens and becomes 'voice' (Krasteva 2016a). The words 'I feel I can change the world' by a volunteer summarises the high transformative potential of human rights activism for social change and innovative citizenship. The Goliath of populist securitisation and authoritarianism demonstrates strength and arrogance; civic David resists and innovates.

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From sleepwalking into surveillance societies to drifting into permanent securitisation: Mass surveillance, security and human rights in Europe

Wiebke Lamer*

Abstract: *The migration crisis, terroristic acts on EU soil and other so-called generators of risks have been accompanied by an increasing trend towards securitisation in many European countries. After decades during which traditional national security threats only indirectly affected most member states of the EU, many European governments have now turned towards policies that prioritise the safeguarding of national security at the expense of human rights and civil liberties. In countries that have been directly affected by Islamic terrorism, such as France and Belgium, extreme anti-terrorism legislation has been implemented and civil liberties have been curtailed. The threat of terrorism and the migration crisis has been accompanied by a legitimisation for the increased use of government surveillance measures for border control and counterterrorism actions. The article examines the linkages between securitisation and surveillance in the European context, and studies the consequences of the increasing trend of government surveillance on human rights. The article argues that looking at the implementation of mass surveillance measures in Europe illustrates that the continent is drifting into a permanent state of securitisation that threatens not only certain human rights, but the very foundation of democratic societies by permanently altering state-society relations. It also discusses possible ways to counter these worrying trends.*

Key words: *securitisation; mass surveillance; Europe; human rights; democracy*

1 Introduction

The migration crisis, terror attacks on European Union (EU) soil and other 'generators' of risk have been accompanied by an increasing trend towards securitisation in many European countries. The term 'securitisation' was coined by Buzan, Wæver and De Wilde in the 1990s. Securitisation occurs when an issue 'is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure' (Buzan et al 1998: 23-24). Processes to securitise the issues of migration and of terrorism in Europe are not novel,

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particularly since 9/11, and have been studied by securitisation scholars of various schools. However, following several terrorist attacks in Europe and the rise of populist parties across the continent who link the influx of refugees from the Middle East and North African (MENA) region with terrorism, many European governments have now turned towards policies that prioritise the safeguarding of national security at the expense of human rights and civil liberties.

France and Belgium, countries recently directly affected by Islamic terrorism, have implemented extreme anti-terrorism legislation that curtails civil liberties. Since the November 2015 terror attacks in Paris, France has been in a continued state of emergency. European countries that have not directly experienced any recent terrorist attacks also implement draconian counterterrorism laws (Amnesty International 2017). This is not least due to the fact that in many European countries, populist rhetoric has given rise to the notion that an increased number of refugees equals an increased number of terrorist attacks. The issue of migration thus is linked to the already securitised issue of terrorism, and both are further elevated above the merely political and into the existential threat territory, which legitimises breaking existing rules or implementing unlawful legislation.

Understandably, many observers in the human rights community have watched this trend unfold with concern. States of emergency in the wake of terrorist attacks become permanent; security becomes the go-to excuse for governments across the continent to curtail civil and political rights; and government surveillance powers become legitimised. In fact, surveillance is intrinsically linked to countering terrorism and, thus, highly relevant to the securitisation debate.

Surveillance is a tool used by governments. Surveillance is staged in securitising language. For example, in 2014 Theresa May, then UK Home Secretary, justified government steps to establish greater surveillance powers by stating that ensuring that police and security services have the right powers to uncover terror plots was now 'a question of life and death, a matter of national security' (Farmer 2014).

As the article shows, it may also be argued that surveillance tends to be moved outside the normal boundaries of political procedure. This is due to the fact that surveillance is framed as a necessary counterterrorism measure as in the example from the UK, and because much of it is conducted in secrecy; secrecy, one has to add, that is also justified in the name of national security.

Given these close links between surveillance, counterterrorism measures and national security, it is vital to take a closer look at surveillance in the context of securitisation. At this point it is worth noting that surveillance also comes with a host of other factors that further complicate its relationship with securitisation. For instance, surveillance itself has garnered considerable attention with regard to its potential to dangerously undermine human rights and democracy, particularly since the 2013 Snowden revelations. This, too, feeds into the processes of securitisation, which include governments using the justification of existential threats that require emergency action to break established rules. As the Snowden leaks showed, by using indiscriminate mass surveillance, governments were indeed breaking laws. What is more, the revelations

also showed that governments were not only using surveillance technologies for the purposes of countering terrorism. They also spied on allied politicians, journalists and human rights defenders.

Consequently, it is worth looking at the interplay between these issues in more detail, especially since we see evidence across the continent that security is becoming the dominating policy paradigm, enabling harmful practices such as mass surveillance, and creating an atmosphere in which security permanently becomes the foundation of political and daily life and discourse. Surveillance, of course, is a broad term and is not only carried out by governments. Surveillance by corporate entities is an equally disturbing phenomenon, and boundaries between surveillance by private and public actors are becoming increasingly blurred. This article, however, focuses on indiscriminate mass surveillance, including the collection and use of electronic (bulk or meta) data, by governments and their agencies.

The aim of the article is to examine the relationship between permanent securitisation, mass surveillance and human rights. The article contends that examining the implementation of mass surveillance measures in Europe reveals that the continent is drifting into a permanent state of securitisation that threatens not only certain human rights, but the very foundation of democratic societies by permanently altering state-society relations. Not only have we sleepwalked into surveillance societies in Europe, as UK Information Commissioner Richard Thomas first warned the UK in 2006, but we are also sleepwalking into permanent securitisation (Wright & Kreissl 2014: 320).

The article proceeds as follows: First, it outlines the current state of mass surveillance in Europe. It then turns to a discussion of the role of the public in the normalisation of mass surveillance, before outlining the impact of mass surveillance on human rights. Finally, the article examines the relationship between mass surveillance and permanent securitisation, and concludes with a discussion on how to counter these trends.

Throughout the article, four examples are highlighted in the context of mass surveillance and securitisation in Europe: France, because of the implementation of anti-terrorism legislation in the aftermath of recent terrorist attacks; the UK, as the European country at the forefront of expanding government surveillance measures in the name of national security; Germany, because its historical experience with surveillance might lead it to resist the normalisation of surveillance; and, finally the EU, as itself an actor in the context of surveillance.

2 Current state of mass surveillance in Europe

A few years ago, a wave of outrage swept through Europe. The revelations leaked by whistleblower Edward Snowden that the US National Security Agency (NSA) and its Five Eyes partner intelligence services had been conducting mass surveillance that affected their own citizens for years and even targeted the political establishment of many of its allies with their programmes drew widespread anger in many European capitals. However, in 2017 this outrage has become history. The general public in many European states might still be worried about mass surveillance, as discussed in the next section, but their leaders have decided to catch up with the NSA and the UK Government Communications Headquarters

(GCHQ) (the UK's intelligence and security arm) and either extend their own surveillance measures or legalise those already in place.

A report by the EU's Fundamental Rights Agency (FRA) of November 2015 examines how legal frameworks in EU countries enable the use of surveillance techniques, and investigates the role of specialised oversight bodies over intelligence services (with both a foreign and domestic mandate), focusing on the right to privacy and the right to data protection (European Union Agency for Fundamental Rights 2015: 8-9). Not surprisingly, the report finds that the organisation, structure, regulation and oversight of intelligence services differ across the 28 EU member states. The same applies to the concept of national security, which is not harmonised across EU member states, while the scope of the concept is rarely defined (European Union Agency for Fundamental Rights 2015: 27).

Since mass surveillance is not a legal term, the report primarily discusses targeted and untargeted data collection. Targeted surveillance refers to traditional forms of secret data interception, such as phone tapping, and presumes the existence of prior suspicion of a target individual or organisation (European Union Agency for Fundamental Rights 2015: 17). It is also widely known in the legislation of EU member states. With the exception of Cyprus and Portugal, all member states have codified their use of targeted surveillance into law (European Union Agency for Fundamental Rights 2015: 20). Untargeted data collection, on the other hand, is carried out with the type of mass surveillance programmes such as TEMPORA (a codeword for the GCHQ's formerly secret computer programme) and UPSTREAM (the NSA's interception of communications system) that were revealed by Edward Snowden (European Union Agency for Fundamental Rights 2015: 17). Only five EU member states (France, Germany, The Netherlands, Sweden and the UK) have legal frameworks that lay out how intelligence services can use signal intelligence (SIGINT).¹ However, SIGINT legislation in these five countries is also problematic. The report states (European Union Agency for Fundamental Rights 2015: 17):

The Snowden revelations have demonstrated that current legal frameworks and oversight structures have been unable to keep up with technological developments that allow for the collection of vast amounts of data. In some cases, outdated laws not intended to regulate these new forms of surveillance are being used to justify them.

Furthermore, the Council of Europe Commissioner for Human Rights also concludes that 'in many Council of Europe member states, bulk, untargeted surveillance by security services either is not regulated by any publicly available law or regulated in such a nebulous way that the law provides few restraints and little clarity on these measures' (Council of Europe Commissioner for Human Rights 2015: 23). With regard to the oversight of intelligence services, the FRA report also finds that 'a number of EU member states do not provide their external oversight bodies with broad powers, backed by effective independence and means. They

1 The Venice Commission defines signals intelligence as 'a collective term referring to means and methods for the interception and analysis of radio (including satellite and cellular phone) and cable-borne communications' (European Union Agency for Fundamental Rights, 2015, 15)

therefore rely heavily on executive control’ (European Union Agency for Fundamental Rights 2015: 34).

The FRA findings, along with various other organisations quoted above, show that surveillance legislation in Europe is in dire need of revision. Judicial oversight has to be vastly improved and legislation amended so that people can understand the reasons and legal framework that allow government surveillance and are able to challenge these.

Already at the time of writing of the FRA report, and particularly in response to the growing number of terrorist attacks on EU soil, governments were starting to put into place legislation that expands the surveillance powers of intelligence and law enforcement authorities. However, instead of including more provisions allowing for adequate judicial oversight and attempting to safeguard human rights, the opposite trend is emerging.

In fact, an Amnesty International report of 2017 on the ever-expanding national security state in Europe found that many EU states now have joined the ranks of ‘surveillance’ states, and that many European governments justify enhancing their surveillance powers by citing security threats (Amnesty International 2017: 26). Specifically, the report states that ‘[s]tates have vastly expanded executive power and largely neutralised the ability of the judiciary to serve as a prior check, thus granting the executive virtual monopoly of power over mass surveillance’ (Amnesty International 2017: 26). The report investigated counterterrorism legislation in 14 EU countries in depth, and eight of these (Austria, Belgium, France, Germany, Hungary, The Netherlands, Poland and the UK) stand out in the context of government surveillance. The table below focuses on this article’s three country examples: France, Germany and the UK.

Country	Legislation	Date	What does it do?	Oversight
France	Law No 2015-912	July 2015	Gives PM power to authorise the use of surveillance measures for wide range of goals. Permits indiscriminate mass surveillance techniques like capturing mobile phone calls and ISP black boxes collecting the personal data of millions of internet users	No prior judicial authorisation required; no ongoing independent judicial oversight

France	Law No 2015-1556	Nov 2015	Allows indiscriminate mass surveillance of all electronic communications (content and metadata) sent to, or received from, abroad (including communications sent from one French citizen to another via servers located abroad)	
	Law No 2016-987 Art 15	July 2016	Law renewing the state of emergency amending the Law on National Security. Gives PM extended surveillance powers over electronic communications regarding individuals suspected of constituting a threat or of 'being associated' with someone who may constitute a threat	No prior judicial authorisation required
Germany	<i>Gesetz zur Verbesserung der Zusammenarbeit im Bereich des Verfassungsschutzes</i>	2015	Expands surveillance powers of intelligence service (BND) in response to 'cyber threats'	
	<i>Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des BND</i>	Oct 2016	Permits BND to intercept, collect and process the communications of non-EU citizens outside Germany when the interception point is in Germany (bulk and targeted surveillance) for vague and overly broad goals.	No provision for independent judicial oversight

UK	Investigatory Powers Bill (Snoopers Charter)	Nov 2016	Institutionalises highly intrusive bulk surveillance powers: bulk interception, bulk acquisition, access to bulk personal datasets, bulk hacking – all without any requirement for individualised, reasonable suspicion	Lacks provision for an independent authorisation and oversight mechanism.
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All these laws were rushed through parliament, in some cases despite opposition from civil society groups and high-ranking UN officials. Indiscriminate mass surveillance has been denounced by the UN High Commissioner for Human Rights (United Nations Human Rights Council, 30 June 2014), the Special Rapporteur on the Protection of Human Rights while Countering Terrorism (United Nations, 23 September 2014) and the Special Rapporteur on Freedom of Expression (La Rue, 17 April 2013). In 2015, the UN Human Rights Council also established a permanent Special Rapporteur on Privacy, whose tasks include reporting on alleged violations of the right to privacy which arise ‘in connection with the challenges arising from new technologies’ (United Nations OHCHR).

In Europe, the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) stated in a report on NSA surveillance programmes that ‘the fight against terrorism can never be a justification for untargeted, secret, or even illegal mass surveillances programmes’ and ‘takes the view that such programmes are incompatible with the principles of necessity and proportionality in a democratic society’ (LIBE Committee 2013-2014). The Council of Europe’s Commissioner for Human Rights took a similar stand and wrote that secret, massive and indiscriminate surveillance violated European human rights law (Council of Europe Commissioner for Human Rights 2014). In April 2015, the Parliamentary Assembly of the Council of Europe adopted a resolution denouncing surveillance in very strong terms.

The surveillance practices so far disclosed endanger fundamental human rights, including the rights to privacy, freedom of information and expression, and the rights to a fair trial and freedom of religion, especially when the privileged communications of lawyers and religious ministers are intercepted and when digital evidence is manipulated. These rights are the cornerstones of democracy. Their infringement without adequate judicial control also jeopardises the rule of law (Council of Europe Parliamentary Assembly 2015).

In addition to such opposition, European courts have also ruled against mass surveillance. In *Schrems v the Data Protection Commissioner of the Republic of Ireland*, the Court of Justice of the EU concluded that legislation giving the authorities general access to the content of electronic communications compromises the essence of the fundamental right to respect for private life, as guaranteed by article 7 of the EU Charter (*Maximilian Schrems v the Data Protection Commissioner of the Republic of Ireland* 2015: para 94). The European Court of Human Rights condemned

Hungary's unlawful surveillance practices in *Szabo and Vissy v Hungary*, and decided in *Roman Zakharov v Russia* (2015) that the regime in Russia violated Convention rights for the surveillance of telecommunications without prior judicial authorisation based on individual reasonable suspicion of wrongdoing.

However, neither the court decisions nor opposition from the UN and EU have had any significant impact on quelling governments' desire for expanding their use of surveillance measures. Surveillance measures deemed unlawful remain either in place or are implemented, if they do not already exist, always in the name of national security. This trend is disturbing, as is the recurring argument governments use to excuse their surveillance activities by stressing that these measures are not aimed at their own citizens but at threats from outsiders. However, the flow of electronic data makes it increasingly difficult to distinguish between citizens and non-citizens. Furthermore, if all governments engage in mass surveillance, even if not aiming at their own citizens, everyone will remain under surveillance.

The EU itself is also caught up in surveillance controversy. In the name of external border control, the EU has created a vast network of control centres and databases. The European Border Surveillance System (Eurosur) connects the National Co-ordination Centres (NCCs), Frontex, the EU Satellite Centre (SatCen) and the European Maritime Safety Agency (EMSA) and allows for information exchange between EU member states (Frontex 2017). While the Eurosur website states that the information exchanged within Eurosur does not include personal data, Frontex is also linked to the EU-LISA operations centre, which manages the three main information technology systems dealing with visas, asylum requests and the exchange of information to guarantee the security of the Schengen Area (EU-LISA 2017). These databases store records on approximately one million people wanted by the police, 32 million visa applicants, and more than five million asylum seekers (Simantke & Schumann 2016). Across the EU, border guards can access this data when examining travellers, with three more databases on airline passengers and travellers from non-EU states soon joining the existing bases (Simantke & Schumann 2016).

Although investigative journalists and French parliamentarians have found that much of Eurosur's information exchange is largely hypothetical and, in practice, does not do much to help the external border agencies on the ground, the mere installation of these systems shows how powerful the concept of ensuring security is in the minds of EU officials (Simantke & Schumann 2016). Since the 9/11 attacks, the EU has channelled billions of euros into research programmes in order 'to develop an autonomous security industry which did not exist before' (Simantke & Schumann 2016). Between 2004 and 2014, 360 million euros of tax money went into new technologies for border surveillance alone: 'The spectrum ranges from high-tech drones for remote monitoring to document scanners with database connection, from networking software for security authorities to the integration of data streams in situational pictures' (Simantke & Schumann 2016). This has led to a symbiotic relationship with the security industry, conflicts of interest for EU officials, and the security industry deciding what constitutes 'security' (Simantke & Schumann 2016). The consequence, according to security scholar Peter Burgess, is that the focus is always on surveillance technology, even though 'there is

very little evidence that it works' (Simantke & Schumann 2016). Despite Eurosur's problems, EU officials remain unrelenting by dismissing criticism and defending their policy line that more surveillance technology and data collection equal more security (Simantke & Schumann 2016). Yet, whether these technologies actually increase security is something that is not publicly discussed, let alone evaluated.

The lack of evaluation and even discussion of surveillance measures, of course, in large part is due to the secretive nature of government surveillance. The public has to rely on the information the government deems safe to disclose, but often stages its lack of surveillance transparency as a matter of security. Decision making surrounding surveillance operations, thus, occurs away from the public eye, which favours securitisation. The next section examines in more detail the relationship between public opinion and surveillance.

3 Complicit public?

Audience is a key concept in securitisation theory. According to Buzan et al, an issue can only be considered securitised if and when the audience accepts it as securitised (Buzan et al 1998: 25). As a result, securitisation scholars have tried to answer many questions surrounding the topic of audience acceptance, but criteria for what constitutes audience acceptance nevertheless remain vague (Balzacq et al 2015: 499). When it comes to surveillance, the question of audience acceptance is equally important. Although surveillance is not a securitised issue, it is a necessary tool to fight the existential threat of terrorism, at least that is how governments justify the use of surveillance. This, then, makes surveillance an important aspect of current securitisation processes in Europe, while at the same time raising interesting questions about the audience acceptance of counterterrorism measures itself.

Balzacq et al summarise the view of the audience among securitisation scholars (Balzacq et al 2015: 500):

The audience does more than merely sanctioning a securitising move. The audience can actually fulfil two different functions, namely, providing moral support and supplying the securitising actor with a formal mandate (such as a vote by the legislature), without which no policy to address the threat would be possible.

The example they cite is the decision of the British government to invade Iraq in 2003. Prime Minister Tony Blair's decision did not have the moral support of the public, but it did garner formal agreement from parliament, which constitutes another audience (Balzacq et al 2015: 500). A similar dynamic can be observed when it comes to government decisions to employ mass surveillance tools. As the current wave of legislative measures to allow governments to use mass surveillance technologies outlined in the previous section shows, executive branches are successful in persuading parliaments to pass such laws. The public attitude towards surveillance programmes, however, is more nuanced.

A report from November 2015 analysing public attitudes in the EU and the UK towards surveillance, privacy and security post-Snowden found that citizens are concerned about surveillance (Bakir et al 2015).² While most of the people surveyed in the EU agree or strongly agree that

security-oriented surveillance technologies are effective national security tools, the EU public also consider all these technologies to compromise human rights and to be abused by security agencies (Bakir et al 2015: 9). The report also shows that, on the whole, the public in the EU does not accept blanket mass surveillance and finds technologies used for such surveillance significantly less acceptable than those focusing on specific targets (Bakir et al 2015: 10). Furthermore, the polls show that the public wants enforced and increased accountability, liability and transparency of private and state surveillance actors (Bakir et al 2015: 10).

These findings underline public concerns about surveillance, but they also hint at the difficult question of how to reconcile concerns over security with concerns over privacy in the context of surveillance. Two Eurobarometer polls from 2015 also underline these competing interests in public opinion. Eurobarometer 432 on Europeans' attitude on security demonstrates that there is rising concern about terrorism and religious extremism to the point where people now see terrorism as the EU's most important security challenge (European Union 2015b). While in 2011 less than half the respondents said that citizens' rights and freedoms had been restricted in the name of fighting terrorism and crime, the majority of respondents felt that way in 2015 (European Union 2015b: 53). Eurobarometer 431 was conducted at the same time as Eurobarometer 432 and highlights people's concerns about data protection and privacy. The poll found that only 15 per cent of respondents felt that they had complete control over the information they provide online; and 31 per cent thought that they had no control over it at all (European Union 2015a: 6). Fifty-five per cent of respondents also said that they were concerned about the recording of their activities via mobile phones (European Union 2015a: 6).

These responses show that the public is aware of the fact that their rights are infringed, either to provide security from terrorism and crime or because there are not enough data protection measures in place. And yet, public outrage over an increase in recent legislation to allow governments to access even more data has been muted. This begs the question why. One argument is that in the wake of more terrorist attacks across Europe, fear has risen and people's willingness to sacrifice human rights in the name of security has increased along with it.

A YouGov poll comparing the attitudes in seven European countries (Great Britain, Germany, France, Denmark, Sweden, Finland and Norway) shows that about half of the respondents in all of these countries except Germany agree that '[t]he security forces should be given more investigative powers to combat terrorism, even if this means the privacy or human rights of ordinary people suffers': 52 per cent in Great Britain; 50 per cent in France; 41 per cent in Denmark; 44 per cent in Sweden and Finland; and 43 per cent in Norway (Germans resist push for greater government spying March 2015). Only respondents from Germany were more skeptical about investigative powers: 31 per cent agreed with the above statement, while 27 per cent said that '[m]ore should be done to protect the privacy and human rights of ordinary people, even if this puts some limits on what the security forces can do when combating terrorism' (Germans resist push for greater government spying March 2015). In

2 The report summarises several public opinion polls conducted in the EU and across the UK.

Great Britain, 16 per cent of respondents agreed with this statement; 19 per cent in France; 17 per cent in Denmark; 21 per cent in Sweden; 13 per cent in Finland; and 18 per cent in Norway (Germans resist push for greater government spying March 2015). When asked whether security services should or should not be allowed to store the details (but not the actual contents) of ordinary people's communications, such as email and mobile phone calls, the same trends emerged. In Great Britain, 50 per cent of respondents said that it should be allowed, while 52 per cent in Denmark, 53 per cent in Sweden, and even 61 per cent in France agreed. In Germany and Finland, only 34 per cent of respondents said that it should be allowed (Germans resist push for greater government spying March 2015).

These polls show that people tend to favour security measures even if these come at the expense of human rights and privacy, and thus makes the public to a large degree complicit in their governments' legislation and implementation of surveillance measures. However, when it comes to surveillance, there are also other factors that lead the public to be complicit in the governments' accumulation of more surveillance powers. In Eurobarometer 431, a large majority of people (71 per cent) said that providing personal information was an increasing part of modern life, and accepted that there is no alternative other than to provide it if they want to obtain products or services (European Union 2015a: 6). This shows that people do not in this day and age see a way around providing personal information online. The comparative study also concludes that 'state surveillance is being carried out on the basis of public resignation rather than apathy or consent' (Bakir et al 2015: 8).

Similarly, a more recent study which examines public opinion and activist responses to the Snowden leaks, argues that public opinion on surveillance and online privacy is characterised by 'surveillance realism' (Dencik & Cable 2017: 763). This condition, they contend, is a result of the lack of transparency, knowledge and control over what happens to personal data online, which in turn causes feelings of widespread resignation, not consent, to the status quo (Dencik & Cable 2017: 763). Surveillance realism thus is characterised by citizens' unease with data collection and by active normalisation of surveillance that leads to feelings of disempowerment among the public and a lack of imagination for better alternatives to safeguard human rights while employing surveillance technologies (Dencik & Cable 2017: 778). In short, the popular feeling of resignation in the face of mass surveillance technologies undermines democracy, as government policies implementing mass surveillance are not established by the consent of the citizenry.

A large-scale, EU-financed research project on surveillance technology and its ethics and efficiency includes an in-depth analysis of the public perceptions of surveillance and their effects. The main findings are summarised in the table below. The first column lists the various sources of negative public perceptions of surveillance. The second point, security dilemma and surveillance spiral, is particularly interesting given some of the public opinion poll results cited above, and the concern of this article with permanent securitisation. The security dilemma refers to security technologies increasing people's feelings of insecurity rather than making them feel safer (Orri et al 2013 14). For example, some studies show that people are more anxious about crime in areas where closed-circuit

television cameras are installed (Orru et al 2013: 14). This, then, can lead to a surveillance spiral, because if people feel less safe, there is a need for more surveillance (Orru et al 2013: 14). In turn, this might lead to governments gaining even more surveillance powers in the name of security, which might further create an environment for permanent securitisation.

Potential sources of negative perception:	Potential consequences of negative perception:	Impact on society:
Technologies perceived as threats themselves Security dilemma and surveillance spiral Fear of misuse (including function creep) Fear of insufficient protection of personal data Fear of unlimited expansion and irreversibility	Self-surveillance Chilling effect (eg by stifling online expression) Conformism and loss of autonomy	Control society Social exclusion and discrimination Social homogenisation Decline of solidarity

In the third column, the table lists the side effects of the negative perceptions of surveillance such as control society, social exclusion and discrimination, social homogenisation, and a decline of solidarity. Some of these can already be observed in the democracies of the EU, and all of them are stepping stones for governments to extend their powers. What is more, these findings show that fear of surveillance can be just as powerful and detrimental as surveillance itself.

The effects of the negative perceptions of surveillance along with surveillance realism also highlight the importance of the public role in accepting the implementation of mass surveillance technologies and creating a climate for permanent securitisation. On the one hand, the public distrusts surveillance and intelligence services. On the other, they feel disempowered to change anything.

The rise of populists in many European countries further complicates this situation. Many of these populist parties, especially those with an anti-EU stance, complain about how technocrats allegedly have too much power over policies. They say that they want to give their country back to the people. At the same time, however, they swear that they are committed to fighting terrorism and that they are tough on the terrorists, which implies an increased reliance on the surveillance apparatus. This seems contradictory. They seem to be saying that they will curtail the powers of the EU and the elites, but at the same time they seem to say that they will curtail individual rights in the name of security.

The slogan for the 'Leave' campaign in the run-up to the Brexit vote was 'Take Back Control'. The result of the vote showed that this sentiment of taking back control resonated with many voters. In fact, the EU is now trying to appropriate the 'Take Back Control' slogan for its own purposes (Heath 2016). However, looking at the example of public opinion towards surveillance, there seems to be a disconnect between taking back political control over one's country versus control over one's political rights. In

order to take back political control, however, civil and political rights in the first place have to be secured. Disturbingly, mass surveillance erodes these rights. Furthermore, if mass surveillance tools are permanently installed as vital instruments to ensure security, in this case because of public resignation rather than consent, we are also moving one step closer to permanent securitisation.

4 Impact of mass surveillance on human rights

Mass surveillance has an impact on human rights in various ways. The primary rights affected by mass surveillance are the right to privacy and the right to data protection. However, other rights, such as freedom of expression, freedom of information, freedom of the press, freedom of association and freedom of assembly, are also impacted by mass surveillance. To address all these in detail would exceed the scope of this article. Instead, the article will focus on how mass surveillance undermines human rights and democracy overall. These rights are indivisible and closely connected to democratic politics and society, and thus garner a holistic approach, one that incidentally tends to be overlooked when it comes to the threat of mass surveillance and its relationship to permanent securitisation.

The right to privacy ensures self-expression and personal autonomy, which are vital for self-determination. However, surveillance undermines these freedoms. People who are watched or who think that they are being watched behave differently from their unwatched selves; they exercise self-control and self-censorship. The resulting society is a control society, in which people try to conform out of fear of showing their true selves and intentions because the government holds vastly more power than they do.

Surveillance, or fear of surveillance, also leads to an erosion of trust. Evidence of this can be seen in the result of the public opinion polls listed above that show that a majority of respondents think that government agencies abuse their surveillance powers. As argued in the previous section, this leads to resignation and unease among citizens and inhibits their civic engagement. What is more, you cannot take political action if you have no privacy. Brad Smith, the president and chief legal advisor of Microsoft, summed it up at a recent conference on liberty in the digital age: 'If you can't plan in private, you can't act in public.'

All this runs counter to the idea of democracy, in which the people are in control of their governments. Surveillance, therefore, has an impact on state-society relations as a whole. This, however, is often overlooked, even in the human rights community, because, as Cas et al state: 'Most privacy-surveillance problems lack dead bodies and sensationalistic cases' such as blacklists (Cas et al 2014: 223).

Yet, the implications of mass surveillance on state-society relations are detrimental. Mass surveillance tips the scales of power towards the governments. In the words of Snowden (Snowden and Bell 2017: 57):

It's not really about surveillance; it's about what the public understands – how much control the public has over the programs and policies of its governments. If we don't know what our government really does, if we don't know the powers that authorities are claiming for themselves, or arrogating

to themselves, in secret, we can't really be said to be holding the leash of government at all.

Current mass surveillance practices, therefore, are extremely dangerous to human rights and democratic society and politics, and there is no shortage of recent examples of how mass surveillance legislation undermines civil society, particularly human rights defenders and journalists. In Germany, the new *Bundesnachrichtendienst* (BND) law allows the intelligence service to spy on foreign journalists, a practice that the BND has been engaging in for years already by spying on journalists from the BBC, *New York Times*, Reuters, and other news organisations (Baumgärtner et al 2017). Furthermore, the so-called *Datenhehlerei* paragraph in a 2015 enacted law on data retention criminalises the handling of stolen data, troubling journalists and transparency non-governmental organisations (NGOs) that it will intimidate whistleblowers (Freedom House 2017a).

In the UK, it emerged that Amnesty International had been under surveillance by the British intelligence services, who intercepted, accessed and stored the organisation's communications, prompting the organisation to ask: 'How can we be expected to carry out our crucial work around the world if human rights defenders and victims of abuses can now credibly believe their confidential correspondence with us is likely to end up in the hands of governments?' (Amnesty International 2015). Moreover, British police have admitted that they used surveillance legislation in order to obtain journalistic material, bypassing other laws that require special warrants for journalists' records (Freedom House 2017b).

In France, the recently legalised mass surveillance powers have been met with similar criticism as those in Germany. As one French journalist put it: 'Now you have to meet your sources somewhere in a forest with a pen and a piece of paper to avoid surveillance which is not always possible' (European Federation of Journalists 2016). In Hungary, the government is taking things even further, with law makers discussing national security legislation that would allow state intelligence agents to be stationed inside newsrooms (Intelligence agents could be stationed in newsrooms 2015).

These examples clearly show that governments are not simply using mass surveillance to counter terrorism. On the contrary, they are using their surveillance powers to undermine civil society and their most prominent defenders: journalists and human rights organisations. Civil society is vital to mobilise against government policies and challenge the dominant political discourse focused on national security. This means that if civil society weakens, the way is open for governments to implement ever more illiberal policies in the name of security. Hungary, where independent media and NGOs have been undermined for years now, serves as a cautionary tale. Political debate has become so one-sided to the point where government-critical voices gain little to no public exposure. However, Hungary is not an isolated case. The same forces are moving to undermine human rights and democracy all across the continent.

5 Mass surveillance and permanent securitisation

The previous sections have highlighted several ways in which the implementation of mass surveillance drives permanent securitisation. Negative public perceptions of surveillance lead to negative effects on

individuals and society. The ubiquity of surveillance and the secrecy surrounding it create resignation and political passivity among the citizenry, which undermines informed consent and, ultimately, democracy. Together, these factors create an environment in which securitising actors can push for ever more policies that emphasise security at the expense of human rights.

When it comes to protecting human rights, the use of mass surveillance creates a vicious cycle: Security threats require mass surveillance; mass surveillance undermines human rights, especially those of human rights defenders and journalists, who are vital for civil society. In turn, the erosion of civil society leads to a lack of public debate and, thus, a lack of policies curtailing mass surveillance and securitisation. This gives the government more leeway to introduce even more legislation that undermines human rights in the name of protecting people from security threats.

In this context, it is worth highlighting that scholars of the so-called Paris School have argued that securitisation does not simply occur as a result of speech acts. Securitisation, they point out, is not necessarily the result of rational design and preordained agendas (Balzacq 2011: 16). In order to identify the processes of securitisation, they argue, it is important to take into account security practices and study the instruments or tools that are employed to cope with security issues and that can lead to the routinisation of practices (Balzacq 2011: 16-17). As demonstrated throughout this article, surveillance measures are instruments used by governments in the context of countering terrorism and managing migration. They become routinised through their use by security professionals, who may not be too concerned with legal frameworks, but rather with carrying out their duties. Furthermore, once these instruments have been implemented, their use might lead to function or mission creep. First, a new technology is used to fight terrorists, then to catch criminals or other offenders, and then for even other potential purposes that the original implementers did not intend or foresee. In sum, the use of these technologies can take on a life of its own if not overseen properly, and once they are implemented, it is difficult to reverse them.

It is also worth keeping in mind in this context that studies have shown that securitisation can happen through the most ordinary steps. Even policies that seem exceptional are often established through the most banal laws (Balzacq et al 2015: 506). In order to guard against creeping securitisation, therefore, it is not enough to simply point at democratic governments that are turning to illiberal policies, such as Hungary and Poland, as cautionary tales. It is important to be aware that securitisation processes also happen within the framework of liberal legislation, especially in the current political climate across Europe, which is dominated by national security issues.

As the examples in this article show, liberal regimes have already been successful in legalising previously unlawful surveillance practices, and many others in Europe are in the process of doing so. In *Surveillance in Europe*, published in 2014, observers already remarked that '[f]requently, rather than law determining the use of the technology, law is reactive and often legitimises current practices rather than shaping practice based on a principled approach' (Kreissl et al 2014: 154). Following the 2015 and subsequent terrorist attacks in Europe, this statement rings even truer

today. In an in-depth study tracing recent surveillance legislation in France, the author argues that due to renewed securitisation rhetoric on Islamic terrorism following the attacks, the French government was able to legalise previously illegal surveillance practices (Treguer 2016). The government, he contends, moved away from the 'rule of law' towards the 'rule by law' (Treguer 2016: 7). As Tarrow (2015: 165-166) points out, this is an important distinction to make:

Is the distinction between rule of law and rule by law a distinction without difference? I think not. First, rule by law convinces both decision makers and operatives that their illegal behavior is legally protected ... Second, engaging in rule by law provides a defense against the charge they are breaking the law. Over time, and repeated often enough, this can create a 'new normal'.

Again, this brings us back to the problem of normalisation of both surveillance and securitisation, which threatens to permanently undermine civil liberties and democracy in favour of security. How dangerously close we already are to drifting into a permanent state of securitisation is demonstrated by human rights defenders working on the issue of counterterrorism and its implications for human rights, being resigned about the fact that their alarming reports and findings are not garnering any public attention. Indeed, there is practically no public debate about whether mass surveillance even works in preventing terrorism. In fact, so far there is very little evidence that it does (Kirchner 2015). A 2013 US government report concludes that the NSA's bulk collection of phone records 'was not essential to preventing attacks', and local police departments in the US have also acknowledged the limits of mass surveillance (Kirchner 2015). Some go even further, arguing that electronic mass surveillance can hinder counterterrorism efforts because, instead of conducting targeted monitoring, intelligence analysts are wasting their time fruitlessly sifting through vast amounts of data (Noakes 2016). Additionally, counter-radicalisation experts argue that mass surveillance may alienate Muslim communities and contribute to radicalisation (Noakes 2016).

Other observers have pointed out that new surveillance technologies are often introduced without any prior evaluation or assessment (Kreissl et al 2014: 154). The problem in this context is that the public is in the weaker position in terms of evaluating whether these technologies are really necessary because they have to rely on the information presented by intelligence services and law enforcement (Kreissl et al 2014: 155). The cross-disciplinary collaborative research project SURVEILLE, funded by the European Commission, created a methodology to determine on a case by case basis whether it is legal, moral, efficient, and effective to use a particular surveillance technology (SURVEILLE 2015). In their policy paper summary, the researchers conclude that 'the SURVEILLE methodology shows that it is possible to reconcile security and privacy in a rational and structured way' (SURVEILLE 2015). Whether this methodology is actually used by technology developers, law makers and security professionals, however, remains doubtful.

6 Way forward

As this article shows, mass surveillance is now widely regarded by policy and law makers as well as by large parts of the public as a necessary tool to

counter terrorism. However, the efficiency of mass surveillance tools as well as the dangers they pose for human rights and democracy is not adequately addressed in the public debate. Instead, the normalisation of mass surveillance goes hand in hand with creating a permanent state of securitisation in Europe, where security has become the dominant policy paradigm. Given this shift towards permanent securitisation at the expense of civil and political rights as well as democratic structures as a whole, it is vital for the human rights community to find a way to counter these developments.

Warnings about the dangers of surveillance states are not new, of course, and since the Snowden revelations in 2013 they have increased at the civil society level as well as at the level of regional and international human rights bodies. Yet, the public debate on mass surveillance remains fairly one-sided, with governments dominating the agenda by justifying their use of mass surveillance with counterterrorism measures and protecting the public. Researchers (Wright & Kreissl 2014; IRISS Consortium 2014) have called for increasing resilience in surveillance societies and have come to similar conclusions on what is needed to equip societies in order to cope with an increased level of surveillance. At the political and regulatory level, it is vital to establish better accountability and oversight procedures as well as improving legal and constitutional protection of privacy (Wright & Kreissl 2014; IRISS Consortium 2014). As evidence in this article shows, however, law makers across Europe are currently busy legalising executive surveillance powers without adequate accountability or oversight mechanisms in place.

At the individual level, these studies call for instilling resilient attitudes and the increased use of privacy-enhancing technologies (IRISS Consortium 2014: 31-34). However, here too the evidence paints a rather bleak picture, as many people in European countries feel disempowered in light of the ubiquity of surveillance technology in the twenty-first century that seems to make it unavoidable to guard privacy and human rights. This leaves resilience at societal level, which requires strong collective action and civil society organisations as well as an independent, activist press to stir public debate towards a more critical approach to mass surveillance and securitisation in general. Civil society, however, is in decline and the press is under unprecedented attack in many European countries, not least due to increased surveillance measures.

Given these circumstances, resilience to both surveillance and securitisation poses a difficult challenge. In order to forge ahead and implement the steps laid out by the resilience studies, what is required first is a re-evaluation of narratives and, what is more, the creation of powerful counter-narratives that can challenge the current securitisation discourses and highlight the relevance of human rights and democracy. Human security is useful in this context in that it focuses on the individual at the centre of the concept of security, rather than on the security of the state, which is the predominant notion in the ongoing counterterrorism policies of European countries. It is, however, a less useful concept in addressing the issue of surveillance.

Stressing the idea of popular sovereignty might also prove useful in this context. For all the talk by various populist parties across Europe, there is little focus on the notion of *popular* sovereignty. What has gotten lost in the many discourses that emphasise the many threats to our security,

Europeans seem to have lost sight of the fundamental concept on which human rights and democracy rest: the notion that the people are the masters of their governments. Europeans forget or take this idea for granted, while governments everywhere are expanding their power over their people, while ensuring them that they are doing this because people's security is at stake. By being silent in the wake of ever-expanding government surveillance, the public becomes weaker and weaker vis-à-vis governments, thus moving away further from the ideal of popular sovereignty. However, the concept of popular sovereignty has been linked to nationalism in the past and, given the nationalist resurgence in Europe in recent years, it might be difficult to disentangle the very valuable idea of the people as the masters of their government from those sovereignty concepts that are appropriated by nationalists.

What then, can be done in terms of creating relevant, powerful anti-surveillance, anti-securitisation, pro-human rights and pro-democracy narratives? Securitisation scholar Didier Bigo argues in an analysis of the EU's 2005 Hague Programme on strengthening freedom, security and justice in the European Union that 'just as security has to be understood as a process of securitisation/insecuritisation/desecuritisation, so has freedom to be understood as a process of freedomisation/unfreedomisation and defreedomisation' (Bigo 2006: 38). The answer, thus, lies in re-focusing on the idea of freedom: What does it mean to be free in the twenty-first century, in the digital age, in an age of increased terror attacks on European soil? What are the values that are non-negotiable when it comes to weighing the risk of curtailing privacy and human rights against security? Further research is required into how to create positive human rights narratives that are able to counter the narratives of securitisation and that will keep us from drifting further into permanent states of surveillance and securitisation. However, it is a useful start to focus on the concept of freedom, and thinking about what we are trying to secure in Europe in the first place.

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The impact of securitisation on marginalised groups in the Asia Pacific: Humanising the threats to security in cases from the Philippines, Indonesia and China

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Abstract: *Securitisation has a disproportionate impact on marginalised groups. This article examines the impact of securitisation on four groups of people: the poor and children in Duterte's 'war on drugs' in the Philippines; female North Korean refugees in China; and the LGBTI community in Indonesia. The article argues that the term 'security threats,' as used by Buzan, does not adequately describe the consequences of securitisation. The term 'human threats' is more suitable as it demonstrates that state securitisation impacts humans and their rights, and that the existential threats have real-life consequences. This is demonstrated in the case studies. First, the war on drugs in the Philippines has been killing the poor and detaining children rather than eliminating drugs. The securitisation of China's border with North Korea results in many women becoming victims of trafficking, forced marriage and other forms of gender-based violence. Religious groups consider LGBTI communities a threat to national security and, as a result, their personal security and access to government services (such as education) is threatened.*

Key words: securitisation; war on drugs; age of criminal responsibility; North Korean refugees; LGBTI rights in Indonesia

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1 Introduction

A frequently-omitted feature of increased securitisation in the Asia Pacific is the impact on marginalised communities. When states strengthen their security laws and increase the powers of the security forces, the results are disproportionately felt among the marginalised, with common examples being the branding of Muslims as terrorists; migrant workers as criminals; and indigenous minorities as destroying the environment. A security analysis too often avoids the uncomfortable truth that the objective of securitisation has little to do with the people who find themselves targeted by these activities. This article examines cases of people who suffer as a result of securitisation, demonstrating that in most circumstances it is hard to justify these threats as security threats. The case studies in the article – human rights defenders; children; women refugees; and the lesbian, gay, bi-sexual, transgender and intersex (LGBTI) community – demonstrate that in many cases, securitisation does not involve the safety and security of a nation, but rather the articulation of moralistic or ideological views most frequently used by weakening democratic states to support political power. But why, and how, are these groups constructed as threats? As the article outlines, there is a widespread use of discriminatory speech (and even hate speech) which gains widespread support. Next, there is scant questioning by security forces about the threats to security. In many cases it, is not clear whether the threats are deliberately constructed, or whether they are the result of incompetence and poor management. The act of securitisation itself is the focus, not those subject to the security force. The article examines the human rights violations faced by these groups and provides a context to their construction as a threat, and how actions against them are justified.

To understand this dilemma, one may critically engage with Buzan's orthodox model of securitisation. For Buzan, a security threat has three elements: an existential threat; needing emergency action; which emergency action justifies extraordinary responses going beyond usual rules and regulations to tackle the emergency (Buzan et al 1998: 23-24). The article focuses on the construction of an existential threat by dividing the threat into two key parts: an existential threat; and a human threat. First, an existential threat is defined by the security sector, as a discursively constructed object which the sector seeks to control through extraordinary powers. Second, this research employs the term 'human threat' to define the actual people who become targets of security. That is, the humans who face the consequences of the security sector force in any way, but most commonly as a violation of rights, regardless of their complicity in the threat itself.

Identifying the 'human threat' component of a security concern has a number of objectives. First, it is important to refigure the operations of the security sector into impacts on humans because, ultimately, if we are to implement a human security analysis, security should be for the protection of humans, and not abstracts concepts such as states, identities or beliefs. The impact on humans is too frequently sanitised with terms such as 'collateral damage', which dehumanise the consequences and avoids addressing the human rights violations. Second, having the human as the unit of analysis for the impact of security enables the consequences to be translatable into human rights. The object of security is the human, but

both as a target and as that which should be made more secure. As the case studies will show, these two roles may seem to be diametrically opposed, but often security actions have the ability to place that which should be made more secure as that which is the target of the security. The case of children in the Philippines is a good example. Their 'rescue' from dangerous streets by the security sector does not protect them, but renders them targets of abuse and violence by security forces. Third, the term 'human threat' shows that what is represented as the existential threat does not come into existence during the operationalisation of the security. Existential threats (which more accurately could be called transcendental threats) are used to distract people from the attacks on humans which are the reality of the action. An existential threat is often unrelated to those who suffer the consequences of the security force, regardless of whether the actions are deliberate or unintended. For example, the LGBTI community is considered a threat to Indonesian national identity. It is difficult to figure how 'Indonesian-ness' can be threatened by whom someone chooses to love, but the consequences are that nationalism is converted into homophobia. Finally, the term 'human threat' forces the security analysis to confront the reality that the function of security is to attack humans. There will be humans who will face violence, and who may be killed as a result of increased security, and this cannot be camouflaged by the use of existential terms.

This article examines four case studies of existential and human threat. Two of these cases emanate from the recent war on drugs in the Philippines, which sees drugs and crime as the existential threat. However, as the case studies outline, the human threats are human rights defenders, who are deliberately targeted by the security sector, and nine to 15 year-old children, who will be criminalised by a law under consideration by the government. Another case study is of the human threat of female North Korean migrants in China. Many of these women could be recognised as refugees, but they are constructed as an existential threat by being categorised as illegal economic migrants involved in criminal activities. The final case study is that of the human threat of the LGBTI community in Indonesia, who are branded as an existential threat to the nation's morality because of their 'lifestyle'. In examining these four groups, the objective of this article is not to remodel security studies but, rather, to incorporate a rights-based analysis of security to show the discriminatory, ideological or political dimensions of security. It is widely accepted that the increase in power afforded by these security laws are frequently abused by states, especially in the Asia Pacific region. Similarly, few would contest the fact that the consequences are significant human rights violations. Securitisation results in the restriction of political space for assembly, association, and freedom of expression for groups such as political opponents or human rights defenders. It creates undue burdens on the freedom of movement, especially between countries, for migrants (and this includes both those migrating for work or who are forced migrants); and it allows the unchecked powers of the police to target the marginalised.

This article understands the concept of securitisation as a state increasing the powers of its security forces in response to an articulated threat. Securitisation commonly occurs as laws, policies and campaigns articulate a threat, and increase the powers and scope of security force action. A crucial component is the process of constructing the threat by creating a fear to justify excessive security measures and the limitation of

rights. The security forces predominantly are the military and police, but also it may include immigration, local government and welfare officers. An important reminder is that the abuse of power is not only by the state, as the manipulation of securitisation by non-state groups through vigilante groups also threatens personal security, as the examples in this article of North Korean women in China and LGBTI activists demonstrate. Other forms of non-state securitisation threats include the incitement to violence through social media, which can target minority religious, sexual or ethnic groups.

In the Asia Pacific region, it is assumed that securitisation becomes a concern, especially for human rights, in the post 9/11 era when many states introduced counter-terrorism laws. Many have acknowledged that the post 9/11 world is a different one for human rights (Goodhart & Mihr 2011; Dunne 2007), because of the growth in the strength and number of anti-terrorism laws, police powers and legal limitations to civil society activity. There are active regional level counter-terrorism activities, with both the Association of Southeast Asian Nations (ASEAN) and South Asian Association for Regional Co-operation (SAARC) having agreements on counter-terrorism.¹ All these laws, in the name of security, are used to expand special investigative powers, such as stop and search; allow preventative arrests and arbitrary detention; and increased surveillance. However, it cannot be argued that these new laws are in response to post-9/11 terrorism as most of these laws existed, in a variety of formats, before 2001. There has been a re-tooling of pre 9/11 security laws to either continue or expand existing powers, for example, the Internal Security Laws in Malaysia; public emergency and the *Les Majeste* laws in Thailand; and terrorism in Sri Lanka which have been re-invigorated or updated.² The laws originally emerge in the Cold War or colonialism as a response to the threats of communism or self-determination. However, at the end of colonialism or the Cold War, rather than considering the end of the threat and thus deleting the laws, states went through a process of inventing new existential threats to justify these laws. A logic reversal is in operation here: Security is not introduced in response to a threat; rather, a threat is created to justify security.

Before examining the case studies, more context should be given to security threats in the region. Although the Asia Pacific as a region is far too diverse to make claims of regional trends, there are some points of similarity in the actors and processes. The first is the role played by the military and police in governance. A generalisation is that Southeast and East Asia have a history of military governance. In Southeast Asia, all

1 There are two regional conventions: the SAARC Regional Convention on the Suppression of Terrorism, and the ASEAN Convention on Counter-Terrorism (ACCT). Furthermore, many, if not most, Asia Pacific countries this century introduced terrorism laws. There are too many to note, but laws that have received criticism include Indonesian and Indian laws in 2002, Chinese in 2016, and Sri Lankan laws recently in 2017. Criticisms of these laws include Mendoza (2011) and Masferrer 2013.

2 In Malaysia, Internal Security Laws include the old Internal Security Act (ISA) which has now been replaced by the Security Offences (Special Measures) Act 2012 (SOSMA). In 2016, it was used to arrest 15 prominent civil rights activists who, it was claimed, were terrorists. Maria Chin Abdullah, an organiser of the Bersih rally, was arrested by the Royal Malaysian police under this law which allowed her detention for 28 days before filing any charge. Similarly, Vietnam, China and, especially Singapore, use administrative measures to detain suspects (and often democracy or human rights activists) with minimal judicial review and little apparent controversy.

countries, except Singapore and Malaysia, have suffered military governments. The military apparatus, commercial interests and governance are often intertwined, thus making the introduction of securitisation easier because of military control of courts, government and the security apparatus. Securitisation through the police has different features, as it is often expressed through quasi or extra-judicial actions, using non-state actors, such as vigilante groups. An example is 'fake encounters' in South Asia, where suspects are killed by security forces in supposed acts of self-defence. There are no accurate numbers, although some regions, such as Manipur in India, have reported nearly 2 000 people killed through fake encounters in the past 10 years (Ambast 2016).³ Other contributing factors include a weak rule of law and an ineffectual court system, encouraging police to use extra-judicial measures against suspects as they do not trust the legal system.

A last important context in terms of securitisation is migration. Throughout the Asia Pacific, there are many countries with high numbers of non-citizens, either as refugees or migrant workers. Almost all these countries have active anti-foreigner advocates, often the government itself, for example, in Australia, one of the few countries to detain refugees – even children. In other countries, it is social discourse with media reporting on claims that crime, disease and social tension is brought on by migrants. This article now turns to the case studies, firstly examining how the Philippines war on drugs has created human rights defenders and children as human targets.

2 War on drugs and human rights defenders

The Philippines government's populist leader, President Rodrigo Duterte, has been dubbed 'the Punisher' for his harsh anti-crime activities dating back to his time as the mayor of Davao City in Mindanao Island. Now known for his war on drugs campaign, Duterte has faced criticism from the international community for the widespread human rights violations during this campaign. To further strengthen the war on drugs, Duterte had also prioritised two house Bills currently being addressed in government: reinstating the death penalty and lowering the minimum age of criminal responsibility (Dalangin-Fernandez 2016). Despite the country in 2007 ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights aimed at the abolition of the death penalty, the Philippines is on the brink of reinstating the death penalty targeting drug-related cases (Morallo 2017). Moreover, the legislative body also aims at lowering the minimum age of criminal responsibility from 15 to nine years, disregarding the country's obligation as a party to the Convention on the Rights of the Child. The congressman who filed the Bill, and those supporting him, believe that children are used as drug runners as they cannot be held liable for a crime (Baylon 2016). To further promote the campaign on the war on drugs, Duterte himself has been overtly vocal on eliminating drugs and drug personalities in his campaign and presidential

3 Some policemen and security forces have a reputation of creating fake encounters, such as Bangladesh's Rapid Action Battalion which has been described as a 'government death squad' by Human Rights Watch (2014). Other examples include individual policemen, such as Pradeep Sharma in India, who has allegedly killed over 300 people in 'encounters'.

speeches. The war on drugs is necessary, he claims, to ensure 'peace and progress' in the Philippines (Ranada 2017; Human Rights Watch 2017). The current administration's objective to increase public safety and security from drugs and crime is enacted through the 'Oplan: Double Barrel' campaign by the Philippines National Police. Actions include targeting both so-called 'high-valued targets' and street-level drug peddlers (Cupin 2016). The use of terms is important, as the existential threat is said to be the drug traffickers and sellers but, as critics argue, the human targets of the campaign do not fit this category, in particular children and human rights defenders. Of greater concern is the fact that the means used often are illegal with the use of planted evidence; attacking users; buy-bust operations; and vigilante-style killings. The consequence of Duterte's regime are devastating for the marginalised, with over 7 000 deaths associated with the campaign from July 2016 to January 2017, through both vigilante-style executions and legitimate police operations (Bueza 2017).

The current administration promotes the message that drugs are a threat that contributes to the rise of criminality and threats to personal security, and this needs to be addressed immediately through special police powers that ignore established rules of law. The underlying factors, such as social problems leading to the proliferation of drugs, are dismissed as irrelevant. Duterte has claimed that there are 4 million drug users (a false claim to which we will return), and that he would 'slaughter these idiots [drug addicts] for destroying my country' (Muggah 2017). According to public opinion, most people are positive towards the war on drugs (Romero et al 2017).⁴ The selling point is Davao City, where Duterte worked in as mayor, vice-mayor and congressman for 22 years before his current position. Davao is claimed to be the safest city in the country, a claim repeated by the supporters of the war on drugs.⁵ During Duterte's term as mayor, he was believed to have reduced crime through the use of killings done by the infamous Davao Death Squad, claiming over 1 424 lives, including those of street children, from 1998 to 2015 (Picardal 2016).

The severity of the Philippines drug problem has been widely disputed. The United Nations Office on Drugs and Crime (UNODC) World Drugs Report reveals that drug use in the Philippines is not that much different from other Southeast Asian countries, and is less than in developed countries such as the USA (Lasco 2016). Rather than the four million users claimed by Duterte, the World Drugs Report measures about 1.8 million. The UNODC confirms an increased methamphetamine abuse (locally known as *shabu*) in the Southeast Asian region, with special reference to the Philippines, but the use of other drugs is the same or lower than in other Southeast Asian countries (UNODC 2015: 69-70). The extra-judicial killings have been perceived as highly discriminatory, the human targets being mainly poor urban slum dwellers, with Amnesty International claiming it is a 'war on the poor' (Wells 2017). Rather than being distracted by existential threats, it is crucial to focus on the human targets of this action.

4 The accuracy of public opinion has been widely questioned. See Parameswaran (2016).

5 This claim has been criticised as the ranking is dubious. See Rodriguez (2015).

When looking at the way in which human targets are constructed, a critical component is Duterte's repeated use of hate speech in defining the threat. Openly promoting killings and impunity for the perpetrators leads to an environment where criminal offenders do not fear reprisals for their acts. Moreover, according to international reports, some perpetrators are rewarded with monetary payments for these killings (Human Rights Watch 2017: 88-89; Amnesty International 2017: 30-32). Hate speech dehumanises the victims, and justifies the excessive use of force with claims similar to 'fake encounters', that victims were 'fighting back' and were killed in self-defence. Two human targets are examined here, namely, human rights defenders and children.

The violence during the war on drugs is being manipulated into a political programme to target human rights defenders and those critical of the Duterte regime, a point made by both Human Rights Watch and at the United Nations (UN) Human Rights Council (Human Rights Watch 2017: 86-93; UN Human Rights Council 2017: para 40). Since the inauguration of Duterte, the number of killings of human rights defenders has increased. In the first quarter of 2017, there were 15 killings of activists, twice as much as in previous years (Front Line Defenders 2016: 14; Front Line Defenders 2017; Global Witness 2016: 9) The European Union (EU) for many years has considered that there is evidential proof of the involvement of Philippines authorities in the killing of human rights defenders (European Parliament 2009: para G). Impunity for the perpetrators is an underlying factor contributing to the number of killings (Global Witness 2014), and it is actively promoted by Duterte, who has promised to pardon every person being involved in killings under the war on drugs. This pardon includes the killing of human rights defenders as they are regarded as a hindrance to the 'success' of this rigid policy (Amnesty International 2017: 48, 53). In November 2016, the President stated: 'I will include you [human rights workers] because you are the reason why their [drug users] numbers swell' (Amnesty International 2017: 53). The violent rhetoric grew over time, with Duterte later stating that he would behead human rights defenders who try to challenge his policy (Garganera 2017). Given the fact that Duterte has kept his word with regard to the impunity of perpetrators, Andrew Anderson, the executive director of an organization aimed at protecting human rights defenders, Front Line Defenders, considers this to make the Philippines the most dangerous country for human rights defenders outside the Americas (Amnesty International 2017: 7; Front Line Defenders 2017).

The threats aimed at human rights defenders jeopardise their position as the last level of protection for those facing the impact of securitisation action in the war on drugs. As the government is complicit in the threats to human rights defenders, an important question arises as to who can protect human rights defenders from the threats of security. If human rights defenders cannot protect themselves, there is little chance for them to help others whose rights are threatened. Although protection comes in many forms, human rights defenders protect themselves through networks such as the UN Human Rights Defenders Protection Regime (Bennett 2015; Bennett et al 2015: 883), or the different international organisations supporting the protection of human rights defenders, such as Front Line Defenders and Forum Asia (Quintana 2012; Schmitz 2010). This support can consist of grants for closed-circuit television cameras, or travelling funds for relocation both inside and outside the country. However, the

most common form is through continued advocacy, which should force the state to be cautious in responding to human rights defenders. However, with the ongoing killings, a culture of impunity has emerged, allowing extra-judicial acts by government forces or paramilitary groups.

3 War on drugs and children

A second serious human target of the war on drugs are children, caused by a belief among Philippines law makers that the current law on juvenile justice has been pampering children, resulting in them committing crimes as they know they cannot be held liable; they will not be placed in prison and are easily released without accountability (Cepeda 2016). The Bill before the Philippines Congress will lower the minimum age of criminal responsibility from 15 to nine. The Bill is directly linked to the war on drugs, as law makers claim that children form part of the distribution network of drugs, and their immunity from the law enables drugs to be widely transported and sold. The Bill will reverse gains made for children's rights through the Juvenile Justice and Welfare Act of 2006 (JJWA), passed ten years ago after pressure from child rights advocates demanding a Bill that will keep children out of the adult justice system. The JJWA increased the age of criminal responsibility from nine to 15, as juvenile offenders as young as nine were previously placed in prison with adult criminals. The JJWA is based on the principles of restorative justice, prevention, intervention, rehabilitation and diversion from courts, and is seen to be broadly in compliance with existing human rights for children. The slogan 'a jail is no place for a child' was used by the United Nations Children's Fund (UNICEF) and its partners to support the passage of the JJWA, and since then there has been an improvement in the juvenile justice and welfare system. This is seen in the successful diversion from courts, intervention and rehabilitation programmes which have significantly decreased offences committed by the Children in Conflict with the Law by 70 per cent (ABS-CBN News 2016). These advances threaten to be lost due to the replacement of the JJWA by the new security-conscious law.

Although the JJWA is a laudable law, lapses and gaps in the implementation still resulted in the violation of children's rights. It is relevant to consider these lapses as they will only get worse if the new Bill is passed. As noted by the Chairperson of the Juvenile Justice and Welfare Committee, Tricia Clare Oco, programmes have not yet been fully implemented, and capacity building is ongoing for duty bearers, especially of law enforcement officers (Oco, interview). Some failures identified with the JJWA were a lack of awareness and misinterpretations of the law, and not instituting a proper protection mechanism for children under the custody of security sector forces. Even though the law mandates that children cannot be placed in prison, children are still detained arbitrarily, if not in cells with adults, then in detention cells similar to those of a prison. The lack of effective protection can be seen in the practice of 'rescue' operations. Although these are intended as a police measure to protect children from insecurity on the streets, instead they perpetuate the arbitrary detention of children, during detention bringing an increased risk of the child being physically and/or sexually abused. Rescues are carried out by government agencies, mostly by the Philippines National Police, targeting street children who may be classified as 'children at risk'. Law enforcers tend to blur the distinction between a child at risk from a child

in conflict with the law, even though these two categories clearly are different. As defined in section 4(e) of the JJWA, a child in conflict with the law is 'a child who is alleged as, accused of, or adjudged as, having committed an offence'. Meanwhile, in the same section, a child at risk is 'at risk of committing criminal offences because of personal, family and social circumstances', meaning that the child has not violated any law. A child at risk should not be incarcerated.

A study of street children subject to rescue in Manila described 'rescue' operations as 'indiscriminate', characterised as 'involuntary', 'harmful' and 'ineffective' (Nugroho et al 2008). A typical rescue operation usually involves three stages: 'apprehension; detaining children for processing and/or short-term detention; referral to other institutions, NGOs or released' (Nugroho et al 2008: 10). The term 'rescue' actually is an 'apprehension' (Oco interview, 2017). Substituting apprehension with 'rescue' suggests a child-friendly manner and disguises the maltreatment and abuses of children during these operations. Many 'rescue' operations, according to child rights workers, end up detaining and abusing children. In Davao City, where a curfew ordinance is in operation, police officers and *barangay* (village) functionaries patrol the city, 'rescue' children, and bring them to the custody of the Office of the Quick Response Team for Children's Concerns (Domingo 2016). Although the Office appears as a house, with a 24-hour social worker on duty, the treatment has not been child-friendly. According to one anonymous interview, staff verbally abuse children by scolding or shouting at them; and the conditions are barely liveable with children sleeping on cement floors without mattresses, and housed in rooms with metal bars, resembling prison cells. Furthermore, children can be indefinitely detained if their parents, guardians or adult relatives cannot provide any birth certificate for their release (NGO Social Worker, interview). In some cases, children are not brought to the office but are detained in the *barangay* hall office. During detention, children are abused, both physically and verbally, receive physical injuries, are threatened with guns and weapons, are tasked with cleaning chores, and some girls are sexually abused, during which they are asked to choose *hirap o sarap* (pain or pleasure) in exchange for release (former girl child detainee, interview).⁶

Compared to children at risk, the situation of children in conflict with the law is no better. A recent report by the OMCT (World Organisation Against Torture) and Children's Legal Rights and Development Centre (CLRDC) reveals that children are subject to more harm, abuse, stigma and discrimination (OMCT & CLRDC 2016). Apart from a lack of appropriate intervention and reintegration to the community, children in conflict with the law are often physically and emotionally tortured during arrest at police station detention centres. Children in conflict with the law aged 15 and above, awaiting court decisions, and children aged 12 and below 15 but in need of special protection, are brought into *Bahay-Pag-asa* (which literally translates to 'House of Hope'). Some *Bahay-Pag-asa* were juvenile jails before the JJWA was passed with only a logo and a name change to attempt to comply with the law. Shay Cullen of PREDA

6 'Pain or pleasure' is where the child is forced to choose between pain (physical punishment) and pleasure' (to provide sexual services to the security forces) by a security force member as a form of punishment.

Foundation, an NGO on the Juvenile Justice Welfare Committee, described the living conditions in these temporary shelters as being 'terrible' and 'inhumane' when going with the council on its on-the-spot monitoring of police stations and detention centres (Shay Cullen, interview). A majority of these centres still have rooms with steel bars, resembling prison cells. Children are deprived of basic needs, such as clothing and food, and their emotional and mental needs are also disregarded (Cabildo & Reysio-Cruz 2016). The attitude of the authorities is punitive and not in compliance with the spirit of the law (Shay Cullen, interview). The staff are disciplinarian and place misbehaving children in cells. These conditions are not as *Bahay-Pag-asa* has been presented to the public on television (former child detainee 2, interview 19 April 2017). Furthermore, the process of investigation is often flawed because records such as a birth certificate are not documented; there is no provision of quality intervention and rehabilitation programmes; and there is no access to social workers for the child during the process (Shay Cullen, interview). Children are still being arrested and jailed like adults in cases where security forces find it easier to assume that a child in conflict with the law is over 18 years of age, as recording and charging children can be a tedious and time-consuming operation. During an unannounced visit at Manila City prison, the Philippines Commission on Human Rights found six young people who were minors when they were arrested. The lack of adherence to the presumption of innocence and presumption of minority contributes to having children placed in detention cells with adults in police stations and eventually transferred to prison (Victoria Diaz, interview).

The current administration believes that the crime rate has risen because children are used as drug runners. However, the report by the Philippines National Police on crime rates from 2006 to 2012 reveals that only 1.72 per cent of crimes in total are committed by children aged 14 to 17 years. These crimes are mostly property-related crimes such as theft, and mostly committed by males from poor backgrounds, who may be victims of abuse at home or involved in substance and alcohol abuse (Alhambra 2016). These kinds of crimes are known as survival crimes, where young children commit crimes for their survival. It is rather ironic how children in conflict with the law have to survive the atrocities and abuses during arrest, being detained in *barangay* hall offices, police stations and rehabilitation centres with inhumane living conditions. The juvenile justice system is supposed to promote, protect, and fulfil children's rights and not jeopardise them.

A final threat is the law to lower the minimum age of criminal responsibility. The abuse and violations of children's rights now inflicted on children aged nine to 15 years should it be ceased. This does not take into account the best interests of the child, nor does it promote children's rights, dignity and worth. The few congressmen who believe that the JJWA is pampering children reflect an outlook that is more punitive and security-oriented than child-centred. Legislators argue that lowering the minimum age of criminal responsibility may decrease crimes committed by children, prevent recidivism, and avert children from graduating into adult criminals. However, the problem is the lack of a full understanding and implementation of the JJWA. Children as young as nine years will become scapegoats for the drug problem and human targets of the war on

drugs. The government can also defer taking accountability and mending the lapses of the JJWA.

4 Securitisation of North Korean women refugees in China

The third case study is that of North Korean refugee women, who in recent decades have increased in number in China, as they escape economic stagnation and political repression in North Korea. The North Korean refugee crisis does not receive the same programmatic attention as other refugee flows around the world because of its position in Northeast Asian geopolitics. The neighbouring countries of China and South Korea have little to gain economically and politically by dealing with them, and a response may jeopardise diplomatic relations. Perhaps more apparent is the emphasis on traditional security such as borders, nuclear deterrence and military strength over non-traditional security concerns such as human rights and migration. Finally, refugee organisations have a limited ability to respond as they lack access to areas such as along the North Korea-China border. It is in this already challenging context that these refugees now face the concern of being constructed as a security threat.

There are an estimated 50 000 to 300 000 North Korean refugees in China (Davis 2006; Lankov 2006; Kim 2010; Yoonak 2008), and what makes this group distinct is that they are overwhelmingly women, with estimates that between 70 and 80 per cent of these refugees are women (Enos 2016; Kim 2010).⁷ Various theories have been given for the high number of women, including greater economic push factors as they need to find work and food for their family, or that they may have more freedom of movement than men, and, finally the demand for North Korean brides acts as a pull factor (Park 2016). It is important to remember these facts when considering China's response to refugees. China and North Korea both perceive international migration as a key security issue, following a trend of the 'securitisation of migration' (Wæver et al 1993; Bourbeau 2011). As a result, a securitisation 'agreement' between China and North Korea against the border crossers weakens the rights of North Korean refugees. Despite the prevailing view by international law experts and humanitarian groups that North Koreans in China are refugees, the Chinese government does not acknowledge this, but since 1986⁸ claims that they are illegal 'economic migrants'. By representing the women refugees as illegal, the security forces can search and apprehend and forcibly repatriate them. As China is a state party to the Refugee Convention, it has a duty to recognise and protect refugees as well as the obligation of *non-refoulement*.

However, by designating the North Korean border crossers as economic migrants, China exempts itself from any legal (and customary) obligations to assist them (Kim 2012). The construction of women refugees as a threat is operationalised with police crackdowns, cash rewards to Chinese citizens for turning in North Koreans, and hefty fines to citizens who aid

7 Like many refugee flows, these numbers are estimates.

8 This is based on the Bilateral Agreement on the Maintenance of National Security and Public Order in Border Area (1986), although it was more strictly enforced since around 2007 when North Korea cut off dialogue with South Korea after they had repatriated about 468 North Korean asylum seekers from Vietnam.

them (Kim J 2012). Further, many of the women refugees are also subject to trafficking, with some estimating that around 70 per cent of North Korean female refugees at some point are trafficked (Davis 2006; Enos 2016; Kim J 2010). Under the slogan of national security and social order, North Korean women who escaped for their survival are turned into criminals and a potential threat to China's sovereignty. The legal justification for China to co-operate with North Korea is on the basis of the 1986 border protocol and the Border Management Hindrance Resolution (1997), which form part of Chinese criminal law. China had increased its securitisation against North Korean women refugees beyond necessary measures. There are reports in the media that Chinese police abuse their power through house-to-house and body searches, as well as arbitrary detention before deportation (Cohen 2014). In 2014, after the murder of three Chinese citizens by a North Korean military officer, border security was operating under new orders to shoot all illegal border crossers refusing arrest (Haggard 2015). These practices reveal how special allowances are made for securitisation to breach human rights.

Crossing the border without state permission is illegal according to North Korean law, and, once repatriated, refugees can face harsh punishment, including detention in labour camps and potential torture. Pregnant repatriated women may be subjected to forced abortions, and babies born to repatriated women are often killed, according to the 2013 UN Commission of Inquiry report (UN Human Rights Council 2013). These practices are driven by racist attitudes towards interracial children, and the intent to punish women who have left the country and have made contact with Chinese men, making the babies 'impure'. Furthermore, Pyongyang extends punitive measures to the families of refugees accused of 'treachery', as a person leaving North Korea without permission may be charged with treason and is automatically seen as a 'betrayal' and a security threat to the regime. Even though it is a state party to the Convention against Torture, China continues its policy of forced repatriation which can result in the torture, inhuman treatment and punishment of those repatriated. By co-operating with North Korea to repatriate these refugees, China is not only violating numerous conventions, but also acts as an accomplice to North Korea's gross human rights violations.

When North Koreans started escaping their country after the great famine of the 1990s, they were frequently given assistance by the locals and especially Chinese Koreans in the border area. However, as security concerns against North Korean refugees were integrated into the policy and laws that label them as a security threat, locals in the border area were also criminalised when they gave any assistance to the refugees. It was reported that, in the context of harsher policies and the accompanying stigma attached to North Korean refugees, some locals on the China-North Korea border have reversed their perceptions and lost their trust towards them (Freeman & Thompson 2011: 27). Chinese mainstream media is selectively reporting North Korean issues. While China is trying to ignore refugee issues as much as possible, it is vocal on North Korea's criminal acts in the border areas. For instance, Chinese state-run media has printed articles critical of North Korea, ranging from the coverage of North Korea's drug smuggling into China to harsh criticism over the kidnappings of Chinese fisherman in May 2012 and again in May 2013 (Feng & Beauchamp-Mustafaga 2015: 41). While willing to acknowledge North

Korean criminal activities, rather than seeing women refugees as a consequence of criminal violations, they are incorporated into the larger problem of a criminal North Korea.

The overrepresentation of women in the refugee population may be a result of the better economic outlook and personal freedoms in China, although another reason is the acute shortage of female brides for Chinese rural bachelors, making them the targets of marriage brokers. This may also cause around 70 per cent of the women to find themselves in a trafficked situation. Women can be subjected to false promises of employment; pressure to marry for survival; abduction; or being sold by family or acquaintances (Davis 2006). Many women sold into Chinese families suffer physical, sexual, mental and emotional abuse and violence while having very little recourse because of their status (Haggard & Noland 2010: 35). North Korean women refugees find themselves as double victims. As illustrated by Davis (2006), women refugees face constant threats of being exposed to law enforcement agents, allowing traffickers and Chinese husbands to further control the women's movements and subordination. Some women prefer to stay in China despite the abuse than to be sent back to North Korea to face punishment or other harsh consequences for their families should they return (Davis 2006: 134).

A number of scholars have pointed out that China's core interest lies in ensuring a stable North Korea, as instability will directly threaten China's economic and security interests (Song 2011: 1137). While the level of securitisation has gradually increased over the past years, the intensity of securitisation, alternating between penalising and neglecting, depends on the political context. Before the 2000s, the Chinese government was more tolerant to North Koreans. However, this changed in 2002, when the Chinese government heightened surveillance and increased deportation of North Koreans after increased attempts by North Koreans to seek asylum by charging into embassies in China (Amnesty International 2004). China is depicting women as human threats to security by reproducing the discourse of illegitimacy and illegality. This diverts the focus away from the fear of a communist regime collapse and potential uprising from other minority groups, including Chinese Korean ethnic groups living on the China-North Korea border. By taking strong action against North Korean refugees, Beijing is signalling a message that any faction attempting to threaten national interest and ideology will not be tolerated. North Korean women refugees are able scapegoats in China's political calculation because they are powerless to defend themselves. Despite international criticism and its obligation as a state party to the Refugee Convention and the Convention against Torture, China continues to repatriate North Koreans on the assertion that they are illegal economic migrants and a human threat.

5 When the rainbow bleeds red: Unfurling LGBTI politics and security discourse in Indonesia

The last case study examines the construction of LGBTI as a security threat in Indonesia. The last few years have seen LGBTI rights evolved from anonymity and stigma to broad and open concern. In some countries, there is a growing recognition of LGBTI rights, particularly in the

Americas (Pew Research Centre 2017), Western Europe (Csaky 2017) and Australia (Barclay 2017). This acceptance has yielded more awareness regarding the interdependence between LGBTI rights and other rights, such as economic development, freedom of expression, political participation and education (Badgett et al 2014). However, this wave of acceptance of LGBTI rights has not reached the shores of Indonesia. This section shows how LGBTI persons are constructed as an existential threat to Indonesian sovereignty, mobilised in the term of 'Indonesianness', with the human targets being LGBTI individuals in the country. While the existential threat is often termed LGBTI 'lifestyles' by anti-LGBTI groups, most commonly religious and political conservatives, the human targets are gay men, lesbian women and transgender persons. Behind the attacks on LGBTI persons is a growing political and religious conservatism that uses the LGBTI threat to consolidate their waning political power.

Dubbed as the world's biggest Muslim-majority country (Jha & Varagur 2017), Indonesia is home to over 200 million people who identify themselves as Muslims. The country practises a more tolerant Islamic view of homosexuality and transgenderism compared to its neighbouring Islamic nations: In Malaysia, sodomy is punishable by a prison term of up to 20 years (Deghan 2011), and Brunei Darussalam is proposing the death penalty for sodomy (Novriansyah 2016). On the surface, Indonesia appears to be LGBTI-friendly due to the non-existence of laws criminalising homosexuality. However, under this façade of legality is a false notion of tolerance, where sexual minorities live under the mantra of 'discretion is security' (Human Rights Watch 2016). While the country can never be described as a utopia for sexual minorities, discretion is a weak shield for the LGBTI community from outright acts of violence (Boellstorff 2005).

Two waves of attacks on LGBTI persons have been identified by Oetomo (2016).⁹ The first wave started on 24 January 2016, when Indonesia woke up to the anti-LGBTI banner story of *Republika*, a right-wing tabloid, which read *LGBT Ancaman Serius* ('LGBTI a serious threat'). The article appealed for 'all elements of the society to join hands' to prevent the development of 'LGBTI lifestyles' in Indonesia (Human Rights Watch 2016). Citing research conducted by *Republika* itself, the reporters warned their readers about the growing threats of 'LGBTI lifestyles' found on social media, and also warned parents that they should be more aware of this lifestyle influencing their children. The article borders on hate speech with its use of metaphors which describe LGBTI people in Indonesia as 'a dangerous, collective disease' and 'spreading faster than drugs' (Human Rights Watch 2016). Also on 24 January, the Minister of Technology, Research and Higher Education, Muhammad Nasir, made a statement that university campuses must uphold the 'values and morals' of Indonesia, and that LGBTI-themed student organisations must be banned from existence. Although he would later retract this view on Twitter, it did not stop a flow of government officials and religious groups from joining the anti-LGBTI crusade in the following days (Human Rights Watch 2016). Within a period of two months after the headline and Nasir's statement, 17 state officials publicly made homophobic and transphobic

9 Delivered during his public lecture at the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) World Conference 2016.

remarks, not only towards LGBTI persons, but also towards those institutions that promoted LGBTI rights.

These events have also awakened hard-line Islamist groups who are 'morally' policing people based on real or suspected sexual orientation or gender identity. In Bandung, four days after the publication of the homophobic article in *Republika*, the Islamic Defenders Front (FPI), a non-state religious group which positions itself as Shari'a patrol, raided several boarding houses in the city to search for lesbians (*Taipei Times* 2016). The group also erected 'provocative' banners calling for gay people to leave the city. In the Human Rights Watch report (2016), it was later confirmed that this illegal search and seizure were done with the complicity of local police. Another example is when the *Al Fatah Pesantren Waria* (Islamic boarding school for transgender students) was forced to shut down after decades of operation following protests from the Islamic Jihad Front (FJI) (Muryanto 2016). These hard-line Islamist groups become quasi-state actors when LGBTI organisations must ask their permission when they want to conduct seminars or activities (Human Rights Watch 2016). What started as a public condemnation led to greater vilification when there were calls to criminalise same-sex relations before the Constitutional Court. Described by Oetomo (2016) as the second wave of attack, the law, if accepted, would challenge the privacy, security and freedom of expression of LGBTIs. Indonesian law makers are recommending an anti-LGBTI draft law, stating that it is imperative for Indonesian society to protect itself from the 'LGBT propaganda' (Dewi 2016).

This repression, according to Oetomo and Yulius (2016), can be based on the waning public trust of the people towards the state. In this case, sexuality, especially homosexuality and transgenderism, is being used as a scapegoat to reclaim the lost power over the people. This is not a novel development. Historically speaking, sexuality has been used as an existential threat to generate a crisis for political gains. In the late 1930s in the then Netherlands East Indies, colonial police arrested around 225 men who were suspected of homosexuality (Bloembergen 2011). Both Bloembergen (2011) and Yulius (2016) argue that 'moral cleansing' or *zedenschoonmaak* is a consequence of the decreasing authority of the colonial government planning to restate their power through increased security laws. The 'campaign of virtues' was a desperate measure for the colonial government to reassert its power (Yulius 2016). Whereas the Suharto government used sexual debauchery to reduce women's rights (Wieringa 2011), the current securitisation on sexuality focuses on LGBTI. Hanung notes that the current increase in anti-LGBTI discourse is used for political power: 'Indonesia is in an era where ultranationalists are locked in competition with religious fundamentalists, as both vie for public support in order to win electoral votes – and, by extension, democratic power' (Hanung 2017). One particular recent event is the Jakarta mayoral election where the first Christian governor was jailed for blasphemy. Most analysts see this as a politically-motivated punishment in order to appease religious hardliners (Ming 2017).

The securitisation of sexual minorities is articulated in three registers: heteronormativity; nationalism; and a threat to the family/children. Heteronormativity asserts that natural and traditional gender roles exist which can be found in religious, educational and nationalist discourse (Mosse 1985). Indonesia is a typical example of how masculinity serves as

the icon of the nation's spiritual and material vitality. Thus, those people who fall outside the masculinity standards set by society are seen as enemies of national values; they are an active threat to the normative order of society. At this point, sexuality becomes a security concern. Sexual minorities become threats to 'Indonesianness' and the 'future generation'. These views can be found in the propaganda conflating LGBTI people with violence against children (Oetemo & Yulius 2016). LGBTI rights have moved from the domain of political engagement over rights to the realm of security where extraordinary measures are needed to respond to the threat to sovereignty. The groundless and discriminatory remarks against LGBTI persons have put their lives at risk. The repercussions to LGBTI Indonesians are the violation of fundamental rights such as the rights to privacy, freedom of expression, freedom of assembly and equal protection.

6 Conclusion

Regardless of the diversity of the four case studies, some commonalities in securitisation can be found. First, securitisation has a severe and direct impact on disempowered marginal groups. It is difficult to see how the four groups that are attacked by security measures, discussed in this article, could realistically be conceived as threats, given their relative lack of power. Rather, the conclusion must be made that they are attacked through securitisation precisely because of their disempowerment. Second, the process of constructing an existential threat should be analysed in the same way as hate speech. Even though government discourses are criticised by human rights groups, this has not reduced its influence and power. Impunity is created by hate speech; extra-judicial violence is condoned by hate speech. As yet, there is no effective response to this. Finally, it is also important to see the connection between democracy and securitisation. Of the four case studies, the three that use illegal or quasi-judicial measures are democratic states: the Philippines using vigilante extra-judicial executions; Indonesia using religious groups homophobia; and the physical and sexual abuse of children by state security officers in the Philippines. Rather than leading to an improved rule by law and legal protection, it seems that some democracies have led to its decline. It is important to place the victim of securitisation at the forefront of this study. Security is not about how a threat is conceived by a state, nor about the capacity and legitimacy of the security forces, but about the people who suffer the consequences – the abused children; the trafficked women refugees; the killed human rights defenders; and the harassed lesbian, gay and transgender persons.

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Interviews

- Tricia Clare Oco, Chair of the Juvenile Justice and Welfare Committee, interviewed on 6 April 2017
- Philippines NGO Social Worker, interviewed on 19 April 2017
- Former girl child detainee in the Philippines, interviewed on 19 April 2017
- Father Shay Cullen, PREDA Foundation, interviewed on 5 April 2017
- Victoria Diaz, Convenor of the Juvenile Justice Network-Philippines (JJNP), interviewed on 25 April 2017

Securitisation in the Arab region: A new form of kinship relations?

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Abstract: *This article examines the repercussions of the process of securitisation in the Arab region, focusing on its impact on the 'everyday'. It demonstrates how this process negatively impacted on human rights and infringed on freedoms, failing to serve national security and human security. The logic the article follows is based on an assumption that securitisation is organically connected to neoliberal transformations, which tend to deform the role of the state in protecting its citizens, and the autonomy of individuals by obliging them with new duties, and conditioning their lives upon a sophisticated regulatory system under various pretexts, not the least of which is security. This conditioning poses a threat to the nature of the everyday, which is the ultimate goal of all political organisations, and is perceived to need protection, as the everyday is the scene where the principles of equality of humans and their dignity are realised.*

Key words: *securitisation; Arab region; 'everyday'; national security; human security*

1 Introduction

One of the most intriguing observations that can be made in the era of securitisation is the hybrid and controversial elements of its manifestations: the extreme legalisation of the everyday life with a declining role of the legislator; the removal of barriers for the movement of goods and restrictions on the movement of their producers, consumers,

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and the finances involved in the process of their circulation; a total embracing of market freedom together with the monopolisation of the market; a call to protect privacy with an unprecedented infringement on the private sphere; and an extremely violent approach to combating violence.

The securitisation doctrine emerged and flourished in a (new) world order that is characterised by the development of (a) a worldwide spread of neoliberal politics and policies; (b) globalisation; (c) a relative unipolarity; and (d) a regionalism reflected in a new approach to peace-keeping by the United Nations (UN) (De Coning 2016: 7) or, as Buzan puts it, by ascribing 'a political quality to a cultural zone' along the worrying idea of a clash of civilisations (Gonzalez-Pelaez & Buzan 2009: 32). While these trends are closely interconnected and should be treated as a package, each on its own represents a particular aspect of the securitisation framework and its practices (Balzacq 2011).

Manifestly, securitisation is a complex process and its interpretation is an ongoing debate. In our effort to shed light on securitisation, we examine the legal and socio-political changes in the concept and practice of security at various levels (national, regional and international) since the end of the Cold War. The article attempts to demonstrate that the securitisation process (as it evolved during the past two to three decades) involves the process of hijacking the public sphere, and limiting the private sphere, thus de-forming and re-forming the everyday. An elaboration of this process and its repercussions on democracy and human rights in the Arab region will be made by examining relevant aspects in the areas of (a) international relations (including international law and regional regulatory frameworks); (b) national legislation (in Morocco and Palestine); and (c) the impact of securitisation on the everyday (understood as the normal, most direct, unmediated relations between community members).

While securitisation techniques vary, the article focuses on anti-terrorism legislation and policies, while anti-money laundry legislation is also considered. Bearing in mind how the securitisation discourse can give way to national and international legal measures, we discuss these measures and their frameworks in international and national law. Once implemented, these securitisation techniques (measures) become realities in people's daily lives, which we also examine as the everyday is essential to evaluate the eventual overall impact of securitisation. The question of securitisation will eventually bring us back to its meaning and implications for human rights and democracy, especially in situations where the restriction of rights becomes a preventive and collective security measure, and when ideological threats and conflicts of interest are identified as security threats.

2 Security, securitisation and the Arab world

The world order that replaced that of the Cold War era had serious impacts on the group of countries that belong to the global south, to which the Arab world belongs. These countries were affected by the new order in the sense that they could no longer negotiate their position of weakness by acting on or reacting to the bipolar divide between the super

powers and their close allies. As a co-product of the neoliberalism along with the concentration of wealth, economic polarisation and corporate domination, securitisation in the Arab region comes in juxtaposition with dependency, colonial and neo-colonial conditionality, and the prevalence of authoritarianism (Anon 2017: 30-33; Sayigh 2016).

This juxtaposition is at the origin of the turmoil that the region went into starting late in 2010. Deep social, political and economic divisions, the intensification of 'identitarianism' (Badiou 2012: 81-95), popular despair, and the lack of economic growth shaped the conditions of struggling for survival. These factors, together with the existence of real threats to life, gave way to the securitisation doctrine with little public negotiation, and little accountability on the part of the political leadership, leading to the creation of international coalitions on security and interventions of foreign forces of various types which frequently align with corporate interests. This serves as the specific (although not unique) context of securitisation in the Arab region.

It is the relatively recent significant changes in the approach to security which help to explain in part the emergence of securitisation. It is argued that security is an 'essentially contested concept' (Buzan 1991: 7). Its conceptualisation and practice have mutated over time and have been adapted to each historical moment depending on the circumstances of war and political tensions among members of the international community, usually defined by the most powerful states. A traditional understanding of security is the protection of the territory from foreign military intervention, centred around the concept of sovereignty (Kelsen 1957: 1, quoted in Nasu 2011: 16). Thus, originally, the scope of the concept was intrinsically related to national security and the historical post-war moment which brought the necessity to establish parameters for the protection of the sovereign state and its citizens.

The first steps towards a common concept of international security were taken by the extinct League of Nations (1919), which identified acts of war that could undermine the peace among state members (Nasu 2011: 16). Based on this ground, the 1945 Charter establishing the Security Council within the UN has also broadened the scope of security to an international level, where maintaining peace and security has to be achieved through a multilateral involvement of the member states. In this manner, national security has been redefined as the building block of international security, and a set of international standards for national securities was developed, in essence making national security a prerequisite for international security, unlike the assumptions of the classical security doctrine (Ramcharan 2008: 37-41, 190-191).¹

The latest crucial changes to security making (and the emergence of securitisation), not coincidentally, went hand in hand with the development of neoliberal politics and the rise of the unipolar world order. Not surprisingly, securitisation and its neoliberal context severely impacted on the global south, including the Arab world. One distinct

1 While there is no room here to provide the basis and evidence for this discussion, the authors of this article believe that the change is connected to the demise of entrusting the security of a country to its political system (sovereignty) and the emergence of a perceived centralised regulatory system in a unipolar world order.

aspect of the everyday consequences of securitisation is the segregation it created in addition to that of the neoliberal order. While neoliberalism allows for economic differences that are gradually reflected in the livelihoods of people, the impact of securitisation is more sudden, declared and unavoidable. Not only can it immediately affect people's private and public behaviour, but it also divides the population when it identifies (and thereby marginalises and excludes) suspects as potential threats to security by using a whole range of profiling techniques (whether based on appearance, or from the examination of verbal and written communication content, or statistically using big data). Furthermore, unlike economic neoliberalism, securitisation leaves room for neither sympathy nor empathy with the 'suspects', or for social responsibility in that matter. On the contrary, it encourages a uniform discourse of unilateral condemnation and creates heroism on the basis of societal divisions of the good and the bad, leading to the unprecedented mainstreaming of public opinion on certain aspects of life that do not tolerate diversity or plurality. This process eventually leads to a socially-embedded segregation under the placard of identity, where society is only unified by the need to be protected by the powerful security apparatus, and eventually willing to sacrifice freedoms, privacy, and distinctiveness for survival.

Securitisation is a complex process, closely linked to the practice of security. Since securitisation engages in a 'speech act' (McDonald 2008), it is imperative to question the construction of the discourse around security and terrorism, especially as they are entwined 'essentially contested concepts' (Buzan 1991: 7). The assumption is that this discourse structure (as well as its background) will prove to be problematic for safeguarding human rights and maintaining democratic systems.

The transformation of security into an undisputed good, the realisation of which requires conformity sets the stage for a rational (and emotional) ground in which securitisation takes root, and this process might best be understood through the perspective of a specific issue in international security.

3 Securitisation and terrorism

The 'speech act' (McDonald 2008), in which securitisation continuously engages and depends on, requires us to pay attention to the construction of the discourse behind security measures. The assumption is that this discursive structure (as well as its background) will prove itself crucial in explaining how violations of human rights and democratic practices are made possible and, at the same time, precisely highlighting those same tools that can be used to safeguard rights.

In the past decades, the phenomenon of securitisation has placed terrorism as one of the forefront issues threatening international security. One of the ways in which it reached this position is through a set of international legal instruments that were developed by the UN, starting in the late 1950s. However, terrorism belongs to the category of 'essentially contested concepts': a legally vague term that transforms over time, location and political international relations. The well-known freedom fighter/terrorist dichotomy reveals the high degree of subjectivity, intellectual and political negotiation involved in the characterisation of

terrorism (McWhinney 1990: 81). National independence movements or organisations formerly considered terrorists and later recognised as legitimate and legal leading national parties (the National Liberation Front (FLN), the African National Congress, the Palestine Liberation Organisation (PLO), and so forth) bear witness to the subjectivity and the shifting connotation of the term. Furthermore, terrorist (and non-terrorist) labels vary across national interpretations. For example, the United States and Canada list the Palestine Liberation Front (PLF) and the Popular Front for the Liberation of Palestine (PFLP) as terrorist groups, whereas in Palestine they both are official political parties that participate in elections, and the PFLP sits in the parliament. In the same vein, the Jewish Defence League (JDL) is tolerated in France, illegal in Israel, and considered 'extremist' in the US (Federal Bureau of Investigation, US Department of Justice 2001).

Since 1963, international law has developed 19 counter-terrorism conventions² under the guidance of the UN and the International Atomic Energy Agency (IAEA) (United Nations (undated)). The Security Council Counter-Terrorism Committee was created in 2001. By 2011, 'some two-thirds of UN member states have either ratified or acceded to at least 10 of the 19 instruments, and there is no longer any country that has neither signed nor become a party to at least one of them' (Security Council Counter-Terrorism Committee 2011).

Some of the most ratified instruments include the Convention on Offences and Certain Other Acts Committed on Board Aircraft (185/193); the Convention for the Suppression of Unlawful Seizure of Aircraft (185/193); and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (188/193), all issued between 1963 and 1971. Since the end of World War II, the public market for commercial and civil use of airplanes and air transportation services had been expanding on a massive scale (Vleck 2013: 199-238). When in the early 1960s the phenomenon of aircraft hijacking gained more and more symbolic publicity, states began to see the need for international legal sanctions to deter such political activism and guarantee the safety of international business (McWhinney 1990: 78-79). Airplanes had become goods to be protected, and air transportation services movements to be controlled.

With the intensification of the capitalist economy, and the growth of multi- and trans-national corporations, a state-corporation interdependence emerged as the state delegated more and more functions to corporations, and a new central function of the state was to protect these corporations, although this protection may have extended beyond state territories. As some scholars point out, capitalist interests are intrinsically at the heart of security strategies where 'human security has been co-opted to legitimise military intervention in places such as Afghanistan and Iraq, and has underpinned the "responsibility to protect" and counter-terrorism strategies that subordinate and securitise the interests of the "other" to the imperatives of core capitalism' (Cooper et al 2008: 393).

2 Naturally, these do not capture the phenomenon of state terrorism. See para 160 of UN High-Level Panel on Threats, Challenges and Change 2004.

Counter-terrorism, through the prism of UN treaties, prioritises securing the state and the global economy before protecting civilian lives. The International Convention Against the Taking of Hostages (1979) defines the offender in terms of who the offence is exercising pressure on: 'any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a state, an international intergovernmental organisation, a natural or juridical person, or a group of persons ...' (United Nations General Assembly 1979: 207). Terrorism is determined by the intention to exercise pressure rather than by the act itself: 'any action ... that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act' (UN High-Level Panel on Threats, Challenges and Change 2004: 49).

The process allowing states to list individuals, groups and entities as terrorists creates a situation where these individuals and groups are criminalised for their identities and affiliations, regardless of their actions. For example, the US Code Title 8, Chapter 12, Subchapter II, Part II, Sec 1182 states that '[a]n alien who is an officer, official, representative, or spokesman of the Palestine Liberation Organisation is considered, for purposes of this chapter, to be engaged in a terrorist activity'. This process of criminalisation with no relation to a concrete act also became part of UN practice. Proposing an entity to the UN terrorist list is the prerogative of states. They can do so, asking not to be named as the designated state. Civilians then become referent objects to secure but also potential targets to be neutralised, since states mostly identify perpetrators of terrorism as coming from civilian population, whether theirs or from other states.

With the terrorist label comes concrete action, not only against individuals and the targeted groups, but also against their suspected supporters which, at times, can even include their relatives. Notwithstanding the open space for interpretation, anti-terrorism clauses have become a common requirement for international funding to humanitarian aid (Mackintosh & Duplat 2013: 11). When the Palestinian political faction Hamas won the parliamentary majority in January 2006, the United States suspended its aid programme to Palestine, while other states, including some European countries, advocated a policy of no contact with Hamas. This complicated the work of non-governmental organisations (NGOs), especially in Gaza, as they had to go through states such as Norway or Switzerland to reach the local authorities, and led NGOs to practise self-censoring which translated into avoidance of any event or action that could have jeopardised their allocation of funding for suspicion of terrorist association. Preventive reactions ranged from not attending community meetings where ministerial officials may be present, to refusing two kindergartens in school feeding programmes because of the kindergarten community's potential ties with Hamas (Mackintosh & Duplat 2013: 99).

To win people's support for their policies, state agents engage in a public process of validation seeking. A good part of this (other than declaring it an acceptable norm of international practice) is realised through the 'speech act' of securitisation. This complex act is described as 'a discursive process by means of which an actor (1) claims that a referent

object is existentially threatened, (2) demands the right to take extraordinary countermeasures to deal with the threat, and (3) convinces an audience that rule-breaking behaviour to counter the threat is justified' (Munster 2012). One of the elements of this act is the legislation and other regulatory tools that define the threat and the new means to counter it, aiming to (re)define normalcy in the process of legitimising securitisation (including through legislation). Such a process transforms the law itself into a tool that the state employs against its own people, preventively and offensively. As Cader puts it: 'Like other state weapons, these laws work to conceal the terror of the state – that is, the terror propagated by the state precisely because it is itself terrified of the resistive and transformative potential of its constituents' (Cader 2017).

Among the active participants in the process is the media in all its forms. Its reaction reinforces the threatening quality of certain issues or challenges it, especially with the language it chooses to use. For example, when an Israeli newspaper headlines read 'Thirteen year-old terrorist charged with attempted murder', it is presenting terrorism as a priority security issue as well as a rampant threat pervading all levels of a society in which children become criminals. Doing so, it produces fear, offers justifications for strict security measures and even suggests support for more and stricter policies (Hasson 2015).

Another striking example of the media's power to frame an issue and influence its political outcome is the false number of civilian deaths reported internationally at the beginning of the Libyan revolution in February 2011. Initially announced by the Saudi television news channel Al-Arabiyya and then taken on by many national media outlets, the state repression of protesters in Tripoli did not cause the death of 10 000 people as it was claimed, but fewer than 250 across the region. While a life is a life and the military repression of civilian protest is a crime under international law, one of the official reasons that prompted the UN Security Council to send troops to Libya was the (then reasonable) fear of deadlier massacres to come, especially as other exaggerations of deaths continued to be issued (Chaix 2016). Although it is not clear whether all or any of the media involved were aware of the falsehood of their information, or were unprofessionally neglecting a rigorous checking of their sources, or simply driven by the prospect of lucrative sensationalism, it does show the role that the media can play in international political decisions that have life and death consequences.

Supported by 'speech' and promoted through various means such as the media, the securitisation process encourages the criminalisation and exclusion on the basis of identity, creating conditions under which security reasons are no longer required to justify the restriction of human rights. A breach of human rights starts to look like a preventive illegal (but legitimate) measure that takes the form of collective punishment in violation of the principle of presumption of innocence. In Palestine, students from the Gaza strip, when striving to attend a West Bank or foreign university, find many administrative and physical obstacles to reach their studies: 'Since the outbreak of the second *intifada* in 2000, sweeping bans on travel to the West Bank have been imposed on university students from Gaza, and all requests to travel for study purposes have since been rejected, even in the absence of security concerns' (UNOCHA 2016: 11).

Another version of identity-based suspicion is the US immigration ban 'Protecting the Nation from Foreign Terrorist Entry into the United States', which had a 'retroactive' impact on life projects that people undertook assuming some sort of normalcy. To mention just a few, an Iranian student who had started his PhD programme at the University of Santa Barbara, California, in 2015, was in Iran when he found out about the promoted immigration ban (Golshiri 2017) and another student, in his fourth year of anthropology studies at Yale University, who also found himself abroad when the executive order was announced (Redden 2017). Such retroactive infringements on rights do not have any legal basis. The power of exclusionary policies even extends to 'self-exclusion', as is suggested by the stories of nationals who are not directly affected by the US ban, but are anxious about its potential implications. A student from Mali at Portland State University summarises it well: The 'anti-immigration' message has been received and, as a foreigner and a Muslim, he does not feel at ease (Alpert 2017). Not surprisingly, as several universities in the United States reported, the number of foreign undergraduate students applying to colleges for Fall 2017 is decreasing (Alpert 2017).

The entire rationale of security is overturned when securitisation becomes a state of mind no longer requiring the investigation of security concerns. A higher threshold of this overturning is achieved when ideological threats become security threats, eventually resulting in the refusal of access to a territory in a state of war for humanitarian workers, human rights professionals and academics for presumed security reasons. One of the authors of this article shares her own experience on the matter: A French citizen following an MA programme in Italy, she came to Palestine for her thesis research. In March 2017, she left in haste for her grandmother's funeral in France (the circumstance further denotes the empathy rarely present in spaces like border control) and, when returning to Tel Aviv four days later, she spent eight hours in waiting or interrogation rooms. She was unceremoniously informed that she was to be 'deported' and spent the night in a detention centre near the airport. The reasons listed for her denial of entry were 'public security or public safety or public order considerations'. She was later told that it was one of the most common reasons. However, she had initially been taken aside for questioning as she gave the name of her institution, namely, the European Inter-University Centre for Human Rights and Democratisation (EIUC). The Israeli officer's instant reaction to the name of the institution was to ask whether there were 'violations of human rights here in Israel', before advising her to 'go to Syria where the situation was much worse'.

4 International human rights law

The Universal Declaration of Human Rights explicitly asserts security as a human right in three different contexts: personal, social and a lack of livelihood (articles 3, 22 and 25 respectively). Implicitly, the right to security may also be deduced or assumed from a variety of other rights (such the right to life). We assume that each of the three mentioned contexts presents different types of rights that are best protected when integrated, but can in certain situations of conflict be addressed separately. This section examines the question of whether securitisation fosters the different contexts in which security figures as a right; whether it can integrate and unify these rights; and whether it can maintain a defensible

balance between them. One of our presumptions is that the doctrinal transition from security to securitisation not only worked against the integration and fostering of these rights, but created the conditions for legitimising their infringement.

As the examples above demonstrate, the securitisation speech act identifies a particular issue, such as a terrorist attack, and manages a sustainable campaign to create acceptance of the proposed measures among the people, presenting the measures in such a way that they become the guarantee to people's safety and justify the invasion of the private sphere for the common good. Individuals then concede to giving up some freedoms in order to receive security from the state. Within the securitisation framework, restrictions are implemented invoking legitimate concepts without defining their contents, allowing the arbitrary restriction of rights.

The international legal framework on security has been sharpened after the World Trade Centre terrorist attacks in September 2001, and changed much of the conception and dynamics of security worldwide. The Security Council, based on article 24(1) of the Charter of the United Nations, adopted Resolution 1373 (UN Security Council 2001) declaring terrorism to be contrary to the principles of the Charter and establishing an international legal framework for the fight against terrorism. Even though the resolution was taken as an action under chapter VII of the Charter of the United Nations and involved a series of actions and prohibitions against persons and entities involved, directly or indirectly, in supporting terrorist acts, it does not define the 'terrorist act', leaving room for states to have a 'margin of appreciation' when invoking 'national security' and counter-terrorism, enabling them to potentially limit the rights of their citizens and other inhabitants (Saul 2006: 48-51). In this context, states, chiefly the US and some members of the European Union (EU), initiated measures concerning the protection of their territories and their citizens, at least *prima facie*, invading the public sphere and, at least partially, the private sphere of the citizens (Balzacq 2011: 125). Measures taken by the UN to counter terrorism involved the creation of the Counter-Terrorism Committee (CTC), the Counter-Terrorism Implementation Task Force (CTITF) and the UN Counter-Terrorism Centre (UNCCT) (United Nations undated).

As Buzan and Hansen suggest, the speech surrounding terrorism works to present a terrorist not as a legitimate enemy but rather as an evil, barbaric and irrational being (Buzan & Hansen 2012: 244). Therefore, any conduct deployed by the states, including the use of force in foreign territories, has the appearance of being justified by the pursuance of a legitimate aim. This helped the US to justify its use of force in Afghanistan and Iraq. The conduct of the US included not only military intervention in foreign countries, but also internal measures, some of which were immediately taken in 2001, such as the Executive Order 13224 by the Bush administration, and the US Congress USA Patriot Act of 26 October 2001. These acts encompass a series of policies establishing security measures on the borders, in the army, in the immigration service, and the inclusion of criminal laws against terrorism.

Securitisation justifies the enactment of policies that infringe on fundamental rights with the guarantee of safety under the presence of a threat (whether or not it is real). The speech together with its public

acceptance can create the façade of legitimacy regarding the measures undertaken by the state. Nevertheless, the acceptance that brings about 'pseudo legitimacy' cannot justify the limitation of rights contrary to the standards of protection issued by the *corpus juris* of international human rights law, because the measures must be balanced with the protection of rights under a defined legal framework, neither depending on vague political decisions nor on public acceptance. The concept of human rights establishes, *a priori*, limitations on state power for the safety of human beings. International human rights law³ has also set the limitations for the restrictions of human rights and the impact of such restrictions.

Alexy proposes an analytical framework that examines the limitations of rights using a 'proportionality test'. It includes three principles, namely, adequacy, necessity and proportionality in the narrow sense (Alexy 2014: 54 ff). If we apply this test to the wall built on the Turkish-Syrian border, it becomes hard to justify the security considerations behind the wall construction. In August 2016, the Turkish authorities started to build a wall alongside their common border with Syria. The first segment was built in the province of Kobani, Northern Syria, and is supposed to extend more than 511 kilometres. According to the Turkish government, the intent was to boost the security at the borders in order to avoid the perpetual trespassing of terrorists. However, the Kurdish population located in the region repeatedly protested against the decision, indicating that the structure aimed to separate the Kurdish population currently settled there (Sputnik International 2016).

According to human rights groups, the measure is affecting the mobility of the population trying to escape from the Syrian armed conflict to seek protection. The Turkish government seems to be 'determined to stop people, including refugees, coming through,' according to Andrew Gardner, Amnesty International's Turkey researcher (Winter 2017). This clearly has serious implications for the Syrian population as their freedom of movement is directly related to their right to life, and the wall represents a threat to their integrity. While arguments exist for the adequacy of the measure (Erkuş 2017), and for its necessity (the Turkish authorities should be able to secure their borders), such a decision should be the last possible resource, as a harmful and more invasive one for the rights of the Syrian/Kurdish population. It is in the proportionality (in the narrow sense) consideration where the building of the wall fails the test. The wall construction represents a disproportionate threat to human rights. The freedom of movement and the threat to the life and physical and psychological integrity affect the Syrian and Kurdish populations in a disproportionate way in relation to the aim of 'national security' that is supposed to be achieved.

The farce lies in how the securitisation speech encourages people to think that there is a real threat from receiving migrants assuming that these migrants might be terrorists, or presenting them as potential would-be terrorists or potential aggressors, and not refugees or victims of a

3 See, for example, art 30 of the Organization of American States, 1969: 'The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.'

conflict, thus using fear and the appeal of security to encourage people to make irrational conclusions.

At the level of international law, especially after the World Trade Centre attacks, securitisation profited from a range of regulations that provided states with an obligation of fighting against terrorism, while lacking clarity of definition and scope. These regulations *de facto* provided states with a wide margin of discretion when considering individuals and groups of people (and states, in many cases) as terrorists or terrorist supporters/exporters/facilitators, thus providing the appearance of legitimacy (and legality) to acts that otherwise would not have been legal or legitimate from the point of view of international law.

5 National legislative and policy reforms

Instigated by the developments in international law and pressure from the international community, in particular from its more powerful actors, as well as by the need to act against terrorism to maintain internal security, many states engaged in legislative and policy reforms to adapt to the new world conditions and developments in the emerging security/securitisation paradigm.

We will explore the reforms at the legislative and policy levels using the examples of Morocco and Palestine by examining (a) the counter-terrorism legislation in Morocco and its impact on society and on human rights; and (b) the emergence of neoliberal policies in Palestine involving security sector reform, anti-money-laundering legislation, and the introduction of vetting policies in a colonial context.⁴

With the spread of terrorism in the past decades (Sofer 2011), the question of security has become a priority on the international, regional and national levels.⁵ However, this coincided with the prevalence of 'open border' policies and the expansion of the phenomenon of globalisation. The parallel increase in terrorism, on the one hand, and the expansion of globalisation, on the other, was alerting. It is argued that globalisation has encouraged religious fundamentalism (Stibli 2010: 2), which has become internationalised. In this environment the securitisation doctrine found fertile ground to flourish. This tendency was all the more evident at the national level.

6 Moroccan example

While threatened by terrorism, Morocco recorded the lowest number of terrorist attacks in the region of the Maghreb and Sahel since the September 2001 attacks.⁶ This comparative difference might suggest a Moroccan 'immunity' to terrorism, possibly through a relatively successful anti-terrorism strategy. Since the Casablanca attacks in 2003, the

4 The colonial context of Palestine, where legislative reforms mostly are made on external demand in the absence of sovereignty, serves as an exemplary model as it reflects a case of maximal adoption to the demands of the international community.

5 See, for example, Council of Europe, 2015.

6 Morocco recorded a total of nine attacks, whereas Algeria recorded 1 285, and Mauritania 27 (Alexander 2014).

monarchy took measures on four different levels: the legal; the social; the religious; and the military.

6.1 Legal reforms

After some violent attacks in Casablanca in 2003, an anti-terrorism law, Law 03-03, was promulgated. Eight years later, the country was shaken by another major terrorist attack in the touristic city of Marrakech. This event triggered a reconsideration of the counter-terrorism strategy by the authorities, leading to the promulgation of Law 86-14, which complemented the previous one. The purpose of these two major statutes was to fight terrorism and maintain security by attempting to prevent future attacks. Many controversial questions arise in relation to these changes: Were these statutes effective? Did they really guarantee more security? What was their impact on human rights? How were they received by Moroccan society?

Law 03-03, the first of two major laws constituting the legal framework of the anti-terrorism legislation, was voted as a reaction to the events in Casablanca of 16 May 16 2003. The Law had three main purposes (Saadoun 2015):

- It criminalised acts considered terrorist offences and defined the penalties.
- It centralised the jurisdiction related to terrorist acts. The Rabat Court of Appeal is now the only competent court with jurisdiction over all Moroccan territory.
- It designated court trials related to terrorism regardless of the location of the crime or where the accused lives or was arrested.

‘The Law addressed the handling of fiscal information and sought to stop the flow of money intended to fund terrorism. This introduced the possibility of freezing suspicious bank accounts, and prosecuting the perpetrators of crimes related to funding terrorism’ (Saadoun 2015).

Although this Law arguably helped to prevent further attacks in Morocco (Kalpakian 2011) and to unify the jurisprudence related to terrorism, it suffered similar handicaps to what was discussed in relation to international law, namely, that its terms are very general and poorly defined. The term ‘terrorism’ itself is not clearly defined. Moreover, expressions such as ‘a serious breach of public order’ are very vague. In addition, there is a lack of precision in describing the means of perpetration: intimidation, terror and violence. These three words definitely are not unique to terrorist acts and can be reunited in other cases, leading to the danger of (mis)qualifying some acts as ‘terrorist’ when they are not.

Another alarming issue are the measures and the severity of penalties related to terrorist activities. Concerning measures, the Law, for example, raised the time limit of police custody to 96 hours, twice renewable, and suspects are only allowed to contact a lawyer after six days, which raises the possibility of subjecting suspects to torture. Houses may be searched or surveyed outside of normal times with the permission of the public prosecutor or the investigating judge. Freezing suspicious accounts and prosecuting perpetrators of crimes related to funding terrorism became possible. All these extraordinary measures form a threat to the private sphere of citizens as they give the authorities a wide margin of

intervention, which can lead to suspecting innocent people and violating their private life in the name of 'public order' or 'social security'.

On 6 January 2015, the draft Law 86-14 was approved by the majority of the House of Deputies. Its main goal was to amend certain provisions of the Penal Code and the Code of Criminal Procedure. According to Issam Saliba, this law criminalised the act of joining terrorist groups, expanded the scope of terrorist acts, and extended the jurisdiction of the national courts to prosecute terrorist crimes whether committed within or outside the Moroccan national territory (Saliba 2015).

Similar to Law 03-03, the new law was also criticised because of its severe punitive aspect that can extend as far as life imprisonment or even execution. Moreover, its very wide application might contradict the principle of 'no penalty without law'. For example, this law even applies to situations where the actions are not intended to harm the people or the state of Morocco or its interests.

6.2 Socio-economic reforms

In addition to the legal reforms, the state engaged in modifications on the socio-economic front on the assumption that such modifications are useful for the success of counter-terrorism goals. Some argued that the Casablanca attack in May 2016 was in reaction to the social inequality in this particular city since 'the eight suicide bombers involved in the attack were youth living in squalid conditions in Casablanca slums' (Paciello et al 2016: 5). Finding a solution for the conditions of extreme poverty in the Moroccan society became a pressing issue. In 2005 the King launched the National Initiative for Human Development (INDH), a project aimed at 'assist[ing] the government in improving inclusiveness, accountability and transparency of decision-making and implementation processes at the local level in order to enhance the use of social and economic infrastructure and services by poor and vulnerable groups'. According to the World Bank, this project has four components: to alleviate poverty in rural areas; to alleviate social exclusion in urban areas; to alleviate extreme vulnerability; and to mainstream INDH governance mechanisms and strengthen institutional capacity (World Bank 2014). These initiatives are perceived to have helped in starting to improve the socio-economic situation (Bennis 2015). Moreover, these measures were complemented by investing in infrastructure (such as initiating a housing project) which also helped to address poverty. A recent example of social changes for security purposes is the ban in February 2017 of the 'production, sale and import of the burka' (BBC 2017). This measure was decided by the King because of 'security concerns'. In the context of securitisation, this ban is regarded as infringing on citizens' personal choices and limiting their private spheres 'for security purposes'.

6.3 Religious reforms

Recent religious reforms in Morocco have targeted mosques, the media and education. Previously, most mosques were operated independently (not under the control of the state). Since 2003, every mosque, whether built by the state or not, falls under the supervision of the Ministry of Islamic Affairs which has the prerogative to appoint *imams* and other clerks. The intervention was an expression of the apprehension of the state towards extremism perceived to be initiated inside these mosques. In a

similar framework, the King decided in 2004 to launch the Mohammad VI television channel and the Mohammad VI radio station. This particular step was a way of promoting a 'homogenous Islam' to the Moroccan nation and to encourage values such as tolerance and moderation. In June 2014, a religious programme was created in order to teach *imams* across the country about the 'values of Islam'. The reform in the religious sector involved the inclusion of women in religious establishments and the introduction of female religious workers. Finally, in 2016, on the initiative of the Crown, a reform of Islamic education textbooks took place with the aim of combating terrorism through teaching a 'more moderate' Islam. A commission was created 'to review the Islamic education textbooks to ensure they adhere to the precepts of Islam and the Maliki Sunni rite, which advocates moderation, tolerance and coexistence with other religions and cultures' (Igrouane 2017).

It is worth noting here that much focus is placed on the ideological roots of terrorism (allowing for a connection between terrorism and Islam) without much attention to the question of the existence of terrorist acts that have no relation to Islam (McCauley & Moskalenko 2011: 5-9), or to the causes of radicalisation amongst Muslim populations that do not lie in the realm of ideology (Johnston 2014; Amrani 2009: 314-315, 318-320). The systematic work on promoting jihad in Afghanistan in the 1980s is also absent from the discussion (Tarabay 2013; Blum 2004).

6.4 Security reforms

Several reform steps were undertaken at the military and security levels. This was a central element of the process of securitisation. It is argued that one of the strengths of the Moroccan system lies in the preventive security measures. Morocco tightened its control over its borders with Algeria,⁷ and reinforced its military presence on its southern border with the Sahara desert. In parallel with this border control, the new security of *Hadar* was installed: Royal armed forces, royal gendarmerie, police and auxiliary forces were deployed all over the territory, either by simple physical presence or by the establishment of checkpoints (Bennis 2015).

A key element of the Moroccan security mechanism is the unofficial network of informants or undercover agents called *Muqaddim* who obtain detailed information about 'suspicious' activities in every neighbourhood, reporting directly to the monarchy through a specific hierarchy. The *Muqaddim* usually is locally appointed as a village or neighbourhood leader, and a *Shikh* is the local head of a group of villages. These two positions report to an appointed head of district, the *Qa'id*, who is a state servant. In this way, the state can be updated in different parts of the country through this chain of agents.

Morocco has been able to maintain a relatively low level of terrorist acts in comparison to its neighbours. Arguably, this is due, in part, to the strategy adopted since 2003. However, the analysis of the Moroccan strategy calls into question certain aspects such as the very fast tempo and global scale of the reaction to the events of Casablanca in 2003. As stated previously, Law 03-03 was voted during the same year of the attacks and

7 It is important to recall that the insurgency from Algeria to Morocco is historically related to the dispute over the Western Sahara, and the war against the Polisario Front.

subsequent reforms that took place covered all aspects of life. All the measures taken resemble long-term strategies geared towards the prevention of terrorist attacks. In addition to the focus on prevention, a common examination of the various aspects and procedures unearths the deployment of the monarchy's monopoly over all aspects of life, which might signify that there is more repression than prevention.

Through the implementation of its securitisation strategy, the monarchy created a web linking and monitoring various aspects of life: religion; education; social assistance; security; movement; and so forth. The constant presence of security forces in the public sphere (malls, airports, streets, neighbourhoods) allows the monarchy to be fully present on the territory and to control most areas of society. Propaganda is another key element in the implementation of the strategy. The media, such as radio, television and advertisement, is used to advance the monarchy, in general, and the King, in particular. The public sphere is utilised (and hijacked) for the implementation of the securitisation strategy.

The private sphere has also been altered by the Moroccan approach. Various aspects of people's lives have become very limited. One example is the hierarchical system in the neighbourhoods: The *Muqaddim* or the *Shikh* observe the movements of individuals in specific neighbourhoods and report any 'suspicious' behaviour. Another example is the impact of the new legislations since they give the state the right to search houses, freeze bank accounts, and listen to private conversations.

In addition to these infringements, human rights protection suffered at the individual level. Persons suspected of being linked to terrorist activities can now be detained for extended periods, which is likely to result in torture and mistreatment. The likelihood of arbitrary arrest has grown, and sentencing has become harsher. This occurred in the case of the Temara secret detention centre, where torture was brutally practised (Arabic Network for Human Rights Information 2005).

On the other hand, the package contains policies and procedures oriented at fostering and enforcing some rights (such as the better inclusion of women as a consequence of the religious and social reforms). The choice of rights to be fostered remains limited and based on ideological assumptions. Other elements of the 'larger' package involve tolerance and attention to poverty after the Marrakech Declaration in 2016 (Anon 2016). In addition, the state has worked through its policies on helping the poor and ensuring housing: 'All this poses the question whether the palace may be moving towards a less inclusive "developmental dictatorship" model that justifies a lack of political and civil rights as the price for progress in modernisation and the prospect of a rising standard of living' (Werenfels & Saliba 2017).

Understanding social acceptance of securitisation strategies might prove difficult because of the controversies they imply. Interviewing people on the streets⁸ shows multiple perceptions of security. Some people feel that security is aimed at defending the monarchy; others feel insecure (by

8 An interview has been conducted in the streets of Rabat. Interviewed citizens were asked about their opinion concerning the security strategy of the state and whether they were in favour of this strategy. Moreover, they were asked if they were feeling 'secure' with the measures taken by the state. Respondents were chosen randomly.

securitisation techniques) but have learned to accept it and to live with it. However, one constant element seems to be present, namely, the existence of (framed) liberty. Although Moroccan society is facing many issues, people feel that they are allowed to behave in 'total' liberty as long as it is does not involve violence, terrorism or the monarchy's interests. Three striking examples constantly emerged during the interviews: the easy access to *hashish*; corruption; and the modernisation of the social sphere (including religion). Security forces tend to turn a blind eye to certain illegal behaviour (like smoking *hashish*) and to accept bribes when an infraction is committed, as long as it has no link to terrorism, violence or the monarchy. Moreover, people seemed to appreciate the modernisation in their society during the interviews. The protests that took place starting late in May 2017 demonstrate the fragility of the situation and the short-term impact of the reforms. Consider this episode from a news report in the *Middle East Monitor* (2017):

Zefzafi was detained 'along with other individuals' and transferred to Casablanca for 'undermining the security of the state' and other 'criminal' acts, the prosecutor confirmed ... Prosecutors said the arrest was ordered after Zefzafi 'obstructed, in the company of a group of individuals, freedom of worship' at the mosque in Al-Hoceima ... The protest leader appeared in footage ... where he was seen berating mosque leaders for being mouthpieces of the government and questioning whether mosques were places of worship or centres of propaganda for the government.

As far as Morocco is concerned, one may interpret the strategy adopted by the monarchy as a double-edged sword, perhaps with the two edges not of equal impact. The strategy involves a certain (contested) promotion of some women's rights and the penetration of the private sphere; some enhanced security and highly centralised control; some (contested) modernisation and socio-religious liberalisation and the mainstreaming and corporatisation of the daily life and the market; the monopolisation of the religious sphere; and so forth. In short, one is faced by a typical hegemonic intervention: The monarchy tries to respond to people's needs in a limited manner that does not compromise its own (including its clients') priorities and interests, hoping to 'stabilise' the public. This approach resulted in limited change. The speech differs from the reality. The 2011 constitutional amendment and its implementation demonstrated the paradox between the human rights norms in the Constitution and their implementation in the social, political and cultural contexts (Lachhab 2013). The strategy of securitisation in Morocco was modelled to protect the society as a means of protecting the monarchy. The major goal of the strategy was to create an 'immune system' around the monarchy and to securitise the society.

7 Palestinian example

Since the emergence of the Palestinian Authority (PA) in 1994, a steady growth has been witnessed of variable legal mechanisms designed for the sake of 'internal security and public order'. The role of law is focused on legitimising obedience, monitoring and social control, in order to manage the Palestinian population and ultimately to protect the security of the colonising system, which is a prerequisite for the existence of the PA. Palestinian laws have been facilitating security measures that respond to

the needs of the coloniser, and promote a culture of soft surveillance in the everyday, violating the civil, political and cultural rights of Palestinians.

The construction of securitisation in Palestine after the signing of the Oslo Accords between Israel and the Palestine Liberation Organisation (PLO) in 1993 involved shifts in discourse and changes in the political rhetoric. It played a role in reshaping 'perceptions', shifting the threat from the 'other' to the 'self'. The new constructs were institutionalised (a process that bears the local signature of former Prime Minister Salam Fayyad) through encouraging the emergence of a new economic elite described as the 'new audiences' (McDonald 2008), which played a role in maintaining the rhetoric of fear and threat.

The drafting of security-related legislation promoted a culture of direct and indirect surveillance, in order to alter behaviour and manage the population, securitising and censoring social acts and relations, eventually leading to the violation of cultural, civil and political rights.

The very notion of 'national security' in Palestine was introduced after the signing of the Oslo Accords between Israel and the PLO. In article VIII this interim agreement handed the task of 'internal security' to the newly-established PA, stating that 'to guarantee public order and internal security for the Palestinians of the West Bank and the Gaza Strip, the Council will establish a strong police force, while Israel will continue to carry the responsibility for overall security of Israelis for the purpose of safeguarding their internal security and public order' (Anon 1993). For Palestinians, this task represented a way of initiating a state-building project, while for the Israeli government, it meant the creation of an internal unit that undertakes a co-ordination task to protect Israeli security. Subsequent agreements stipulated the responsibility of the PA to pursue terrorists. The shift from 'armed struggle', 'freedom fighters' and 'revolutionaries' to terms such as 'internal security', 'public order', 'riots' and 'terrorists' constituted a reshaping of Palestinian aspirations through colonial and neo-colonial transplants. What added insult to injury was the vague and shifting meaning of 'terrorism' which started to be used to describe acts of resistance (including armed resistance), historically seen as legitimate and legal from the point of view of international law.⁹ The ultimate project of liberation was replaced by the state-building project. Anything that jeopardised this new project became a 'threat'. The construction of threats can extend, as Sjostedt argues, to 'individual perceptions' (Sjostedt 2008). As a result, one's image and identity are colonially constructed. One of the links between colonialism and surveillance is the Fanon(ian) implication of the colonised adopting the same surveillance and control techniques of the coloniser (Zureik 2011).

An effective and successful securitisation is 'audience-based' (Balzacq 2005). Audiences are defined as the 'addressee of the speech act', differing from the 'referent object [which is] the entity to be protected' (Cote 2016) The audience not only is a recipient, but a security actor, since they play a role in shaping (perceived) threats and security matters.

Today, daily actions that are not shaped by direct confrontations with the officers of the colonial power resemble it, not only through the

9 See para 160 of the UN High-Level Panel on Threats, Challenges and Change, 2004.

implants that the PA adopted, but by the 'new audiences'. For example, on 3 May 2017, a meeting was organised in Ramallah on a public square named after Nelson Mandela. The meeting was in support of the hunger strike declared since 17 April 2017 by more than 1 500 Palestinian political prisoners in Israeli prisons to protest the conditions of their incarceration. Support for the striking prisoners is a common denominator amongst Palestinians and, hence, thousands of supporters gathered peacefully on the square (which is far from any point of potential friction). The protesters were surrounded by the agents of two private security companies who attended voluntarily. The square was also full of the unsolicited 'support' of the major telecom company, which asked its personnel to join the event. When asked about the reason for the presence of the 'security force', answers ranged between logistics, providing drinking water, and helping people around. However, it turned out that one of the two companies provided security for the telecom company. Eventually, any movement in cities might very well be perceived as a threat (Fawaz et al 2012: 186).

The politics of securitisation in Palestine focus on creating a fear of uncertainty. Although it is a difficult task to present fear in a colonised space, the investment in fear, and re-introducing it in the everyday, was shaped in such a way as to transpose fearing 'the other' into fearing oneself, making it possible for fear to penetrate the sphere of social relations and the everyday of Palestinians.

In the Palestinian case, Fayyad's project, which focused on reforming the security sector, building institutions and the free market (Tartir 2015), produced new political and economic elites who, naturally, have a vested interest in the *status quo*. These groups have been co-opted with bank loans and tempted into enjoying a 'secure' lifestyle. As a result, they synchronise their attitudes with the political narrative of the PA on 'internal security and public order'. New audiences are a product of the new policies of securitisation, and any discussion around what constitutes security 'becomes a privilege of selected elites' (Sarikakis 2006). The new audience becomes an active agent in responding to these political narratives as part of the securitisation measures. They subscribe to the PA's rhetoric by advocating public order, increasing investments, and creating NGOs and media platforms that are silent about PA conduct.

While the criminalisation of certain conduct may not prevent actions of terror, the very idea of criminalisation creates a certain threat. As Ramsay argues, penal codes have political significance, in which they emphasise the idea of the sovereign state (Ramsay 2012). In Palestine the legislative process is presented as evidence of the notion of the existence of state structures, and a reminder that there is control. Thus, penal codes are a central part of securitisation measures to the extent that these codes explicitly or implicitly define the concept of security through criminalising acts against 'public order'.¹⁰

In addition to the vagueness of the 'public order' concept, the Palestinian security apparatus in charge of preserving it operates under legislation that does not provide clarity on the distribution of tasks and mandates among security apparatuses. The law suffers from dualism

10 See the Jordanian Penal Code of 1960 Section 13/2 (applicable in the West Bank).

(Dayya et al 2007), which facilitates violations of civil liberties and rights, and a lack of accountability. The possible 'abuse' of the concept of 'public order', together with the lack of clarity on which conduct poses a threat to it, add to the difficulties in regulating the protection of rights in the everyday life of Palestinians. For example, in the only functioning Palestine cinema hall, a warning sign is displayed before a film is shown, indicating that there is camera surveillance in order to detect any conduct that may jeopardise 'public order'. In this context, people understand that socially-unaccepted behaviour is a threat to the 'public order'.

Preserving public order not only has a cultural but also a political incentive. The public sphere in Palestine is a battleground between the complex competing agendas of state building and national liberation. The recent events of March 2017 portray this relationship. On 6 March 2017, the forces of the Israeli Occupation entered Ramallah and executed the Palestinian activist Basel Al-Araj, who had been convicted before the Palestinian courts on a charge of 'acquisition of unlicensed weapons'. The coincidence of his trial session after his death and the alleged co-ordination between Israeli and Palestinian security organs led to public protest. The Palestinian security forces declared this protest illegal, and responded by using force that was incompatible with the peaceful nature of the protest (Dweik et al 2017). The clash between the security forces and the protestors not only resembled a clash between the above-mentioned competing agendas, but also a battle over the public sphere. It highlighted the lack of co-ordination between the two security agencies *Al-Amen Alweqa'i* and *Al-Mukhabarat*, and exposed gaps in regulations (Dayya et al 2007). The immediate and extensive use of force by Palestinian security forces denotes (a) that these actions can jeopardise the 'manufacturing' of the artificial public sphere; and (b) that securitisation is more important than civil liberties. The PA's behaviour towards public protests demonstrates a deliberate restriction of citizens' access to policy making (Sarikakis 2006).

Olesker (2013) argues that 'laws contribute to the formation of the concept of 'national security' in such a way to legitimize illiberal practices'. In general, anti-money-laundering and counter-terrorism laws have been limiting the private sphere. For example, certain rights to privacy and financial information are undermined for the sake of a 'general cause'. The complex tension between anti-money-laundering laws and privacy rights could be considered a battle between individual liberty and social order (Pasley 2002).

The Palestinian anti-money-laundering and financing of terrorism law of 2015 is no different. While article 23 states that the information of individuals should be preserved, the law gives tremendous powers to banks by authorising them to undertake identity checks, follow transactions, and exchange and reveal individual information. This means that the 'individual's lifestyle, personal interests and political beliefs ... to which groups and associations the individual belongs are not protected' (Pasley 2002). Furthermore, the law exempts financial institutions, their directors, administrators and employees who reveal information on the ground of good intentions from any criminal, civil, or administrative procedures against them, in obvious violation of article 32 of the Palestinian Basic Law, which states:

Each aggression committed against any personal freedom, against private life of human being, or against any of rights or freedom, which have been guaranteed by the law or by this basic law, shall be considered as a crime. Criminal and civil case resultant from such infringement shall not be subject to any status of limitation. The National Authority shall guarantee fair indemnity for those who suffered from such damages.

Not only is the state collecting private information but, in essence, it is subcontracting this task to the private sector. Private information is frequently requested for the purchase of vital services, including water, electricity and telecommunication.

Muharemi (2015) defines security vetting as ‘an evaluation method that considers whether a person is an acceptable risk to the state and its public order’. As in other places, the security vetting procedures in Palestine are of political and partisan nature. These have been inherited from previous orders, but were developed under the current President, Mahmoud Abbas, to control the employment in areas such as the educational system, the judiciary and other sectors of the public service, on the basis of ‘security conditions’.

Vetting in Palestine has no clear legal reference but responds, for example, to the political division between *Fateh* and *Hamas*. After the *Hamas* victory in the legislative elections, former Prime Minister Ismail Haniyeh issued Resolution 8/5/10 to cancel the refusal of employment for ‘security’ reasons, based on conditions established by the Civil Service Law No 4 of 1998. The government of Salam Fayyad re-established this refusal policy by a decision (18 of 2007) of the Cabinet. The decision contradicts the Palestinian Civil Service Law which determines the requirements for employment (article 24). Nothing in the law indicates that ‘security clearance’ is a prerequisite for employment. In 2010, more than 1 500 employees were fired for ‘security reasons’ (indicating links to *Hamas*) (Saadeh 2013).

The interference by security apparatuses (*Al-aman el weqai* and *Almukhabarat*) in the civil employment procedure is common knowledge in spite of the fact that laws regulating their work do not allow them to ‘interfere in government appointments’. Such acts not only indicate discrimination on the basis of political affiliation, but also demonstrate the failure to maintain the rule of law.

In 2012, the High Court of Justice responded positively to a petition presented by the Palestinian Ombudsman requiring the cancellation of the security clearance condition, and a re-allocation of teachers who had been fired on security grounds. However, the procedure remains in place, shedding doubt over the ability of judicial institutions to observe and correct the conduct of the executive.

In the case of Palestine, one more aspect of securitisation is discernible, namely, the colonial dimension of the external aspects of ‘internal’ security. The Palestinian political system is conditioned by external factors, in addition to Israeli occupation. The agreements between Israel and the PLO, and those between Israel and the PA, directly and indirectly selectively handed the mission of preserving internal security and public order in certain areas to the Palestinian security apparatus. This mission focuses on preserving Israeli security from Palestinian threats and attacks rather than on the security of Palestinian citizens. The Palestinian public

'feel[s] no tangible effects of the co-operation for its own security' (Lisiecka 2017), and 'whilst in 2011 one-third of the PA's budget was spent on security, the main beneficiary of such large national expenditure is Israel' (Purkiss & Nafi 2015: 5). The security co-ordination between the occupied and the occupying entities is 'a core issue upon which Israeli-Palestinian peace depends', in which Palestinians would preserve it as a way to persuade the international community of their commitment to peace and, thus, of their readiness to build an independent state.

Israeli security and securitisation measures relating to the Palestinian population are hard to differentiate. Israel have grossly violated, and still violates, the human rights of Palestinians. The syndrome is older than the emergence of securitisation reform.¹¹ Israeli security and securitisation practices became part of this discussion on Palestine as these measures constitute a core part of the lives of Palestinians. The extent to which these measures impact Palestinians is vast and comparable to typical colonial conditions prevailing in colonies.

In summary, one may conclude that four layers of securitisation measures exist in Palestine: (a) the measures typical of colonial conditions practised by Israel over Palestinians; (b) a Palestinianised version of the Israeli measures, which serve as a local extension of what Israel perceives as a 'security threat'; (c) measures aimed at social control and framing or altering the behaviour of the ordinary Palestinian citizen to ensure obedience and submission, and to establish a 'control society' (Parons 2011), at the cost of violating rights such as the right of political participation, the right to freedom of expression and the right to protest; and (d) measures focusing on the exclusion of 'ineligible' political parties and factions (such as *Hamas* and other organisations that are listed as terrorist groups outside Palestine).

Securitisation measures in the West Bank are strengthened by legal instruments; ranging from presidential decrees to cabinet decisions, in which not only the drafting of these laws intended to exclude political participation, but were able to promote a culture of surveillance and control where rights and freedoms are being violated.

It is unfortunate that there is no short story in the case of Palestine. The situation in Gaza, which is not controlled by the PA, but by *Hamas*, also has a complex security/securitisation architecture which differs from the one in the West Bank. This requires a separate discussion.

8 The everyday

One major difference between the security and securitisation doctrines lies in their association with the everyday and how and to what extent they impact on it. The everyday, understood as the unmediated (un-brokered) life where people live their lives regardless of their education, profession and status (a good example is the way people drive), is the final direct and indirect target (landing spot) of all disciplines, events and practices.

11 That seems to be a reason behind the fact that Israeli companies play a leading role in securitisation technology. See for example (Palmer, 2011).

Hence, the everyday is the crucial scene to evaluate the eventual overall impact of securitisation.

Security, as a sector oriented towards maintaining the sovereignty of the state, is a professional subdivision of society and the state, with its own structures, rules and regulations, work ethos, clothing, manners and traditions. These apply to it exclusively, and the rest of society is expected to appreciate, respect and facilitate its functions while realising and recognising the military/civil dichotomy as part of respecting the professionalism of those who are in charge of security. The impact of the operations and functions of this societal subdivision on the everyday is brokered by the state, and is seen as a product that comes from outside civil society, and from outside the private spheres. Only in the exceptional times of war would it become possible to flout the delineations of private/public duties and functions.

On the contrary, as demonstrated above, securitisation, while being the responsibility of more sophisticated, larger, separate and professional subdivisions of society, functions in a manner that is embedded in the everyday, and requires the involvement of all citizens (and non-citizens) in the realisation of its goals. Individuals, families, groups, institutions and businesses have security duties that are supervised by security organs either directly, or by delegation, through the private sector, or through adding security tasks to almost all other sectors of the public service including, but not limited to, education through the securitisation of school curricula, health, transportation, through introducing biometrics or DNA tests, and security-related measures to car rentals or flights, and the financial sector with security measures related to bank operations involving bank account eligibility and fiscal transactions.

The dismissal of the broker function of the state in the relationship between security and the everyday, ideally, is good news if it is related to overcoming hierarchies and power relations. Unfortunately, the discussion above suggests that this is not the case. On the contrary, the securitisation-driven conditions resemble a combination of an everlasting situation of urgency akin to war, and a super-porous shield protecting the private sphere, which is penetrated by a powerful security apparatus that shields itself from accountability. Not only does this immanent overarching securitisation penetrate the private sphere, but it also hijacks the public sphere since this becomes the melting pot of the public and the private that can no longer be delineated.

A stark example of the overarching securitisation considerations on the everyday is an order (No 1169-b) by the governor of Beirut, Justice Ziad Chbib, issued on 26 April 2017, prohibiting the practice of street vendors and cancelling their work licences. The order was issued upon the recommendation of the Lebanese minister of interior. In essence, this order changes the image, tradition and daily habits of Beirut inhabitants and visitors. When in a televised interview the governor was asked about the reasons for this order, he stated that they are multiple, the most important of which are security considerations (since this group is at risk of being used [lured or fooled] for terrorist acts) (Chbib 2017). One street vendor indicated that the order was the result of a dispute between the governor and the police chief (Anon 2017). The perception of this vendor is supported by a study of Beirut's security, which states that Beirut is subjected to overlapping, sometimes conflicting security systems that

neither report to the same authorities nor concur on their identification of what constitutes a threat' (Fawaz et al 2012: 188).

The impact of the transformation of security into securitisation on the everyday is the ultimate impact of the process. The everyday is where people negotiate securitisation, accept or reject it, and assume or are assigned various roles. Ultimately, it involves the process of transposing the free civil beneficiaries of security into slave agents of securitisation. This process uses the people who should benefit from the security measures and their resources in order to motivate their support for those who create the security threats after they have amalgamated them with those who are responsible to provide the protection. Instead, the protection is provided to neoliberal investments (Fawaz et al 2012: 177).

Various transformations (mutations) accompany securitisation, including globalisation, dichotomisation and polarisation. These transformations relate to the state, to the nation, to security, to the community, and they all lead to transformations and deformations in the everyday. The techniques used to facilitate this transposition vary, and require a separate discussion, but they include such pseudo presentations as the promotion of ignorance through replacing knowledge production with knowledge consumption, mainstreaming, extreme legalisation through the 'proceduralisation' of all aspects of life,¹² reducing the question of legitimacy to the question of legality, replacing the law with the procedure, and reducing the popular will into the will of its protectors/representatives, thereby reincarnating feudal dependency relations in the form of fabricated identities and tribes where the like should stick with the like. Security is

a catalyst of social and political divisions ... like capital, security has become one more form in which existing social hierarchies are consolidated and/or challenged and new ones imposed. An individual's political position and/or sympathy for a particular political group, her gender, age, class, religion or nationality converge to construct the same security deployment in unequal frames, with one being threatening and the other protective (Fawaz et al 2012: 191).

These techniques are capable of cultivating popular acceptance of anti-popular measures (to the degree that fascist trends are redefined as populist), and reframing reality where friends and enemies are mixed up. It becomes 'legitimate' to curtail rights in the face of a perceived threat of an enemy, in order to guarantee the *status quo* perceived as preferable survival. This is how one accepts the hijacking of public space by security personnel together with corporate advertisement that amounts to shaping public taste through imposing corporate identity on public space (frequently presented as a donation or a gesture of social responsibility).

While coming forth in response to emerging security needs, the securitisation framework is not shaped to fulfil these needs, but rather to protect a main instigator of the threats that emerged. Whether terrorism or other types of violence affecting public safety and security are a direct

12 This can involve tagging, the obligatory ownership of cellular phones and bank accounts as a precondition to acquiring vital services or being employed. It can also involve limitations on participation or even its denial due to certain digital limitations in certain procedures.

result of poverty, alienation, despair, or are instigated by dichotomies of the good and evil, or the radicalisation of ideological differences, or the expression of identity crises, or a reaction to the globalised polarisation of wealth, or the globalised dominance of ‘westernisation’, or the re-emergence of national aspirations, or tribal belonging, the techniques utilised in securitisation and the components of the neoliberal securitisation package do not attend in any significant manner to the resolution of any of these possible causes or similar ones. On the contrary, securitisation techniques create the conditions for the penetration of these phenomena into the everyday in a manner in which social symptoms become psychological syndromes. Such negative aspects of current globalisation as the radicalisation of wealth polarisation are protected and promoted by the securitisation techniques, and the marginalisation of non-mainstream cultures and views is fostered by these techniques, to the extent that the everyday is invaded by the coalition of the preeminent state control and the corporate world rendering the everyday a utensil of the governance system rather than its ultimate goal.

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Securitisation and its impact on human rights in Latin America

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Abstract: *In Latin America, securitisation policies and their rhetoric have been part of historic challenges to the rule of law and are very much a part of current challenges in a new security agenda designed to combat complex crimes, such as terrorism, money laundering, drug trafficking, human trafficking, and common crimes affecting citizen security. These policies are also manipulated in order to disable dissent and weaken the right to accountability. Securitisation is at the heart of the current interventionist tactics, and their impact on the respect for human rights. Securitisation links public security to a discourse of war, and builds on a friend/enemy dichotomy. In the collective imagination, the perception of fear connects with and feeds back into the discursive and practical instrumentation of securitisation and the threats to (physical or moral) integrity that it seeks to confront. These issues are explored mainly by reference to the invocation of the National Security Doctrine during the dictatorships of the 1970s and 1980s in Latin America, and through the criminalisation of human rights defenders in the more recent democratic era. Initiatives based on the human security paradigm are also considered, in light of their desired contribution to a possible desecuritisation strategy.*

Key words: *securitisation; Latin America; National Security Doctrine; criminalisation of human rights defenders*

1 A violent region

In Latin America there is great concern over the incidence of crime and violence. One in four citizens in the region state that insecurity is the main problem in their lives, even worse than unemployment or the state of the economy (IACHR 2009). Latin America accounts for just over 8 per cent of the world's population, but more than a third (35 per cent) of homicides worldwide. According to recent studies by the Inter-American Development Bank (IDB), 400 homicides are committed in Latin America every day, that is, four every 15 minutes. The region's annual homicide rate in 2016 is over 20 per 100 000, more than three times the world average, six times that of the United States and 20 times that of the United Kingdom (IDB 2016).

Globally, the homicide rate of males (9,9 per 100 000) is almost four times higher than that of females (2,27 per 100 000). Latin America

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matches this trend, but its indicators are four times higher (30 per 100 000). When adding the age dimension, a specific victim profile becomes visible: The number of male victims aged 15 to 29 exceed more than four times the world average for this group. Also, two-thirds of homicides (66 per cent) are committed using firearms.

The latest UN global survey of homicides distinguishes three types of killings: delinquency related; interpersonal; and socio-political. Latin America ranks first in all three types (UNODC 2013). Young male victims of homicide are particularly affected by organised crime and gang violence. Interpersonal homicide – committed by a close family member or partner – disproportionately affects women, and makes up two-thirds of the total. According to the United Nations (UN) Observatory for Gender Equality in Latin America and the Caribbean (UNO), in absolute terms, with 466 femicides in 2016, Honduras is the country with the highest total number; El Salvador, Argentina and Guatemala rank second, third and fourth, with more than 200 femicides each in the same year (data available at <https://oig.cepal.org/en>). These figures correspond to the annual quantification of homicides of women 15 years of age and older, murdered on the basis of gender. According to these figures, while men primarily die in public spaces, female victims mostly are murdered inside the home.

Some countries in the region have common problems involving the proliferation of highly-complex crimes, such as drug trafficking; money laundering; trafficking in persons; irregular migration flows; and, above all, criminal networks with the capacity to corrupt public officials and penetrate the structures of states.

In 2016, the war on drugs in Mexico became the second most lethal conflict in the world (only surpassed by Syria). As a business where murder is commonplace, drug trafficking is an enabler of insecurity. Nevertheless, countries such as Nicaragua, Costa Rica and Panama, which are also part of the drug route to the United States, have the lowest homicide rates in Central America, as opposed to their neighbours in the Northern Triangle (Guatemala, Honduras and El Salvador). In the latter, gang violence has placed them as the world's highest homicide sub-region. Colombia, despite achieving a one-third decrease in deaths associated with the internal armed conflict, remains one of the 20 most violent countries in the world. On average, 33,5 people were killed daily during 2016; more than 12 000 Colombians, in one year. In Brazil, the police force is one of the deadliest in the world and, according to official sources, there are 161 daily homicides resulting from confrontations between gangs and the security forces (IDB 2016).

These figures present the region as one of the most dangerous places on earth. The region has since the mid-1950s had homicide rates five to eight times higher than those in Europe and Asia (UNODC 2013). What is more, Latin America remains the only region on the planet where, on average, the levels of violence have invariably intensified since 2005.

Behind these figures are drug dealers or police officers; a paramilitary group; large or small criminal networks; a landowner; or simply a child that took a gun in exchange for an otherwise legally unobtainable sum of money. Behind these indicators is also the failure of a model of political intervention that has been in place for at least half a century. Two key

elements converge to explain the persistence and seriousness of violence: social inequality and the lack of an effective state response.

Social inequalities are connected to the systemic failures in the distribution of wealth, means and opportunities that constitute or generate welfare among different social groups. In this respect, the analysis by the Economic Commission for Latin America and the Caribbean (ECLAC) of economic and social development illustrates that Latin American economies have historically been characterised by a marked structural heterogeneity based on high levels of social inequality due to factors such as low diversification of production; the regressive distribution of income; a highly-stratified labour market; and stagnant social mobility mechanisms (ECLAC 2010, 2012 & 2016).

In terms of state responses, risk mitigation strategies are particularly costly. On average, the investigation of homicides takes up at least 3 per cent of the gross Latin American gross domestic product (GDP), a figure comparable to the annual amount invested in infrastructure (Jaitman 2015). The judicial branch, the public prosecutor's office, the security forces and the penitentiary system have failed to develop the capacities required to ensure crime prevention and legitimate action to repress crime and violence (IACHR 2009). Institutional fragility is accompanied by a sterile and polarised debate on strategies for intervention measures, either focused on re-engineering the punitive power of the state or on a generic improvement of social conditions.

Thus, a matrix of historically-ingrained social inequality, institutional fragility and an oblique debate between polarised positions aggravates the difficulties in implementing effective intervention measures in the area of security. This contributes to a profound crisis of credibility in political actors and politics in general. According to recent studies sponsored by the Inter-American Development Bank (IDB) and the *Comision Andina de Fomento* (CAF), there is a high level of mistrust in government, parliament, the judiciary, political parties and the police in Latin America, with approval ratings no higher than 35 per cent (Barometer-BID-CAF 2016).

Securitisation brings the perception that insecurity constitutes a force to which a greater force must be applied through the repressive state apparatus. Paradoxically, while securitisation rhetoric feeds into the perception of a lack of governability and fear, it impedes the design and implementation of medium and long-term responsive measures.

2 Securitisation

Securitisation empowers the state to legitimately resort to extraordinary means to guarantee the security of its citizens, and strengthen political, economic, social, cultural institutions, in order to avoid a conflict or the unfavourable impact of the threat. In the mid-1960s, with the implementation of the so-called low-intensity warfare strategy, 'securitisation' meant curtailing preventive/repressive tasks of police organs and bodies by decrees or states of exception, and placing these tasks under the supervision and control of the armed forces. In this complex process, public security was incorporated into military rule. As a result, various insurgent movements in the region were lumped together as

‘subversive threats’, and the intervention strategy used was the result of a combination of excessive use of the repressive apparatus of the state in conjunction with political propaganda.

The so-called Copenhagen School – influenced by constructivist sociology and the rise of language theories – has developed a theoretical framework on security as a social and intersubjective construction. The fundamental elements of the so-called ‘theory of securitisation’ consist of its nature as act speech and its intersubjective character. The consideration of security as a discursive act is based on the premise that the mere fact of pointing out a certain issue and describing it as a threat is associated with a specific rationality charged with symbolic power that forms a positioning based on the friend/enemy dichotomy, in which the use of the necessary means is legitimised to end this threat urgently (Williams 2003). The intersubjective nature is understood as the need for the threat to an object of reference to be so identified by the ‘securitising actor’, as recognised and approved by the ‘audience’ to which the message is directed.

Securitisation transforms ordinary political problems into perceived threats to security in a process of identification of existential threats, emergency action, and effects on inter-unit relations by breaking free from rules (Buzan et al 1998: 6). The concept of security is based on the idea of getting rid of threats and being able – whether as individual states or collectively – to maintain their independence in terms of their identity and functional integration against forces of change that are considered hostile (Buzan 1991: 432). Whenever there is a threatened object, a securitising actor will claim a right to extraordinary measures to ensure its survival (Wæver 2004: 13). The denomination removes the issue from the realm of ordinary politics into the realm of emergency politics, where it can be dealt with outside the sphere of the rule of law, giving the power to the securitising actor to redefine its meaning and erase any pre-existing meaning.

From this perspective, securitisation is presented as a phenomenon of indeterminate content but with a specific form: the creation and discursive representation of one or more existential threats requiring immediate and exceptional actions in time to establish a particular relationship between the parties involved. This school proposes to move to scenarios in which ‘securitised’ issues become part of ‘politicised’ issues and tend to be subject to the normal mechanisms of accountability and public policy decisions, thus moving to a so-called ‘de-securitisation’.

2.1 Political use of securitisation: Need and fear

Fear is often the first and foremost tool of governmental discipline and social control. It is an effective way of intimidating collective wills predisposed to protest; of neutralising political adversaries; as well as confining the inhabitants of a territory to the realm of private life, dislodging the public forums of opposition voices that claim for themselves a share of power or that question privileges. The nomenclature of an enemy opens the door to demonisation and political insecurity. The feeling of insecurity promoted by ‘totalitarian movements’ involved not only the commodification of its adherents but also the sub-humanisation of scapegoats. Authors such as Arendt have over the years identified how political fear operates as an instrument of the ‘elite’ to govern social resistance. The demonisation of ‘the other’ has the immediate effect of

expanding government capacities. The ultimate aim is to generate indoctrination within the same group on the pretext of keeping the community united in the face of an 'evil' or 'danger' presented as 'on the outside'.

The second factor used as a source of securitisation policies is the invocation and construction of a state of necessity of such gravity as to (lawfully) compel the adoption of extraordinary measures. One of the problems posed by this complex relationship is the impasse in every justification of the exception, in order to ensure the vicious circle by which the exceptional measures attempting to justify the protection of democratic are the same that led to its ruin (Agamben 2003).

2.2 Securitisation and democratic governance: Threat of ungovernability

With its pessimistic and often conservative implications, the concept of governability entered the agenda of researchers and politicians in the 1970s. Ungovernability involves the joint product of a crisis of administrative management of the system of government and political support of citizens for their authorities.¹ The central dilemma of democratic governance, though, is that demands on democratic governance grow, while the capacity of democratic governance stagnates (Crozier, Huntington & Watanuki 1975: 9). This paradox arises from the combination of three types of challenges to democratic governance: contextual challenges;² internal challenges;³ and intrinsic challenges.⁴ In other words, it is the same successful operation of democratic government that gives rise to tendencies that impede its functioning, hindering its own governance. The 'overload' thesis is based on elements such as the involvement in the political activity of a growing proportion of the population; the development of new political groups, including ethnic minorities, regional and youth groups; the diversification of tactics and political means by which groups secure their ends; a growing conviction on the part of these groups that the government has a responsibility to satisfy needs; and an elevation in their conceived needs (Crozier, Huntington & Watanuki 1975: 163-164).

In Latin America, the concept of 'governability' acquired its own nuances during the 1970s and 1980s as it was framed within a process of debt crisis, adjustment and economic restructuring. This resulted in the political exhaustion of the conditions that shaped the post-war interventionist state and its subsequent redefinition in terms of reform of the state. In this sense, the appropriation of ideas such as 'delegitimation of

- 1 The text that laid the groundwork for the discussion and introduced the term in contemporary political language was *The crisis of democracy. Report on the governance of democracies to the trilateral commission*, published in 1975 by Michel Crozier, Samuel Huntington & Joji Watanuki.
- 2 Modifications in the 'external environment in which democracies operate and which are not products of the functioning of democratic government', for example, changes in the international distribution of military power.
- 3 Difficulties originated in the social and political dynamics of the societies themselves, for example, the emergence of new values that imply disenchantment of politics in the younger generations or that by different circumstances affect the basic cultural supports of (liberal) democratic legitimacy.
- 4 These arise from the very functioning of democracy, for example, the extension of rights and their mechanisms of enforceability.

authority', 'overloading the State' and 'fragmentation of interests' as threats to the management of politics and a threat to political security, operated against the background of the changing regional itinerary of breakdowns, transitions and democratic consolidations.

In Latin America, considering the impact of securitisation on human rights and democracy implies reflecting on the way in which social demands linked to fear and the need for possible threats (be they cultural, economic or ideological) are articulated and the nature of state responses, to show government capacity or governance. This involves questioning the limits of the state's police function and the costs that these societies are willing to pay in terms of freedom and democracy. As a consequence, when considering the present and the immediate past of the region, in connection with the impact of securitisation, the National Security Doctrine and the criminalisation of social protest come into focus.

3 Securitisation in Latin America

The consideration of security with biases of securitisation incorporates discursive and practical elements characteristic of a war-footing conflict situation. In this sense, the most conspicuous feature is militarisation as an intervention strategy on internal security issues. The incorporation of military forces and other military bodies in the fight against public insecurity while denaturalising their original functions contributes to building and reinforcing in the collective imagination the feeling of being in a state of war. Historically, securitisation had its more iconic representation during the application of the so-called National Security Doctrine.

3.1 Securitisation outside the rule of law: National Security Doctrine

Between the 1960s and 1980s, the National Security Doctrine was the most complete expression of the militarisation of the concept of security. The Doctrine placed the military component at the centre of society, transcending typical military functions and becoming the contemporary military ideology of the greatest political impact in the region. Its historical roots originated in the militaristic tradition resulting from the wars of independence of the region. In the middle of the last century, the military forces again acted as an integrating agency of the state and not as an institution that should be integrated into it.

After World War II, with the continued influence of the United States, the advent of communism was identified as a threat to regional and internal security. Far from being considered an isolated episode or transitory conflict, the war against subversion was the main priority on the basis of which all the symbolic and material resources of the state were directed. The Doctrine placed the military as agents for defending the values and traditions of 'Western civilisation'. All those groups or individuals who did not accept this interpretation of international tensions were grouped together as enemies of or threats to the nation.

Militarisation was justified on the basis of the alleged weakness and disintegration of political institutions. When the perception of ungovernability and fear built a context of political threat and power vacuum, the military forces could claim popular representation through

moralising slogans, extreme simplicity in their assessments, a denial of political dialogue, a catastrophic vision of social change and the exaggerated reevaluation of the past. In this way, with the perceived ineffectiveness of political parties and civil actors and the absence of authority and leadership, the armed forces directly intervened to ensure stability (Costa Pinto 1969).

As an early form of securitisation in the region, the most striking effect of this doctrine was the intervention of the military – like a corporation – in areas of politics unrelated to their professional activity. There was a process of occupation of civil institutions in many countries of the region through different variants of *coups d'état*. Latin America continues to hold the unenviable record of being the region with the largest number of *coups d'état*, namely, 36.

In Brazil, the Doctrine was instrumental in preparing and justifying the military *coup* of 1964 against the government of Joao Goulart. In Argentina,⁵ something similar happened in the overthrow of two administrations of different persuasions: one led by the Radical Party in 1966 and another by the Peronist Party in 1976. In Chile, the Doctrine helped to legitimise the democratic hiatus of 1973-1990; according to its perpetrators, a necessary action to prevent the 'communist revolution' of Salvador Allende's government. The 1973 *coup d'état* in Uruguay had its rationale in preventing the threat posed by the 'Tupamaro' national liberation movement. In Peru and Ecuador, the national security doctrine was implemented by democratically-elected civilian regimes. In the case of Paraguay, between 1954 and 1989, the dictator Alfredo Stroessner constructed a model of intervention more akin to old-fashioned militarism, but based on the same doctrinal principles as the National Security Doctrine. In Central America, the influence of the Doctrine was felt indirectly through the American conception of security in the context of the political and even military domination of the United States.

A secondary impact of the National Security Doctrine in Latin America was regional co-operation between dictatorships, such as that of Augusto Pinochet in Chile (1973-1990); Alfredo Stroessner in Paraguay (1954-1989); the National Reorganisation Process in Argentina (1976-1983); Juan Maria Bordaberry in Uruguay (1973-1985); General Hugo Banzer in Bolivia (1971-1978); the Somoza dynasty in Nicaragua; the governments of El Salvador during their bloodiest years of civil war; and the Colombian government of Julio César Turbay Ayala with his well-known 'Statute of Security' (1978-1982). The repressive action of all these governments was unified through the so-called Plan Condor in South America (Dinges 2003), and Operation Charlie in Central America.

The third fundamental feature is that military interventionism did not obscure the abstract ideological attachment to the institutions and values of Western democracy. In this sense, many interventions were justified in the name of democracy and the defence of institutions, and even of the

5 In Argentina, one of the precursors of the Doctrine of National Security was the CONINTES plan, sanctioned and put into practice during the government of Arturo Frondizi in 1958. The acronym meant 'Internal Commotion of the State', and consisted in placing the armed forces and security at the disposal of internal repression, allowing the militarisation of large urban centres and permitting the search and arrest of opposition leaders.

Constitution. Latin American armed forces formulated the Doctrine within an ideological frame of reference that implied the application, as a necessity, of an exceptional regime to safeguard security and democracy.

In order to fully comply with the priority function of security, the government had to consolidate all existing resources: political, economic, military, social and cultural, among others: ‘The need for an enemy to give meaning to military action and to reinforce corporate identity was replete with the discovery that other types of wars could be carried out’ (Rial 1990). The rigid military logic of the friend-enemy opposition then was used to create the concept of an ‘internal enemy’, transforming the circumstantial political adversary into an existential threat. Again, ‘the most important contemporary military change at the professional level was the replacement of the old professionalism of “external defence” by the new professionalism of internal security and national development’ (Stepan 1973). In this way, the military *coup* and ‘state terrorism’ were justified as a system of political action. This type of ‘terrorism’ is not only intended to identify and destroy current enemies and dissuade potential enemies, but also to convince ordinary citizens that their personal security is inevitably and obligatorily under the control of the regime. In this way, politics are conceived as a strategy and as a form of internal war with a high expectation of violence. Thus, the National Security Doctrine was converted from a macro-military theory of conflict into a hermeneutic tool to interpret social functioning in a key period of Latin American history.

Once the era of military dictatorships, characterised by serious human rights violations against the civilian population, was over in the mid-1980s, the countries of the region returned to civilian, democratically-elected governments. After the traumatic experience of decades of military rule, and a strong transitional process seeking truth, justice and reparations – under the slogan ‘Never Again’ – securitisation was confronted with conceptual and social boundaries based on the legitimacy of the rule of law, the international protection of human rights and the idea that there could be no legitimate political discourse outside the democratic system.⁶

There was considerable optimism about the benefits of political freedom and the possibility of achieving sustainable regional development from new institutional forms. The strong feeling of a ‘re-foundational’ process led to the opening of discussions and the implementation of new institutional arrangements, which sought to consolidate the minimum prerequisites of the rule of law and give greater effectiveness from democracy to governmental action. As a strategy, many democratic governments in the region sought to consolidate republican institutions by strengthening national constitutions, ratifying international human rights treaties and recognising their constitutional status, and seeking regional integration. However, this recovery of democratic institutions took place in a context of poverty and social marginality, high rates of infant

6 In 2001 the member states of the OAS adopted the Democratic Charter wherein they acknowledged democracy as a right of individuals, that governments have the obligation to promote and defend, and establish international collective mechanisms to protect it. Inter-American Democratic Charter, adopted by the OAS General Assembly at its special session held in Lima, Peru, on 11 September 2001.

mortality, low levels of education, predominantly agrarian economies and alarming levels of external indebtedness.

3.2 Securitisation and the rule of law: Criminalisation of human rights defenders

After navigating the perilous waters of the 1980s debt crisis, and the consequences of the neo-liberal 1990s (Foxley 1988), the new millennium re-edited securitisation through the criminalisation of social protest, but this time within the framework of the rule of law, with a regressive impact on human rights and democracy.

In this context, the threat of ungovernability was linked to three key areas. First, in economic terms, the threat to the maximisation of profits obtained from mega projects on the exploitation of natural resources where any opposition, such as the demand for territorial rights by the indigenous peoples of the Americas, is seen as a potential threat to national economic development. Second, the demands on the recognition of workers' rights are seen as a threat to competitiveness in a world market that seeks flexibility in labour regulatory frameworks. Third, in social terms, the recognition of the rights of women and lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in some countries of the region, which have promoted debates on the rights to abortion, same-sex marriage and the recognition of same-sex parental families, often triggers perceptions of threat to entrenched national and cultural identities. Added to this, more sophisticated social organisations and the human rights movement have given their advocates significant public exposure at a time of political conflict. These three scenarios – opposition to extractive industries, regressive labour policies and public policies and legislation restricting freedom of choice in reproductive health or sexual diversity – have provided a context for new forms of securitisation in the region. The preferred tools for these new forms of securitisation include the use of the criminal law system against social activists and human rights defenders.

In this sense, the Inter-American Commission on Human Rights (IACHR) has observed that 'criminalisation' through the legal and judicial system is employed as a tool through the filing of unfounded or criminal complaints that do not conform to the principle of legality or are incompatible with international human rights standards (IACHR 2015: 13). Accusations of the commission of criminal offences, such as 'incitement to rebellion', 'terrorism', 'sabotage', 'apology of crime' and 'attack or resistance to authority', are often preceded by stigmatisation by public officials or other influential actors whose interests are threatened by social demonstrations and human rights activism.

In the case of those who actively participate in social protest, the use of criminal law is aimed at restricting the rights to freedom of expression and peaceful assembly, through the invocation and enforcement of criminal offences in tension with the principle of legality, with justifications in line with public order and national security. The criminal offences often invoked range from 'attacks', 'rebellion', 'obstruction of public highways' to 'terrorism' (IACHR 2015: 13).

As indicated by the UN Special Rapporteur on Indigenous Peoples, 'one of the most serious shortcomings in the protection of human rights in recent years is the tendency to use laws and the administration of justice to

punish and criminalise social protest activities' (UN Human Rights Commission 2004). This action is implemented through the application of emergency laws, such as anti-terrorism laws and the by prosecuting demonstrators for common crimes.

Paradoxically, democratic regimes currently limit the actions of democratising agents, through domestic criminal law. Within the framework of the rule of law and with a strict practical and discursive attachment to democratic validity as a limit to any state response, there is a scenario of restrictions to the work of human rights defenders. Legal proceedings initiated against human rights defenders produce a chilling effect in the grassroots movements that intimidate them and hamper their work.

State officials seek to delegitimise or stigmatise human rights defenders in the eyes of society in order to use social pressure on judicial officials and thus prosecute criminal action against them. These actions involve smear campaigns accusing human rights defenders of the crimes of sedition, conspiracy or a threat to national security and the state.

During the course of social protests, human rights defenders are detained without an official warrant in order to deactivate demonstrations. In some cases, they are deprived of their liberty for unreasonable periods. The use of preventive detention, temporary prohibitions on demonstrations and meetings, and bail bonds are forms of criminalisation when in tension with the principle of the presumption of innocence, and these can become a *de facto* sanction, imposed even before there is a final sentence. The IACHR has indicated that preventive detention and the imposition of bail bonds in criminal proceedings has been used as a means of repression against certain groups of defenders who are not in a position to satisfy their financial requirements, such as indigenous and peasant leaders. In practice, keeping this alternative to preventive detention out of reach of members of disadvantaged communities reinforces vulnerability, discrimination and criminalisation (IACHR 2015). For instance, in Ecuador, the UN Committee on Economic, Social and Cultural Rights expressed concern over criminal investigations and convictions of social and indigenous leaders involved in public demonstrations against legislation on water management and development projects in Lake Kimsakocha. The Committee recommended that the state safeguard the right to freedom of assembly; regulate the use of force by law enforcement officers in connection with public demonstrations; and that the scope for the applicability of the criminal offences of sabotage and terrorism be clarified and restricted (UN Committee on Economic, Social and Cultural Rights 2012).

Human rights defenders are criminalised under the guise of protecting the honour of public officials. Freedom of thought and expression and appeal through domestic criminal law is seen as constituting a threat to public order. In a number of countries in the region, human rights defenders have faced prosecution by publicly criticising or participating in protest rallies against state authorities (IACHR 2015).

As part of the effects of securitisation, the financing of organisations dedicated to the defence and promotion of human rights through international co-operation has been limited on the assumption that organisations that receive funds from abroad encourage forms of

intervention by other nations on domestic politics, act as conspirators to destabilise the state, or support combined causes such as terrorism or similar crimes.

The extensive use of criminal offences, such as sedition or terrorism and other laws relating to state security against human rights defenders, involves equating social protest movements with subversive groups, a practice extended in the region during the 1970s and 1980s. Because of the vagueness of criminal offences punishing terrorism-related conduct, there is a wide discretion for the justice system in a context of securitisation.

4 A new agenda for securitisation: Multidimensional security

The rapid development of globalisation has made it clear that states no longer are the only main international actors. New risks and threats with cross-border dimensions have emerged, requiring international and inter-sectoral co-operation and solutions. This view was first reflected at the level of the Inter-American system in the discussions of the 2002 OAS General Assembly held in Barbados. This discussion was expanded in the 2003 Declaration on Security in the Americas, and was institutionalised in 2005 with the creation of the Secretariat for Multidimensional Security. In this process, a definition of multidimensional security was established, focusing on human rights and democracy through the promotion of economic and social development, and expanding the definition of security to cover new and non-traditional threats that include political, economic, social, health and environmental aspects (OAS 2003). This approach includes terrorism; transnational organised crime; drug trafficking; corruption; money laundering; arms trafficking; security challenges to and social exclusion of citizens; extreme poverty; natural disasters; pandemics; deterioration of the environment; attacks on cyber security; and access to weapons of mass destruction.

This perspective has encouraged a number of isolated civil society initiatives. In Honduras, the Partnership for a Fairer Society developed a project aimed at improving criminal investigations through institutional strengthening. In Venezuela, the Alcatraz Project offers work, sports and training to young people involved in criminal gangs. Brazil has experimented with community police officers in places of risk, in programmes such as *Fica Vivo* and *Pacto Pela Vida*. In Guatemala, '24-0' gives visibility to a campaign against lethal violence by promoting 24 hours without murders. The restriction on the carrying of firearms in Colombian cities has resulted in a decrease, albeit moderate, in murder rates. The implementation of harm reduction programmes on drug use produces interesting results in terms of the moderation of conflicts between young people in urban contexts, such as the cases of alcohol consumption regulation strategies in Bogotá (Colombia) and Diadema (Brazil). An interesting international co-operation effort, the *Instinto de Vida* campaign, which involves 30 civil organisations from the seven most violent countries of the region (Brazil, Colombia, El Salvador, Guatemala, Honduras, Mexico and Venezuela), was initiated in April 2017. The goal is to reduce homicides by 50 per cent over the next ten years through conflict mediation; firearm regulation; alcohol and drugs; the prevention of recidivism; guaranteeing access to justice and due process; and

strengthening the relationship between the police and the community (Igarrapé 2017).

For its part, the UN Human Security Trust Fund has sponsored initiatives based on the idea of human security as an ideal and a principle for management. This approach seeks to

protect the vital essence of all human lives in a way that enhances human freedoms and the full realisation of the human being. Human security means protecting fundamental freedoms: freedoms that constitute the essence of life. It means protecting the human being against critical situations and threats (serious) and omnipresent (generalised). It means to use processes that are based on the strength and aspirations of the human being. It means the creation of political, social, environmental, economic, military and cultural systems that, as a whole, give human beings the cornerstones of survival, livelihood and dignity (Commission on Human Security 2003).

Dogmatically, human security is an approach arising from freedom and not from restriction. It articulates the ideals of peace, development and human rights. As a form of management, it seeks to ensure security in different dimensions (economic, food, health, environmental, personal, community and political) and conceives intervention in security from multiple angles and not simply as 'law and order'. In both senses, it involves an interesting contribution for the creation of de-securitized scenarios.

As a result, initiatives such as the 'Plan for fostering coexistence' in Sonsonate (El Salvador), 'Actions on public schools and health services' in São Paulo (Brazil) and support for the development of 'Participatory social protection solutions' in Soacha (Colombia) have articulated efforts of international organisations, states and civil society organisations with strategies for alternative interventions to securitisation. These interventions include the formation of municipal committees of citizen security and coexistence; the elaboration of diagnoses and strategies of intervention in areas with higher rates of delinquency; conducting awareness campaigns; the training of community agents to care for victims; the training of public officials; the training of community leaders in co-ordination with agencies dedicated to human rights; vocational training for young people from high-risk areas; the training of community leaders in sports, and art workshops; the creation of municipal offices for women and gender; psycho-social care for the prevention of risk behaviour; the creation of toxicology units; and the installation of municipal observatories on violence and delinquency.

All these measures share a multidimensional approach: They reject *mano dura* policies, and focus on communities specially affected by violence as a complex phenomenon. They also make it possible to deploy general (population-based) and targeted (at-risk population) prevention strategies, while intervening in both victims and those responsible for violence and crime. At the same time, they enable interagency work between state agencies at the sub-national, national and regional levels, incorporating the contributions of civil society organisations.

However, despite the innovative – and even humanistic – nature of a concept of security closer to individual and collective rights and not as dependent on the *raison d'être* of the state, there is no lack of critical approaches to human security. For example, it is argued that the

overarching concept of human security is difficult to put into practice with a view to achieving concrete results (Rivera 2008: 14). Its dimensions, in terms of its lack of completeness and the difficulties they present in terms of atomised management, are also questioned by its critics. In this regard, it should be noted that for the purposes of truly effective inter-agency co-operation, it is necessary for the participants to enter into complex construction agenda agreements. It is obvious that all the agents involved should perceive the threat with an equal level of importance. Similarly, accountability and the evaluation of indicators require a complex harmonisation of interests between the parties involved and symmetrical shares of power.

Taking responsibility for greater safety means granting it its true scale, providing solutions in a context of respect for rights, and not limiting it to a reduction of risk to certain crimes through a discourse of threat and fear.

At present, security does not refer either directly or indirectly to the state, but involves a complex network of relations and links with other non-governmental spheres, such as citizenship, the business sector, economics and co-operation between nations. Similarly, the multifaceted nature of the problem requires interventions diagnoses of violence and crime as social, educational, economic and cultural phenomena, and not merely factual problems.

5 Final remarks

The theory of securitisation unveils the political nature of the discursive construction of threats and the manner in which they are invoked to build consensus and legitimise strategies to expand state police power. In the Latin American region, this dynamic operated in the imposition of the National Security Doctrine as from the 1960s, and currently operates by criminalising human rights defenders as a measure to counter them as perceived threats to economic development, order or state governability. The impact of securitisation in terms of the enjoyment of rights and democracy is evident. In the region's immediate past, it involved the breakdown of democratic institutions, the suppression of all political dissent through the death and torture of thousands of Latin Americans, and even the appropriation of identity. Currently, the criminalisation of human rights defenders limits the actions of the main agents of democratisation in the region. Intimidation, imprisonment and defamation alter the basic rules for the progressiveness and enforceability of human rights.

Its less obvious impact is the extent to which its simplified rhetoric makes it difficult to think about models of intervention for the new challenges that violence and crime present in the region. The classic concept of security was intimately related to military power. In the past, it was understood that the state should prevent and eventually reject military threats from other states, by defending sovereignty, independence and territory militarily. Thus, each state was called upon to preserve its own security by increasing its military capacity.

The complex Latin American scenario combines high levels of violence; high levels of social inequality; a skeptical and frightened citizenry; institutional fragility; a brutally repressive past; and a present marked by

criminalisation. To this must be added a fluid and polarised political debate and the legacy of past dictatorships that, symbolically and practically, linked order with repression. In Latin America today, criminal law is used as a tool to contain social conflicts connected with the right to territory, the workplace, sexual and reproductive rights and gender identity. The criminalisation of human rights defenders is the backlash of bringing complaints against public officials in cases of corruption, or in the context of the investigation of serious violations of human rights. In this context, punitive demagoguery and securitisation become keys to interpreting the new political scenarios of the region. Good examples are government-sponsored securitisation programmes, such as Plan Quadrant (Chile); Democratic Security (Colombia); *Plan Antimaras* and *Plan Mano Dura* (Guatemala, Honduras and El Salvador); Plan Merida (USA, Mexico, Central American countries); as well as various forms of regional spatial securitisation (territorial and virtual) co-operation.

The effects of the past currently are still felt, when demonstrations perceived as disorder are repressed and, conversely, when every attempt to steer the course towards order is denounced as repressive.

Therefore, the questions remain as to how to build consensus on security without appealing to fear; and how to incorporate the critical sense of securitisation theory into a security intervention agenda that promotes human rights.

The contributions of human security and the multidimensional approach seem to open an alternative path. However, much remains to be done in this regard, including how to promote strategies of political coordination between the states of the region for the construction of a common agenda on the matter of security; how to implement gradual and flexible intervention procedures in such a way that local strategies for the containment of violence and crime can be expressed; how to give financial sustainability to forms of interagency co-operation between states and civil society organisations; how to identify performance indicators that combine regional, national and local problems; and how to ensure the integration of human rights defenders in the design of public policies and their implementation.

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Selected regional developments in human rights and democratisation during 2016: Rights amid turmoil in the Arab region

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Abstract: *In the Arab world, covering the Mashriq, the Arabian Peninsula and North Africa, wars and conflicts are impeding every initiative to reflect upon democratic progress or the protection of rights. Where peace prevails, economic difficulties are discouraging political reform and tolerance, and where petrodollars flow, regimes are using their wealth to buy support, reinforce allegiance, fund intervention in neighbouring countries, and catalyse fratricidal conflicts. War-torn countries such as Syria, Iraq, Yemen, Libya, Sudan and Somalia have witnessed continuous violations of human rights. Chemical weapons, torture, harsh detention conditions, child soldiers and other abuses have been practised by all sides, with the international community turning a blind eye to violations committed by its allies. As long as conflict prevails in these countries, prospects will look grim. Geostrategic conflicts, land conquest and border control will remain their primary concern. However, countries that managed to remain relatively peaceful in the region have shown patterns of modest reform despite challenges resulting from forced migration and a lack of economic resources. In many Arab countries some progress has indeed been noticed with regard to electoral participation, gender issues and migrant workers. These reforms remained limited and were associated with populist ambitions, driven by bottom-up activism and civil society movements. These movements reflect the existence of grassroots initiatives channelling social demands and new voices being heard in the Arab world. Women are also starting to gain ground, and elections are proving to be a vector of change.*

Key words: war; migration; economic hardship; elections; gender; Mashriq; Arabian Peninsula; North Africa

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The wisdom of the many is your shield against tyranny. For when we turn to one another for counsel we reduce the number of our enemies.

Gibran Khalil Gibran

1 Introduction

During 2016, the Arab region was marked by continuing war and recurring peaks of violence, particularly in Syria, Iraq, Libya, Yemen, Sudan and Somalia. Furthermore, two important reversals of trends occurred in the Middle East. First, the Islamic State, which straddled Iraq and Syria, saw a constant shrinkage and the near collapse of its territorial institutions. Second, in the Arabo-Persian Gulf, the Gulf Co-operation Council, which was heading towards military and economic integration, was jolted by the Saudi-Qatari rivalry which turned into a direct confrontation. These dynamics have affected the human rights situation within the relevant states.

One may distinguish between three sub-regional dynamics in the Arab world. We will be consecutively examining the Mashriq, the Arab Peninsula and North Africa. Differences and commonalities can be found in and between all three sub-regions.

2 War, migration, and economic hardship in the Mashriq

In 2016, direct regional and international interventions tilted the balance of power in favour of the regime in Syria. In border areas that have gained autonomy at the hand of opposition groups, cross-border military interventions attempted to reverse the trend. Turkey's military intervention in August 2016 momentarily slowed down the progress of Kurdish groups in the north, while Hezbollah, a Lebanese armed group allied to Iran, continued its operations to dislodge opposition groups from areas bordering Lebanon. Russian air strikes against Syrian opposition forces allowed the regime to take back major cities (for example, Homs in December 2015 and Aleppo in December 2016) from the opposition, while air strikes from the American-led coalition allowed the Syrian regime to roll back the Islamic State (ISIS).

The increase in violence through air strikes and ground operations was accompanied by serious breaches of international humanitarian law, with disproportionate attacks on civilian areas, and the use of non-conventional weapons (chemical weapons reportedly were used by the regime on three occasions and once by ISIS). The United Nations (UN) Commission of Inquiry reported that medical workers and facilities came under intentional targeted attacks, and the healthcare infrastructure was weakened, with devastating consequences for civilians' lives in general. No humanitarian assistance was allowed into Eastern Aleppo between July and December. Moreover, according to Human Rights Watch, pro-regime forces were responsible for the systematic use of arbitrary detention and torture. The Commission of Inquiry reported widespread human rights abuses by ISIS and Jabhat Fateh al-Sham (formerly Jabhat al-Nusra, affiliated to al Qaeda), including kidnappings and executions. Human rights abuses by opposition groups were equally reported (HRW 2017).

In Iraq, the government steadily started gaining ground against ISIS at the end of 2015, recapturing Ramadi in early 2016 and Mosul in July 2017. The US-led coalition's air strikes against ISIS, at the request of the government, allowed the Iraqi forces to steadily advance, but with a heavy toll on lives and infrastructure. In April 2016, supporters of cleric Moqtada al-Sadr stormed the parliament building demanding a new government, a commitment to fight corruption, and an end to the allocation of governmental posts along sectarian lines. Likewise, the Kurdish regional government kept on increasing its territory and reinforcing its powers, a dynamic that culminated with the organisation of an independence referendum in September 2017, a move opposed by the Turkish and Iraqi governments.

Even though the increased violence in Syria and Iraq did not cause additional waves of refugees due to border restrictions, the gradual expansion of the control of pro-government forces and the fall of Eastern Aleppo discouraged refugees in Lebanon and Jordan from returning home. The resulting shift from crisis to a protracted refugee situation has created resentment among host communities.

In Lebanon, host communities increasingly consider refugees, who by some estimates represent nearly a fourth of the country's population, as a social, political and security threat. Following the terrorist attacks around Beirut and in the Beqaa claimed by warring factions in Syria, the Lebanese army stepped up its security operations against refugees. Additional conditions to obtain permits of residence threw the vast majority of Syrian refugees into illegality, increasing their vulnerability to economic hardship and human rights abuses. Politicians and the media increasingly point the finger at refugees for a supposed rise in criminality, and blame them for the country's economic problems.

A general complaint against the governing elite continued to be manifested throughout 2016, through regular protests in objection to the vacancy of the President's office, the extension of the parliament's term and the government's failures in respect of waste management. In May 2016, the government organised municipal elections. A new group calling for reform received an impressive 40 per cent of the vote in Beirut, against a list supported by the country's largest political blocs. In October 2016, Parliament elected a President, ending a 29-month vacuum in the office of head of state. In June 2017, it extended its term for the third time, bringing it to nine years (from an initial mandate of four years), while introducing a new electoral law.

Jordan faces challenges similar to those of Lebanon, hosting a significant number of refugees as a result of the conflicts and ongoing wars in Syria and Iraq. On the legal and political front, civil society in Jordan is relatively fragile, and citizen participation in political life is limited. A survey conducted in June 2016 revealed that a high percentage of Jordanians believe that Parliament is not effective, since it neither legislates nor chooses the government, and can only amend legislation which the King and the Senate can override (Global Security 2016). In addition, the King has the power to dissolve the Lower House of Parliament, which he did in May 2016, after the resignation of the Prime Minister. Nevertheless, the Elections Law ratified in 2016 introduced new changes, such as decreasing the voting age to 18 years and allocating a 15-

seat quota for women, while reducing the number of seats in the Lower House from 150 to 130.

At the same time, some progress has taken place concerning women's rights in Lebanon and Jordan where two issues dominated the public debate: 'honour killing' and 'rape law'. In Lebanon, a widespread campaign by civil society urged the government to revoke article 522 of the country's penal code which allowed a rapist to escape punishment for his crime if he married the victim. On another front, while honour killing has been illegal in Lebanon since 2011 (Tamer Salman 2016), scandals reported recently in the media highlighted perpetrators who had received light sentences. This matter did not sit well with civil society activists, who took the opportunity to utilise these scandals and strengthen their lobbying and advocacy campaigns. Cases such as those of Roula Yaacoub and Manal Assi made national headlines and played upon social and cultural pressure locally.

In Jordan, civil society lobbied to repeal articles in the Penal Code allowing for the reduction of the penalty of a man who kills a female relative accused of adultery (article 340), or exempts a rapist from prosecution if he marries his victim (article 308). In September 2016, King Abdullah II created the Royal Committee for Developing the Judiciary and Enhancing the Rule of Law. Among its recommendations were the amendment of the Penal Code to protect women from such violence, among other unprecedented shifts in the Code. The Jordanian Parliament repealed article 308 in August 2017.

The war in Syria and Iraq, refugee problems in Lebanon and Jordan, and international military interventions in the region have been at the top of the international media agenda, putting neighbouring Palestine on the backburner despite the continued occupation and political crisis within the Palestinian Authority. Israeli settlements in the West Bank had deplorable effects on the lives and livelihood of Palestinians. Freedom of movement is restricted by their expansion, the infrastructure that links them and the numerous checkpoints meant to protect them. The Gaza strip is still suffering from the blockade imposed on it since 2007, and the closure and restrictions of its crossings by Israeli and Egyptian authorities. As for Israeli Arabs, they continue to suffer discrimination, especially with regard to access to the labour market (Working Group on the Status of Palestinian Women Citizens of Israel 2016). Fatah in the West Bank and Hamas in the Gaza strip are also responsible for violations of human rights, such as the rights to freedom of expression and peaceful assembly. Torture and other ill-treatment of detainees remained rife in both areas. Unfair trials of civilians before military courts continued in Gaza, and in the West Bank detainees were held without charge or trial.

Overall, several paradoxes marked the Mashriq during the last year. The Islamic State shrunk amidst a rise in impunity. Syria and Iraq put Palestine on the backburner despite Israel's continuing land confiscation and movement restrictions. Local Palestinian authorities added to those violations by restricting the freedom of expression of their own people. Regimes that engaged in civil and political rights violations in Lebanon and Jordan made small compromises on the social front, and gender issues were used to alleviate frustrations through small compromises.

The Arabian Peninsula displayed a similar syndrome, with oil-rich countries exploiting civil wars, launching air strikes, violating human rights in neighbouring countries and restricting civil and political freedoms internally, while initiating economic reforms and minor tactical compromises on gender and domestic workers in their homeland.

3 Unprecedented change amid conflict in the Arabian Peninsula

In April 2016, negotiations were held in Kuwait between the Yemeni government and Houthi forces. However, the government has been harshly delegitimised for its support of the Saudi air strikes that led to considerable destruction throughout the country. The actors disagreed on most of the terms of the negotiations. As soon as the failure of these talks was announced, confrontation again started and grew in intensity. The Saudi Arabia-led coalition is repeatedly criticised for its air strikes aimed at the civilian population and economic structures, inflicting substantial damage on Yemen's production capacity. The coalition has also organised a naval blockade on Yemen, restricting the importation of vital goods. Moreover, the use of internationally banned cluster munition by the coalition has been documented, as well as numerous air strikes on schools and health facilities (HRW 2016).

Houthi forces are also held responsible for many human rights violations. Since seizing control of Sanaa, they cracked down on dissent, and committed crimes such as the torture of detainees, enforced disappearances and arbitrary detentions of activists and political opponents. The Houthis and other armed groups are also accused of using child soldiers to wage war (HRW 2016). In order to control the territory and population, they confiscated medical supplies and food of civilians in several key areas and blocked humanitarian assistance from entering these regions (Amnesty International 2016).

Next door, in neighbouring Saudi Arabia, things look different. On the internal front, in the second quarter of 2016, Crown Prince Mohammed bin Salman launched Vision 2030 and the National Transformation Plan. The Vision and Plan aim at introducing significant economic shifts, mainly summarised in a diversification of revenue and less dependence on oil, combined with cuts in government subsidies to services and cuts in salaries and benefits of employees in the public sector (Vision 2030 2016). These economic measures are motivated by the country's economic difficulties and the fact that it had to make up for the spending of the state on the Saudi-led coalition against Houthi forces in Yemen. Saudi Arabia's young crown prince announced further socio-political developments in September 2017, giving women the right to drive after decades of heated legal and social debates around the issue (Hubbard 2017). Nonetheless, Saudi regulations that systematically discriminate against women, such as the guardianship system, are effectively still in place. Women are still being treated as minors in many situations despite their empowerment (HRW 2016).

In parallel with these initiatives, the Saudi government has prosecuted and detained a number of clerics, activists, journalists and writers, and has sentenced them to years in prison (Amnesty International 2017). Discrimination against and arrests of members of the Shi'a minority in

Saudi Arabia also continued to take place. The Saudi government continued the crackdown on undocumented or irregular migrants, arresting, detaining and deporting hundreds of thousands of migrant workers and their families. Tens of thousands of migrant workers were fired from their jobs without having been paid for months, after the government cut spending on contracts with construction and other companies affected by the financial crisis in the country (Amnesty International 2017). About nine million migrant workers, representing more than half the work force, occupying manual, clerical and service posts suffer abuses and exploitation, which in some cases led to conditions of forced labour (Amnesty International 2017).

In neighbouring Bahrain, the authorities tightened restrictions on the rights to freedom of expression and association and continued to curtail the right to peaceful assembly. They detained and charged several human rights defenders and banned others from travelling abroad, dissolved the main opposition group and stripped more than 80 people of their Bahraini citizenship, forcibly expelling four. Opposition leaders continued to be imprisoned as prisoners of conscience. There were new reports of torture and other ill-treatment and unfair trials. Migrant workers and lesbian, gay, bi-sexual, transgender and intersex (LGBTI) persons faced discrimination. Women continued to be discriminated against in law and practice, but Parliament agreed to abolish article 353 of the Penal Code, which allowed rapists to avoid a prison sentence if their victim consented to marry them.

The Kuwaiti authorities followed the trend, as they curtailed freedom of expression and prosecuted and imprisoned government critics under criminal defamation laws. Members of the Bidun, a group that has been denied access to Kuwaiti citizenship, continued to face discrimination. Migrant workers, including those in the domestic, construction and other sectors, continued to face exploitation and abuse under the official *kafala* sponsorship system, which ties workers to their employers and prevents them from changing jobs or leaving the country without their employer's permission. Women continued to face discrimination in law and in practice, although some progress was marked, as the Committee for Legislative and Legal Affairs approved a proposed amendment to the citizenship law that would allow Kuwaiti women to pass their nationality on to their children, regardless of the father's nationality. The amendment, however, has not yet been enacted.

A similar pattern is apparent in Qatar, where authorities have continued to prohibit the existence of 'independent' political parties, workers' unions and foreigners' associations. Furthermore, unauthorised public assemblies were prohibited and dispersed, while laws criminalising any form of expression deemed offensive to the Emir were further cemented (Freedom House 2017). Courts imposed death sentences throughout 2016 and early 2017. Personal status laws, similar to many countries in the Arab world and Gulf states, continued to discriminate against women in areas related to their rights within their marriages, divorces, familial and spousal inheritance, the custody of their children as well as in the areas of nationality and freedom of movement without the consent of their 'guardian' (Aldosari 2016).

However, there are some minor positive shifts in the areas of migrant workers. Law No 21 (adopted in 2015, and in effect since 2016) eliminated the sponsorship system and the two-year ban on migrant

workers returning to Qatar (HRW 2017). In addition, in August 2017, the Emir of Qatar ratified Law No 15 relating to domestic workers, which guarantees workers a maximum 10-hour work day, a weekly rest day, three weeks of annual leave, and an end-of-service payment of at least three weeks per year.

These contradictory dynamics also hold true in the United Arab Emirates (UAE). Political participation remained elitist, while the majority of the population is not allowed to vote, and political parties are banned. The UAE still has not ratified the International Covenant on Civil and Political Rights (ICCPR), and the rights to freedom of assembly and association have regularly been denied. Arbitrary arrests and pre-trial detentions are common practice, and there has been an increase in the number of people arrested for what many dubbed 'subtle' or 'harmless' criticism of the government on various social media outlets. Forced disappearances remain a common tool for undercover security officers to arrest government critics.

Since the Arab Spring, the UAE has launched a systematic crackdown on freedom of speech and association. A significant development in 2016 was the increase in the government's use of cyber-surveillance. A report by Citizen Lab (2016) revealed that spyware technology had been employed by subcontractors of the UAE government in Israel and the US to hack peaceful government critics and activists (Marczak & Scott 2016). The government recently updated the cyber crime laws of 2012 and anti-terrorism laws of 2014, which provide a vaguely-worded legal framework restricting internet and social media use. These laws have been employed by the authorities to arrest human rights defenders, journalists and activists, and to crack down on dissent, with a specific focus on political activists as well as members of non-violent Islamist groups. Media outlets such as *Al Araby*, *Middle East Eye* and the *Huffington Post* have been blocked as online content and news continue to be censored.

Despite the introduction in 2016 of new Labour Ministry decrees aimed at protecting migrant workers from abuse, workers remained vulnerable to exploitation by their employers because of the *kafala* sponsorship system. Domestic workers are particularly at risk of forced labour and human trafficking. Trade unions are banned. Domestic violence against women remains unaddressed as the law allows such practice and the country does not provide assistance to victims of abuse. LGBTI communities as well as people with disabilities are discriminated against by law and in practice. Nevertheless, the UAE has eight female ministers, one of the highest rates of ministerial representation in the Arab world. The UAE has made women's empowerment a key element of its national strategy, which should be achieved by 2021. The Minister of State for Tolerance, Shaikha Lubna Al Qasimi, is actively pursuing this initiative aimed at equality of education opportunities as a key in achieving women's economic empowerment.

Oman currently faces the same obstacles as other Gulf Co-operation Council (GCC) countries with regard to rights and freedoms. As such, freedom of expression is limited, and it is prohibited to criticise the Sultan. The Omani government allows the establishment of media outlets and private media publications. However, many of these companies practise self-censorship, or have to deal with the consequences (Freedom House 2016). Personal communications are monitored, and the number of

arrests, prosecutions and interrogation of citizens has over the years increased in an attempt to deter government critics.

In addition to discarding people's rights to freedom of expression, the Omani government has limited people's rights to assembly and association (Amnesty International 2017). The country has in the last year witnessed peaceful protests. However, these protests were not taken lightly, and the government's response was to arrest and prosecute several of these individuals who called for economic and political reform (Freedom House 2016). On 8 November 2016, Abdullah Habib, a 53 year-old writer, cinema critic and online activist, was sentenced to three years in prison and an additional fine of 2 000 Omani Rials for violating article 19 of the Information Technology Crimes Act, and using the internet to interfere with the country's stability. Habib used his Facebook page to express his opinions on the human rights situation in Oman (Afef Abrougui 2016).

In Oman, the *kafala* immigrant labour system, which hinders the movement of immigrants, remains in place, while inclusive labour laws remain absent, making it extremely difficult to protect migrant workers. It is estimated that more than 140 000 migrant domestic workers are subject to exploitation and abuse by their employers (Amnesty International 2017). Women in Oman are still not given their full legal rights despite the fact that under the law all citizens are to be regarded as equal, and gender-based discrimination is prohibited. The personal status law, based on the Shari'a, considers women not equal to men in matters of divorce, inheritance and child custody, and does not allow women to pass their nationality on to their children (HRW 2017). With regard to women's participation in political life, only 23 women ran for the 202 seats in the 11 municipalities, including Muscat and the Oman capital. Nevertheless, while only four women were elected during the elections of 2011, seven women were elected in 2016, marking modest progress towards engaging women in the public sphere.

To sum up, most countries in the GCC follow similar patterns in their laws and policies, restricting political rights, the rights to freedom of expression and assembly, labour rights and women's rights. Rising internal dissent, fear from disruptions in light of the Arab Spring and turmoil in the region may have encouraged authoritarian regimes to show signs of opening up with regard to gender issues and migrant workers, which is taking slightly different forms in different countries. But what about Northern Africa?

4 From war interludes to authoritarianism, to democratic quest in North Africa

The regimes in Egypt, Tunisia, Morocco and Algeria range from populist dictatorship to emerging democracy, but the same winds of change blow over all of them, with vague memories of the fading Arab Spring still in the air. The pressure from below is noticeable across all these countries, amid worries about economic recession and attempts to boost productivity in order to alleviate social pressure. In the meantime, wars and instability in neighbouring Libya, Sudan and Somalia add to the pressure in the region with divided governments, bomb attacks, killings, hostage-taking, ransom demands and child soldiers, in addition to various violations of rights.

Despite the apparent relative stagnancy of the Egyptian political scene over the past year, several major shifts took place on the economic, social and legal levels. During the last quarter of 2016, the Central Bank of Egypt (CBE) floated the currency, causing a sudden devaluation of at least 50 per cent. The CBE's decision came in conformity with conditions of the International Monetary Fund (IMF) to approve a 12 billion dollars loan to be given to the Egyptian government over three years (Farouk 2017). In return, the government has been forced to undertake a long-term strategy of liberalisation of the economy, the withdrawal of public services, and a sudden de-subsidisation of energy sources. On the legal level, the government introduced new investment laws aimed at facilitating the start of new businesses along with tax cuts for small businesses and new industrial projects. Simultaneously, though, the government added the value added tax law to increase sales tax from 10 to 13-14 per cent (Egypt Parliament Watch 2016). Although the sudden economic reforms affected the standard of living of millions of Egyptians, the Egyptian government managed to use this situation as a distraction to shift the attention from major human rights and constitutional violations to the focus on the national economic plan of 'rebuilding Egypt'.

In parallel, and in line with the state's behaviour in maintaining 'order' in society, President Abdel-Fattah El-Sisi has extended the historical state of 'emergency', thereby allowing the authorities to arrest and search the homes of suspects, as a tool for fighting terrorism in the country. On 25 April 2016, the Egyptian police arrested over 1 000 protesters who took to the streets in opposition to the handing over of Tiran and Sanafir Islands (*Mada Masr* 2016). The following months witnessed the release of nearly 60 per cent of the detainees. Nevertheless, the Egyptian government banned hundreds of websites and key newspapers such as *The Daily News Egypt*, *Al-Jazeera* and *Mada Masr* (Abouelenin 2017). In addition to this, the Egyptian government banned the website of Human Rights Watch.

In contrast, Tunisia showed signs of democratic consolidation and the expansion of human rights. In June 2016, Parliament adopted a change to the democratic regulation requiring political parties to have an equal number of alternating men and women on their list. An improvement has been observed in the Code of Criminal Procedure, as Parliament in February 2016 reduced the maximum period that a captive can be held without burden from six to four days, allowed prisoners to have direct access to a lawyer and their family, and permitted the presence of a lawyer during investigations. The reforms did not affect the authorities' influence to hinder without charge for up to 15 days those arrested for terrorism-related offences.

Following protest movements in 2016, police violence was reported, and several protesters, bloggers and journalists were charged for 'offending the army' (article 91 of the Criminal Code) and 'insulting a public official' (article 125). Security concerns have led to the construction of a security wall along Tunisia's border with Libya. This did not prevent Ansar al-Sharia, an Islamic state affiliate, from trying to take over the border town of Ben Guerdane in March 2016. At least 68 people died in clashes between the group and Tunisian security forces.

To understand the current situation in Morocco and the Moroccan-controlled Western Sahara, it is important to note several marking points in 2016. On the economic front, 2016 was marked by slow economic

growth (1,5 per cent). On a regional level, the North African state has made the decision to open up to its African neighbours, by re-joining the African Union (AU), which it had left when the AU accepted the Sahrawi Arab Democratic Republic as a member state 33 years ago (MWN 2017). This endeavour has also allowed the country to sign economic agreements with Nigeria and Ethiopia, which also brought opportunities for national economic growth. On the international level, the COP22 climate change conference, which took place in Marrakech, allowed the Paris Agreement to be signed. Moreover, to further efforts on the environmental question, in February 2016 Morocco banned the use of plastic bags and launched its first solar farm, also known as the Noor complex. Finally, as far as national political matters are concerned, the second parliamentary elections since the Arab Spring were won by the leading Islamist Justice and Development Party in October 2016 (HRW 2016).

The Moroccan state demonstrated a will to polish its image internationally and present itself as a leader in the region. However, it did not always manage to protect human rights. In the Rif, the fish vendor Mouhcine Fikri in Al Hoceima was crushed to death as he tried to recover his confiscated swordfish from a garbage truck, as fishing is not allowed at that time of the year (Project on Middle East Democracy 2017). Protests started in the Rif and spread nationwide. As a response, the Moroccan authorities initiated waves of arrests. Some demonstrators were allegedly tortured. Moreover, the right to legal representation has to be questioned (*Al-Jazeera* 2012).

Algeria also showed a willingness to change its position towards human rights. On 5 January 2016, the government presented draft constitutional reforms. The Prime Minister of Algeria stated that the Constitution adopted by Parliament had brought about institutional and democratic reforms in Algeria. However, regardless of the constitutional reform, the country continues to restrict human rights in significant ways. First, the Constitution states in article 49 that 'the right of peaceful assembly is guaranteed within the framework of the law, which sets forth how it is exercised'. In practice, the right of peaceful assembly is not applicable. For example, Algeria's Penal Code punishes the participation in unauthorised demonstrations in a public place. In February 2016, the National Union of Public Administration (SNAPAP) planned a conference on the socio-economic situation. As a result, police surrounded the place and arrested six leaders for hours, subsequently releasing them without charge. Second, freedom of speech is guaranteed in 'the information code' adopted in 2012, but in practice the authorities punished a number of Algerians for critical speeches. For example, on 9 August the Appeal Court imposed a two-year prison sentence on freelance journalist Mohamed Tamalt because he posted a video on Facebook with a poem criticising the President.

On a more positive note, women's rights are to a large extent protected in Algeria. The Algerian Constitution enshrines the principle of non-discrimination based on gender, and obliges the state to take positive action to guarantee equality of rights to men and women. However, the Family Code discriminates against women in matters of marriage, divorce, child custody, guardianship and inheritance. The Penal Code prohibits rape, but does not explicitly define it, allowing men who rape girls under the age of 18 to escape trial by marrying their victim.

While its neighbours are trying to consolidate stability by introducing minor reforms, Libya remains in a state of chaos. The year 2016 opened with ex-deputy Fayed al Sarraj being designated as the internationally-recognised Prime Minister. However, the UN's readiness to create a Government of National Accord (GNA) in Libya failed to include enough actors in the deal. The city of Tripoli remains split between two rival governments, namely, the UN and the Government of National Salvation, headed by Khalifa Ghweil, ex-member of the 2012 parliament who has wide support amongst Islamist militias. In the west, the Tobruk Parliament twice refused to vote for a motion of confidence to al-Sarraj's government (*Al-Jazeera* 2016). General Khalifa Haftar and his army also refused to co-operate with the GNA. Nevertheless, al-Sarraj was able to unite some tribes and militias to its cause. The GNA could recapture the coastal city of Sirte and defeat ISIS in the country in December (*The Guardian* 2016). The GNA was pledged loyalty by the Central Bank and the National Oil Corporation, two major economic institutions (AFP 2016).

In 2016, the human rights situation in the country was critical in several regards. Impunity prevails as the judicial institutions are down. According to the UN, 'both state and non-state are accused of very serious violations and abuses that may, in many cases, amount to war crimes' (UN News Centre 2016). An important report by the Office of the High Commissioner for Human Rights (OHCHR) was released in early 2016 pointing out unlawful killings, arbitrary detentions and abductions or torture and other ill-treatment. The report also refers to the situation of women in the country (OHCHR 2017). Journalists, activists and women activists, in particular, have been harassed, abused and even killed in an effort to silence their voices (HRW 2017).

The Geneva Conventions on International Humanitarian Law have also been violated, as multiple sources report violent attacks on civilians and civil infrastructure, by both state and non-state actors (UNSMIL 2017). The use of child soldiers by ISIS has also been documented (BBC 2016). As regards migrants, an important report of the OHCHR on the subject was published in December, unveiling the way in which armed groups and even state institutions arbitrarily detain migrants, torture them and inflict other ill-treatment on them (OHCHR 2016). Migrants are used as hostages for ransom and are exploited as forced labour. Women migrants are the most at risk, and numerous cases of rape and other sexual violence have been reported. International organisations have tried to draw the attention of the international community, particularly Europe, to the question, with few results (Amnesty International 2017).

In Sudan, the conflict in Darfur entered its thirteenth year in 2016 and conflict in Southern Kordofan and Blue Nile entered its fifth year (Amnesty International 2017). These both continue to cause deaths, poverty and violations of human rights. In March, the AU High-Level Implementation Panel (AUHIP) proposed an agreement in order to end these conflicts and ensure access to humanitarian aid for the Sudanese population.

Sudan's National Intelligence and Security Service (NISS) detained human rights defenders, students, lawyers and those perceived to be critical of the government. In April, at least 25 students in Khartoum (Darfur) were detained without charge or access to a lawyer by NISS agents, and some of them remained in prison for two months (Sudanese

Rights Group 2016). Government authorities continued to restrict freedom of expression by using force or other means of pressure or by threat. Twelve newspapers were banned in 2016 (Amnesty International 2017).

In Somalia, the situation remains far from being secure, and attacks by way of suicide bombings and explosive devices still have a crushing impact on the population. On 21 January 2016, Al-Shabab conducted an attack on a Mogadishu restaurant, resulting in more than 20 deaths. Similar deadly attacks every day killed many people, including women and children.

In the area of civil liberties, 2016 saw the arrest and assassination of many journalists. In Puntland, in June 2016, the Minister of information ordered the closure of Daljir's FM radio stations throughout the region, reportedly as a result of an interview with a critic of the government (HRW 2016). In the same month, Sagal Salad Osman was killed while working for the state-run media (HRW 2016). A month later, five members of the Centre for Research and Studies were arrested – without being given any precise reason – for violating legal and human rights. In September Abdiaziz Mohamed Ali, a journalist at Radio Shabelle, was killed by unknown gunmen (HRW 2016).

Harsh environmental conditions did not assist the country. According to UNHCR data, in November 2016, drought displaced more than 135 000 people inside Somalia (Dobbs and Navier 2017). The El Niño phenomenon had an additional severe impact on the already weak and vulnerable population, aggravating their situation. Despite efforts to enhance the economy of the country, due to the drought, the gross domestic product (GDP) growth in Somalia, estimated at 3,7% for 2016, is projected to decrease to about 2,5 per cent in 2017. However, construction, telecommunications and service sectors are projected to continue to register a decent growth, perhaps bringing hope for growth of employment in the country (Dobbs & Navier 2017).

During 2016, the main action taken in favour of human rights was the Action Plan for the Implementation of the Human Rights Roadmap (2015-2016) (Ministry of Women and Human Rights Development 2016). The aim was to give more rights to vulnerable groups, women and children regarding education, health, work and, more importantly, to give everyone access to water and food. Nevertheless, the implementation of these measures has not been sufficient as many violations of human rights were carried out during the entire 2016, as the phenomenon of bomb attacks remained stable and freedom was still an utopia. The elections that took place at the beginning of 2017 were the most expensive elections and extensive democratic exercise in Somalia for decades. Even if the new President, Mohamed Abdullahi Mohamed, showed an intention of building a long-lasting democratic state, he already started off on the wrong footing, as the election procedures were not democratic (Jason Burke 2017).

In the Comoros islands, a new President, Azali Assoumani, was elected on 10 April 2016 as well as a new parliament and governors for the islands in 2015. These elections were reported to have been successful and relatively free and fair according to the European Union (EU), the AU and the Arab League. A third round of voting was held in Anjouan, after some ballot box thefts were registered by their observer missions.

Although security forces are effectively controlled by civilian authorities, many human rights violations were registered in 2016. Long pre-trial detentions, poor prison conditions, child abuse, human trafficking and bribery were the most pervasive types of official corruption. Human rights violations range from ineffective workers' rights protection; freedom of the press and assembly; child marriage; LGBTI rights; as well as a lack of legal framework for refugees. Police impunity is especially noticeable during misconduct during arrest procedures, by detainees being denied access to an attorney. Child abuse was also reported by non-governmental organisations (NGOs) and even reflected in official statistics. Many poor families would send their children to work for wealthy families or relatives in the hope that they could obtain a better education. The government and the UN Children's Fund have been supporting *Service d'Ecoute*, which provides counselling and support for abused children and their families on all three islands of the Comoros. Many cases of child abuse have so far been referred to the police in order to be investigated.

Interestingly enough, the local culture in Ngazidja and Mwali is traditionally matrilineal. Although the law provides for equality in inheritance and property rights, all inheritable property is in the legal possession of women. Therefore, in this case this local practice discriminates in favour of, rather than against, women. However, societal discrimination against women is much more visible in the rural areas, with fewer opportunities for education and paid employment. In rural areas, women have mostly been limited to farming and child-rearing duties.

The Djiboutian nation is 'African at heart, Arabist in culture, and universalist in thought', as President Guelleh stated in Schermerhorn in 2005 (USAID 2005). Djibouti is the only country in the world in which United States, French, German, Italian, Spanish and Japanese military forces are simultaneously stationed within its borders; China will also soon have a presence there. Moreover, it has welcomed economic and educational aid from GCC countries (USAID 2005).

Presidential elections took place in Djibouti on 8 April 2016, and President Ismail Omar Guelleh was re-elected for a fourth term, receiving 87 per cent of the vote in the first round. International observers from the AU, the Intergovernmental Authority on Development, the Organisation of Islamic Co-operation, and the Arab League have characterised the 2016 elections as 'peaceful', 'calm' and 'sufficiently free and transparent'. In fact, the government suppressed any kind of opposition, refusing to allow several opposition groups to form legally-recognised political parties; harassing, abusing, and detaining government critics; denying the population access to independent sources of information; and restricting freedom of speech and assembly.

According to the 2016 Djibouti Human Rights Report, other human rights problems persist, including the use of excessive force; torture; harsh prison conditions; arbitrary arrest and prolonged pre-trial detention; the denial of fair public trials; interference with privacy rights; restrictions on freedom of association and religion; a lack of protection of refugees; corruption; discrimination and violence against women; female genital mutilation/cutting; child abuse; trafficking in persons; discrimination against persons with disabilities; and discrimination against persons with

HIV/AIDS and the LGBTI community. The government restricted workers' rights and child labour (US Department of State 2016).

On the whole, Northern African countries have been under heavy economic and environmental pressure, notwithstanding wars and violent clashes in hot spots. Reconciliation efforts have been in vain and difficult, while external economic support and associated reforms produced tough conditions on parts of society. This has reinforced control and the violation of rights, while minor social initiatives related to vulnerable groups, especially women, were taken wherever they were deemed 'safe' for regimes in place.

5 Conclusion: 'Wisdom of the many'?

In the Arab world, wars and conflicts are impeding every initiative to reflect upon democratic progress or the protection of rights. Where peace prevails, economic difficulties are discouraging political reform and tolerance, and where petrodollars flow, regimes are using their wealth to buy support, reinforce allegiance, fund intervention in neighbouring countries, and catalyse fratricidal conflicts.

War-torn countries such as Syria, Iraq, Yemen, Libya, Sudan and Somalia have witnessed continuous violations of human rights. Chemical weapons, torture, harsh detention conditions, child soldiers and other abuses have been practised by all sides, with the international community turning a blind eye to violations committed by its allies. As long as conflict prevails in these countries, prospects will look grim. Geostrategic conflicts, land conquest and border control will remain their primary concern.

However, countries that managed to remain relatively peaceful in the region have shown patterns of modest reform despite challenges resulting from forced migration and a lack of economic resources. In many Arab countries some progress has indeed been noticed with regard to electoral participation, gender issues and migrant workers. These reforms remained limited and were associated with populist ambitions. However, they have been driven by bottom-up activism and civil society movements. These movements reflect the existence of grassroots initiatives channelling social demands and new voices being heard in the Arab world. Change can be reversible in the short term, but some trends will build up in the long term. Women are also starting to gain ground, and elections are proving to be a vector of change. Progress in democracy and human rights in the region may take time, with rises and falls and oscillating trends. However, one thing is certain: In countries where peace prevails, winds of change will, sooner or later, bring the 'wisdom of the many' mentioned by Gibran Khalil Gibran, spreading respect for dignity and rights in the Arab region.

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Selected developments in human rights and democratisation during 2016: Sub-Saharan Africa

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Abstract: *This brief overview of selected developments in human rights and democratisation in sub-Saharan Africa during 2016 paints an uneven picture of progress, stagnation and retrogression at the global, regional and national levels. The contribution discusses elections held in 2016 and pertinent jurisprudence on elections and electoral management bodies during the year; accountability for mass atrocities; LGBTI rights; women's rights; and protests and internet shutdowns. As far as elections were concerned, many were free and fair and led to democratic changes of government, while others were manipulated by incumbents to maintain their stay in power. In terms of jurisprudence in support of democracy, the African Court delivered an important judgment against Côte d'Ivoire on the need to ensure the fair composition of electoral management bodies. With regard to accountability for mass atrocities, the African Union's onslaught against the International Criminal Court started yielding results, with Burundi, The Gambia and South Africa withdrawing their membership of the ICC, even though The Gambia and South Africa have subsequently revoked their withdrawals. On a positive note, the Extraordinary African Chambers convicted and sentenced former Chad dictator, Hissène Habré, to life imprisonment for atrocities committed between 1982 and 1990. With regard to LGBTI rights, even though the national executive continues to be an impediment, national courts are increasingly taking on the mantle of protecting LGBTI rights, especially in respect of the right to freedom of association and assembly. While the realisation of women's rights continues to face significant challenges at the national level, the AU showed encouraging signs of its commitment to gender equality, especially in a decision by the AU Assembly to only elect female judges to the African Court in order to ensure the gender balance of the Court. As far as protests are concerned, many states used internet shutdowns as a means of silencing dissent, especially during elections and protests that infringed on rights such as freedom of association, expression and assembly, in addition to substantial financial consequences.*

Key words: human rights; democratisation; sub-Saharan Africa; elections; LGBTI; gender; women's rights; internet shutdowns; accountability

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1 Introduction

This article provides a brief overview of selected developments in human rights and democratisation in sub-Saharan Africa during 2016. The issues discussed relate to developments at the global, regional and national levels. The review covers five main thematic areas, namely, democracy; accountability for mass atrocities; lesbian, gay, bisexual, transgender and intersex (LGBTI) rights; women's rights; and protests and internet shutdowns. This article is by no means a comprehensive review of developments relating to democratisation and human rights across sub-Saharan Africa. While it aims to provide an analytical review of some of the most important legal and political developments across sub-Saharan Africa, it also, to a limited extent, contains descriptions of violations that occurred during the year under review.

2 Democracy

2.1 National elections

The year 2016 may be described as the year of African elections. Africa's electoral calendar for 2016 included elections in as many as 30 countries, including the semi-autonomous region of Zanzibar (EISA 2016). Of these, 18 were scheduled presidential elections (ISS 2016). Presidential elections were scheduled to be held in Benin, Chad, Cape Verde, Central African Republic, Comoros, Republic of Congo, Democratic Republic of the Congo (DRC), Djibouti, Equatorial Guinea, Gabon, The Gambia, Ghana, Niger, São Tomé and Príncipe, Somalia, Uganda, Zambia and the semi-autonomous region of Zanzibar (EISA 2016). All the scheduled elections were held with the exception of the DRC.

'A review of the electoral events ... [of the] year highlights the manipulation, intimidation and contestation that mar democratisation processes in the continent', even though a few of these elections were conducted in a transparent, free and fair manner (ISS 2016). In many instances, elections were used only as tools for long-serving regimes to enhance their legitimacy rather than to allow for genuine contests to democratically select leadership. These were usually achieved through incumbent rigging of elections or systematically weakening opposition parties through repression and using state resources to gain patronage and consequently an unfair advantage over opposition parties (ISS 2016). A salient example is Equatorial Guinea, where incumbent President Teodoro Obiang Nguema received 99,2 per cent of the votes cast to win another seven-year term (Nguema has been in power since 1975). In Djibouti, the incumbent Omar Guelleh, who has been in power since 1999, received 87 per cent of the votes to win another term of office after term limits were revoked in 2010 (ISS 2016).

The elections in Uganda were characterised by the usual tactic of the incumbent National Revolutionary Movement (NRM) government's intimidation of the main opposition leader, Dr Kizza Besigye, of the Forum for Democratic Change (FDC) through numerous arrests and the disruption of public campaigns and protests under the guise of maintaining public order. The electoral process was further marred by delays in delivering polling material, which led to a delay of almost four

hours in the opening of polling stations in mainly opposition strongholds. In the end, the incumbent Yoweri Museveni of NRM was declared winner with 60,62 per cent of the valid votes cast as compared to the FDC's Dr Kissa Besigye's 35,61 per cent (Electoral Commission of Uganda 2016).

Presidential elections in the Democratic Republic of the Congo (DRC) to determine the successor of Joseph Kabila, whose term was coming to an end on 19 December 2016, was scheduled for 27 November 2016 but was rescheduled to April 2018. This move was viewed by opposition parties as an attempt by the incumbent President to remain in power beyond the constitutionally-allowed term, and possibly to give him the opportunity to manipulate a constitutional amendment to extend his term of office (Sow 2016; Aljazeera 2016). This announcement was greeted by protests which were violently quelled by law enforcement officials, leading to the death of between 17 (official government figure) and 50 (account of opposition groups and the UN) people (Sow 2016; Aljazeera 2016; Burke 2016). A dialogue brokered by the African Union (AU) brought in a less-known opposition leader, Samy Badibanga, as Prime Minister in a power-sharing arrangement, with the main opposition party, Rassemblement, boycotting the dialogue. The situation in the DRC is particularly disturbing as these elections presented the opportunity for a peaceful and democratic change of government for the first time. However, this opportunity to consolidate democracy and the rule of law in the DRC seems to have been sacrificed at the altar of political greed on the part of the incumbent President.

In The Gambia, '[t]he period leading to the 1 December 2016 presidential election was characterised by deep political and security tensions, resulting from the face-off between government and opposition parties' (Odigie 2017). Protests for political reforms by the main opposition United Democratic Party (UDP) between 14 and 16 April 2016 led to several arrests, including that of the leader of the UDP, Ousainou Darboe. Three people, including Solo Sandeng, the youth leader of the UDP, allegedly died in custody. Adama Barrow became leader of the UDP subsequent to the detention of Ousainou Darboe.

An Economic Community of West African States (ECOWAS) pre-election fact-finding mission identified as challenges that could hamper free and fair elections in The Gambia the denial of state media to the opposition; the intimidation and arrest of opposition leaders; and a lack of press freedom. ECOWAS, therefore, declined to send election observers for the second consecutive time, citing the lack of a political environment conducive to guaranteeing free and fair elections (Odigie 2016; BBC News 2016). It therefore, came as a surprise when on 2 December 2016 the opposition coalition candidate, Adama Barrow, was declared the winner of the elections by the Independent Electoral Commission. 'An even greater shock was the spontaneous acceptance of defeat by Jammeh who, based on his track record of unpredictability, surprised his most ardent critics by conceding election defeat' (Odigie 2016). However, Jammeh a week later withdrew his concession and challenged the electoral results citing irregularities. He subsequently resorted to declaring a state of emergency in a bid to exercise his emergency powers to retain power. An attempt to use the Supreme Court to stifle the electoral results proved futile since there was no properly-constituted Supreme Court to adjudicate on the petition challenging the elections. Jammeh had dismissed two judges of

the Supreme Court and had failed to appoint replacements for more than a year, leaving the Court without quorum (Jahateh & Jawo 2016).

The Authority of Heads of State and Government of ECOWAS (Authority) condemned these machinations and urged Jammeh to accept the result of the polls. It also undertook to take all necessary measures to strictly enforce the results of the elections. The Authority further requested the AU and United Nations (UN) to support its decision and assist in the mediation of the situation, including the provision of technical assistance (ECOWAS 2016). Both the AU and the UN Security Council, who decried attempts to circumvent the election results, supported the ECOWAS position. The AU specifically declared that it would stop recognising Jammeh as President of The Gambia if he refused to hand over power. In the end, it took the strong will of ECOWAS, which vowed to enforce the elections results including the threat of use of force as a last resort, with the support of the AU and UN Security Council to get Jammeh to hand over power and go into exile in Equatorial Guinea on 21 January 2017.

The Gambian election impasse illustrates the important role regional economic communities can play in enhancing democracy and respect for human rights in Africa. ECOWAS has during the past decade shown a renewed commitment towards entrenching democracy and zero tolerance for election manipulations by incumbents in accordance with its Protocol on Democracy and Good Governance. In a similar situation in 2010, when Laurent Gbagbo attempted to hold onto power in Côte d'Ivoire after losing elections to the opposition's Alassane Ouattara, ECOWAS rejected the manipulations and refused to accept the idea of a power-sharing government, which was floated by the AU. With the backing of the UN and France, ECOWAS removed Gbagbo through military intervention (Penar 2016). This consistency in upholding the results of free and fair elections is to be encouraged if the democratisation project in Africa is to make progress.

One important lesson which can be learned from the ECOWAS response in The Gambia is the coherence with which intervention was co-ordinated with the AU and the UN Security Council. While ECOWAS took the lead role in the intervention, it all along called on the support of the AU and the UN Security Council. This coherent and co-ordinated support from the three entities, with a consistent message, was crucial in the success of the intervention. This collaboration between ECOWAS, the AU and the UN must be encouraged and emulated by other regional economic communities (Odigie 2017). Such collaboration has the potential to provide additional international support for intervention, including the mobilisation of relevant UN assets, if necessary (Penar 2016).

Zambia's 2016 elections are discussed in much detail here because of the many lessons it bodes both for the conduct of elections and the settlement of electoral disputes by the judiciary. The polls covered the election of the President, parliamentarians, mayors and a referendum on the Bill of Rights. The referendum was important as, among others, it was aimed at including additional provision on civil and political rights and new provisions on justiciable economic, social and cultural rights (Lumina 2016). The elections were marred by an abuse of incumbency, with the ruling government closing down the only opposition newspaper – *The Post* – blocking many campaign attempts by the opposition United Party for

National Development (UPND) through the courts and the use of party cadres (Resnick 2016). Violent clashes between the supporters of various political parties forced the electoral commission to suspend electoral campaigns in the affected areas for ten days (EISA Election Observer Mission 2016). Opposition parties also complained that the Public Order Act was regularly used by the police to restrict their rallies, especially in instances where the incumbent President was holding election-related activities in the same district or province (SADC Election Observation Mission 2016). The elections were concluded with mixed results.

While the majority of the voters supported the adoption of the reforms proposed by the referendum, the referendum failed as less than 50 per cent (44,44 per cent) of eligible voters actually voted in the referendum, even though the general voter turnout was 56,45 per cent. The failure of the referendum has been attributed to, among others, 'concerns relating to the framing of the referendum question, the timing of the referendum and the lack of awareness of the proposed changes among the general public' (Lumina 2016). The question put to the electorate was: 'Do you agree to the amendment to the Constitution to enhance the Bill of Rights contained in Part III of the Constitution of Zambia and to repeal and replace Article 79 of the Constitution of Zambia?' This question conflated two issues: the amendment of the Bill of Rights and the amendment of the amendment clause of the Constitution (Lumina 2016). One commentator warned that a failure to simplify the referendum question would lead to a failure of the referendum (Open Zambia 2016), which warning the ruling government ignored. Civil society had also warned that more time was needed to sensitise the electorate about the implications of the referendum, but this was also ignored by the government. The limited time for sensitisation deprived the electorates of the right to be sufficiently informed about the complexities relating to the referendum, which may have led many of them to abstain from voting in the referendum (Lumina 2016).

For an important referendum such as the one under discussion, which would have enhanced the constitutional protection of human rights, it was perhaps imperative that the referendum should have been held independent of the general elections. 'Referendums tend to be successful in circumstances where there is bi-partisan support for proposed changes' (Lumina 2016), especially in situations where there are almost equally-divided views on the issues at stake. Combining the referendum with the general elections essentially meant that the political divisions associated with the general elections became transposed on the referendum, with many viewing 'the entire constitutional reform process as a project of the ruling Patriotic Front (PF) rather than a national project' (Lumina 2016). A successful referendum to incorporate these important human rights provisions in the Constitution will require bi-partisan support, sufficient voter education and the simplification of the relevant questions.

As noted above, unlike the referendum, the general election received a voter turnout of 56,45 per cent, with the incumbent Edgar Lungu of the PF receiving 50,35 per cent of the votes, compared to 47,67 per cent of the opposition UPND's Hakainde Hichilema, according to the electoral commission. Consequently, Edgar Lungu was declared President-elect. The results were challenged by the UPND, which alleged collusion between the electoral commission and the PF (BBC 2016). Hakainde Hichilema subsequently approached the Constitutional Court to challenge

the election results and the declaration of Edgar Lungu as President-elect.¹ New Constitutional amendments introduced in January 2016 require that the petition challenging the presidential elections be filed within seven days of the declaration of results, and the Constitutional Court is required to 'hear an election petition filed ... within fourteen days of the filing of the petition'(art 101(5) Constitution). The amendment, following Kenya's example, was aimed at rectifying the situation where petitions had taken many months or even years to adjudicate, leading to legal uncertainties or even prejudicing the Court's mind in favour of the incumbent who would usually continue in office until the finalisation of the petition (Owiso 2016). The amendment was to provide legal certainty which was imperative because, under the new amendments, the President-elect could be sworn in only after the petition had completely been disposed of by the Court.

The petition was filed on 19 August 2016, which meant that the Court had to give its judgment on 2 September 2016 if a strict literal interpretation of article 101(5) was to be adopted. This strict timing, coupled with the unrealistic provisions of the Rules of the Constitutional Court, put the Court in an awkward position. 'The rules require the respondent to file an answer to the petition within 5 days of service and the petitioner to reply within [5] days of being served with the answer.' This is followed by the discovery of documents and status conference which must be completed before the commencement of the hearing. 'These preliminary processes, even if rushed, consume a better part of, if not the entire, 14 days' (Owiso 2016). Unfortunately, both the petitioners and the Court seem to have been oblivious of these Rules. Consequently, by the time the preliminary processes were completed, it was already 2 September 2016 – the last of the 14 days. Had the Court been proactive enough to anticipate this potential challenge, it could have overruled its Rules in favour of the supremacy of the Constitution and abridged the timelines to ensure sufficient time for hearing and judgment (Owiso 2016).

This challenge seemed to have dawned on the Court only when the respondents on 2 September 2016 raised an objection to continuing the proceedings beyond that day. The Court adjourned to 5 September 2016 to consider the objection of the respondents. In a rather strange turn of events, when the Court returned on 5 September 2016, 'Judge Sitali ... announced that three of the five judges have met over the weekend and have decided to reverse the unanimous decision' (Centre for Human Rights 2016). The new ruling by the three judges was to the effect that the 14 days prescribed for hearing the petition had lapsed on 2 September 2016, and consequently struck out the petition. The sequence of events raised the suspicion that extra-judicial pressure may have influenced the decision of the three judges.

There are several ways in which the Court could have resolved this petition without allowing itself to face this controversy and disrepute. First, the Constitution only requires the Court to 'hear' the case in 14 days. Given the high political stakes, this could have generously been interpreted to mean that the Court was only required to commence hearing the application within the stipulated 14-day period, which would

1 *Hakainde Hichilema & Another v Edgar Lungu & 2 Others.*

have given it ample time to continue the hearing and deliver a judgment once both parties had presented their case. In order not to overly prolong the case, given that the constitutional amendment was aimed at ensuring the speedy disposal of the petition, it would be imperative that the Court would impose firm timelines to ensure the speedy adjudication of the case. This would have ensured that substantive justice was done rather than relying on a technicality to defeat the ends of justice, as was argued in the opinion of the dissenting judges (Owiso 2016).

In the alternative, if the Court was so minded to stick to a strict interpretation of the 14-day 'hearing' rule, the Court had two options. First, it could have interpreted 14 days to mean '14 working days', which would exclude weekends and public holidays. This would have given the Court up to 8 September 2016 to consider the merits of the case and deliver judgment on the substance (Owiso 2016). In the instance that the Court would consider 14 days to include weekends and public holidays, it was imperative for the Court to at least warn the parties and their lawyers that it would deliver its judgment on the fourteenth day, failing which it would dismiss the case for want of prosecution. This would perhaps have prompted the petitioners to apply for an abridgment of time for the filing of pleadings in order to ensure sufficient time for the hearing and judgment. Even without an application for abridgment by the petitioners, it is submitted that the Court had an obligation to judicially manage the proceedings in such a manner as to would enable it to deliver judgment within the stipulated period. This is exactly what the Supreme Court of Kenya did in the case of *Raila Odinga v Independent Electoral and Boundaries Commission*,² when it ruled that the petitioners were not expected to file a reply to the respondents' answer to his petition, in the interests of time (Owiso 2016).

The point that strongly comes to fore from this case is that election petitions are not only legal disputes, but also political disputes that could have repercussions for peace and stability. Consequently, in as much as it is important to ensure that presidential election petitions are speedily dealt with, it is equally important that the judiciary is given ample time to effectively consider the opposing claims and deliver well-reasoned judgments. Rushing the judiciary may result in an underdeveloped consideration of issues and, hence decisions, or even perhaps the tendency for courts to simply confirm the declared results since they do not have sufficient time to make well-informed decisions.

However, it was not all despondency for the electoral calendar of 2016 as a number of free and fair elections were recorded. Benin's Yayi Boni stepped down after his two terms and handed power over to Patrice Talon who was elected President in March 2016. São Tomé and Príncipe's Manuel Pinto da Costa, who served as President from 1975-1991 and 2011-2016, was defeated by former Prime Minister Evaristo Carvalho after the former, who obtained only about 24 per cent of the votes in the first round of voting, boycotted the run-off elections (ISS 2016).

In Ghana, authorities intimated the possibility of an internet shutdown during elections. However, this idea was soon dispelled because of public criticism of the attempt to shroud the electoral process in secrecy and mar

2 Supreme Court of Kenya 2013.

an electoral process that has earned the commendation of all over the past two decades. This marked another sign of maturity of the Ghanaian democratic process and the willingness of successive administrations to conduct free, fair and transparent elections.

In another mark of democratic maturity, the incumbent President of Ghana, John Dramani Mahama, who was seeking re-election, promptly conceded defeat when the Electoral Commission of Ghana announced the main opposition's candidate, Nana Akufo Addo, as the winner of the 7 December elections. The setting up of a joint transition team, made up of members of the outgoing government and the newly-elected government, to peacefully and seamlessly hand over the administration of the state, followed a few days later. Ghana once again proved itself worthy of being described as a beacon of hope for democracy in Africa.

2.2 Local elections in South Africa

While national elections (presidential and parliamentary) usually take the centre stage of discourse on democratisation in Africa, local (municipal) elections also provide an important avenue of ensuring that democratic governance and accountability are brought closer to grassroots level. In this regard, we turn our attention to the municipal elections in South Africa. South African municipal elections led to the ruling African National Congress (ANC) losing in the three biggest cities of Cape Town, Johannesburg and Pretoria and other major cities to the biggest opposition party, the Democratic Alliance (DA). This is further evidence of the dwindling electoral fortune of the famed ANC which led South Africa out of apartheid into democratic governance in 1994. Growing dissatisfaction with slow economic growth, the non-delivery of essential socio-economic services and an increase in youth unemployment has led to growing disaffection for the ruling ANC, especially among the urban middle class and the youth. If the current trend continues, some commentators argue that the 2019 general elections may prove very challenging for the ANC. While this state of affairs clearly is detrimental to the ANC, the growth of opposition parties with its consequent effect on increasing political competition between the parties arguably is good for the democratisation process in South Africa. This has the potential of increasing accountability of the ruling party and improving service delivery, given that there is now the real threat of the ANC losing control of the national government to an opposition party in the near future.

2.3 Electoral management bodies

As discussed above, elections are fundamental to democratic governance. However, electoral processes would only be deemed fair and results accepted if conducted by a fair and impartial electoral management body (EMB). In this regard, the African Court on Human and Peoples' Rights (African Court) was called upon to make a pronouncement on the importance of having a balanced representation of various interests in the constitution of an EMB, especially where representatives of political parties constitute the EMB. The Court dealt with this issue in the case of *Actions Pour la Protection des Droits de L'homme (APDH) v Republic of Côte d'Ivoire* (African Court 2016). The applicant in this case had challenged the composition of the Independent Electoral Commission (IEC) which comprised, among others, representatives of the President; the president of

the National Assembly; the Minister in charge of Territorial Administration; and the Minister of Economy and Finance, as ‘creating unequal treatment in the form of over-representation in the favour of the President’ (Nyarko & Jegede 2017). According to the applicant, this was in violation of the respondent’s obligation to establish an independent and impartial EMB and the right to equality and equal protection of the law contrary to provisions of the African Charter on Human and Peoples’ Rights (articles 3 and 13(1) and (2)); the African Charter on Democracy, Elections and Governance (articles 10(3) and 17(1)); the ECOWAS Democracy Protocol (article 3); the Universal Declaration of Human Rights (article 1); and the International Covenant on Civil and Political Rights (ICCPR) (article 26). The African Court held that, although international law does not prescribe any exact characteristics of an independent and impartial EMB, an EMB would ‘be deemed independent if “it has administrative and financial autonomy; and offers sufficient guarantees of its members’ independence and impartiality”’ (Nyarko & Jegede 2017). Consequently, the Court held that ‘the imbalance in representation in favour of the ruling coalition amounted to a violation of its obligation to establish an independent and impartial electoral management body’, which also affects the right to freely participate in public affairs and the right to equal protection of the law. The respondent state was ordered to amend its laws to conform with the relevant international instruments accordingly (African Court 2017; Nyarko & Jegede 2017).

The judgment in this case is important for a number of reasons, two of which are highlighted here. First, it offered the Court the opportunity to pronounce itself on what constitutes a ‘human right instrument’ in terms of article 3(1) of the Court’s Protocol. This became necessary as the Court had to satisfy itself whether the African Charter on Democracy, Elections and Governance and ECOWAS Democracy Protocol qualified as ‘human rights instruments’ in terms of article 3(1) of the Court’s Protocol. The Court reasoned that in order to ascertain whether a treaty is a human rights instrument, recourse has to be had to the purpose for which it was adopted. A treaty, therefore, would qualify as a human rights instrument if it contains ‘express enunciation of the subjective rights of individuals or groups of individuals, or ... mandatory obligations on state parties for the consequent enjoyment of the said rights’. Consequently, the Court held that these two instruments were human rights instruments since they place an obligation on member states to establish an independent and impartial EMB, which is essential to the enjoyment of the right to freely participate in the governance of one’s country, either directly or through elected representatives guaranteed in the African Charter on Human and Peoples’ Rights. This ‘broad and inclusive interpretation’ on what constitutes a human rights instrument and the Court’s willingness to accept the two instruments as human rights instruments, even when they only indirectly protect other fundamental human rights, ‘marks a positive improvement in the Court’s jurisprudence’. This provides the complainants with the opportunity to rely on as many instruments as possible to give a broader meaning to the relevant human rights they seek to protect (Windridge 2017).

This judgment is an important reminder that African states need to establish impartial and independent EMBs if free and fair elections are to be achieved. This is an important step towards the struggle for

democratisation on the continent. It can only be hoped that this case will serve as a precedent to other African states to ensure that their EMBs are established in accordance with internationally-recognised principles of independence and impartiality.

3 Accountability for mass atrocities

Accountability for massive violations in sub-Saharan Africa remains a challenge. While high-intensity conflicts and wars in Africa have been on the decline since 2015, political violence appears to be on the increase with a resulting increase in civilian targeting, usually by state forces or militias (Aucoin 2017). In the majority of instances these violations occur with impunity, as victims are left without redress. AU efforts to set up a continental court with criminal jurisdiction to prosecute perpetrators of the most egregious violations of international law did not make much progress as the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted in 2014, has by the end of 2016 still remained unratified by member states of the AU.

Notwithstanding this situation, the AU has continued its onslaught for the collective withdrawal of African member states from the International Criminal Court (ICC) and, pending such withdrawal, non-co-operation with the ICC concerning warrants issued for the arrest of Sudanese President Omar Al-Bashir (Nyarko & Jegede). This call yielded some results as South Africa (Nichols 2016), The Gambia (Withnall 2016) and Burundi (HRW 2016) withdrew their ratification of the ICC Statute. Burundi's withdrawal appears to have been triggered when the UN Human Rights Council passed a resolution to establish a commission of enquiry to investigate the human rights violations committed since violence broke out in April 2015, to identify the perpetrators and to make recommendations on how to hold them accountable (HRW 2016). The Gambia has subsequently re-joined the ICC, following the defeat of former strongman Yaya Jammeh and the installation of Adam Barrow as President in January 2017 (Klepper 2017). South Africa has also revoked its withdrawal following a finding by the Pretoria High Court that the withdrawal was unconstitutional as it had not been preceded by the approval of parliament (*Democratic Alliance v Minister of International Relations and Co-operation & Others (Council for the Advancement of the South African Constitution Intervening 2016)*).

Another issue of concern regarding accountability for massive human rights violations relates to Rwanda's withdrawal of its declaration allowing individuals and non-governmental organisations (NGOs) direct access to the African Court. Rwanda's principal reason for withdrawing from direct access to the African Court was that the Court had granted audience to an individual who had been convicted of serious crimes (genocide) by domestic courts (Centre for Human Rights 2016). As the African Court later confirmed, states generally have the discretion to withdraw from a treaty or revoke a declaration provided the right procedures are adhered to, unless the relevant treaty expressly proscribes withdrawal or the treaty reasonably so implies (*Ingabire Victoire Umuhoza v Republic of Rwanda*). As has been observed elsewhere,

what is disturbing about Rwanda's withdrawal is the reason given as justification. Rwanda's justification assumes that there are categories of persons who should not be able to have access to the Court because of crimes they are alleged to have committed. This kind of reasoning not only is wrong as it is discriminatory, but also fundamentally goes against the very mandate of the Court, which is to ensure access to justice in the protection of human rights irrespective of the designation of the person(s) seizing its jurisdiction. Rwanda's withdrawal and subsequent refusal to participate in further proceedings also undermine efforts to strengthen African institutions to ensure accountability for human rights violations, and cast further doubt on the commitment of African states to ensure the effectiveness of African human rights institutions. Rwanda's actions further set a bad precedent for member states to withdraw their declaration whenever they disagree with the Court on any matter. This has the potential to weaken the Court and may possibly lead to self-censure by the Court in order not to get involved in confrontations with member states (Nyarko & Jegede 2017).

Perhaps more importantly, Rwanda's actions coupled with the hesitation with which member states have made declarations allowing individual access to the Court (by the end of 2016 only seven member states have allowed direct access by individuals and NGOs) speaks to the lack of political will on the part of African states to ensure that victims of human rights violations have access to a remedy. In addition to the reluctance of member states to ratify the Protocol establishing the criminal chamber of the African Court (no member state has ratified it), this should remind supporters of the 'collective withdrawal' by African states from the ICC of the accountability vacuum that would be created if states withdrew.

The most outstanding positive event concerning accountability for massive violations during 2016 relates to the conviction and sentencing of the former Chadian dictator, Hissène Habré, by the Extraordinary African Chambers (EAC) for crimes committed between 1982 and 1990 when he was President. The EAC was established in 2012 through an agreement between the AU and Senegal to try Habré and his accomplices after several failed attempts by Chadian, Senegalese and Belgian courts to prosecute Habré for these crimes (Nyarko & Jegede 2017). A commission of inquiry, established in 1990 by the Chadian government after the overthrow of Habré, determined that the regime had been responsible for mass atrocities including 'more than 40 000 victims, more than 80 000 orphans, more than 30 000 widows, more than 200 000 people left with no moral or material support as a result of this repression' (Kritz 1995; Adjovi 2013; Nyarko & Jegede 2017). The jurisdiction of the EAC covers war crimes, genocide, crimes against humanity, and torture committed by the Habré regime between 1982 and 1990, and any individual who participated in the commission of the crimes (EAC Statute 2012). Even though the EAC was established by an agreement between Senegal and the AU, it was embedded in the Senegalese judiciary rather than as an independent international organisation akin to the International Criminal Tribunal for Rwanda (ICTR) or the Special Court of Sierra Leone.

Habré was charged with war crimes, crimes against humanity and torture. The EAC convicted Habré of 'crimes against humanity of rape, sexual slavery, murder, summary execution, kidnapping followed by enforced disappearance, torture and inhumane acts' and 'war crimes of murder, torture, inhumane treatment and unlawful confinement committed against prisoners of war' (*Ministère Public v Hissèin Habre* 2016; Pérez-León-Acevedo 2016). The EAC sentenced Habré to life

imprisonment and awarded reparations of USD \$33,880 to each victim of rape and sexual violence; USD \$25,410 to each victim of arbitrary detention, torture and prisoners of war; and USD \$16,935 to each indirect victim (Amnesty International 2017). Habré immediately appealed his conviction to the Appeal's Chamber of the EAC, which overturned the rape conviction but confirmed all the other convictions, including the life sentence, in its appeal ruling of 27 April 2017 (Amnesty International 2017). Habré's trial and conviction are an 'an important and promising example of zero tolerance to impunity in Africa and also bring justice to victims of serious human rights violations constitutive of international crimes' (Pérez-León-Acevedo 2016).

The Habré trial has set a number of important milestones in international criminal justice. It marks the first time the head of state of a country has been successfully tried and convicted by the domestic courts of another state for serious human rights violations, reinforcing 'the principles of subsidiarity of international tribunals and the complementarity between national courts and international tribunals' (Pérez-León-Acevedo 2016). It is also the first time courts of an African country have exercised universal jurisdiction over crimes committed in another country. Further, this was 'the first time the AU has been involved in the establishment of an internationalised criminal court to successfully investigate, prosecute and convict perpetrators of serious human rights violations' (Nyarko & Jegede 2017; Pérez-León-Acevedo 2016). The Habré case is an important reminder that accountability is achievable if sustained pressure is brought to bear on the relevant authorities.

4 LGBTI rights

The rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people remained a thorny topic in Africa during 2016. While no new legislation was adopted by an African state criminalising LGBTI rights, most African states continued to oppose the protection of the rights of LGBTI people. The most notable aspect of this opposition during 2016 concerns the adoption of the resolution appointing the Independent Expert for protection against violence and discrimination based on sexual orientation and gender identity (SOGI), which was not supported by the affirmative vote of any African state. Even though the resolution was passed and Vitit Muntarbhorn was appointed as the Independent Expert, the African Group subsequently petitioned for the suspension of the mandate, claiming that the appointment of the Independent Expert on SOGI rights was an 'attempt to focus on certain persons on the grounds of their sexual interests and behaviours, while ignoring that intolerance and discrimination regrettably exist in various parts of the world, be it on the basis of colour, race, sex or religion, to mention only a few' (African Group 2016). The African Group also claimed that attention was being given to SOGI rights 'to the detriment of issues of paramount importance such as the right to development and the racism agenda' (African Group 2016). The claims of the African Group contained many inaccuracies, some of which are briefly highlighted below.

It is trite that the UN system of special procedures consisting of working groups, special rapporteurs and independent experts cover a broad range of thematic and country-specific mandates – usually targeted

at vulnerable groups and countries at risk of massive human rights violations. There are currently 44 thematic and 12 country-specific mandates, several of which cover the issues raised by the African Group. Notably, the mandate of Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance was established in 1993 (UN Commission on Human Rights 1993), while that of the Special Rapporteur on the Right to Development was established in 2016 (Human Rights Council 2016). These are issues which the African Group claimed were being neglected.

In addition, the resolution gave the Independent Expert a narrow mandate to focus on 'violence and discrimination against persons on the basis of their sexual orientation or gender identity' (Human Rights Council 2016) and not a general mandate to promote SOGI rights *per se*. The right to non-discrimination is enshrined in all UN human rights instruments and, therefore, cannot be said to be a new right or a matter that should even raise controversy. Indeed, the obligation on states to protect the right to life of LGBTI persons has been echoed by the UN General Assembly in several resolutions (UN General Assembly 2014; UN General Assembly 2012; UN General Assembly 2010; UN General Assembly 2008; UN General Assembly 2006; UN General Assembly 2004; UN General Assembly 2002). Even in countries where same-sex sexual activity or relations are criminalised, it cannot reasonably be argued that LGBTI persons, even if suspected or accused of contravening the criminal laws, should not be protected against violence. Indeed, the Human Rights Committee has proclaimed in General Comments, communications and Concluding Observations that corporal punishment of any prisoner amounts to cruel, inhuman and degrading treatment or punishment (Human Rights Committee 1992; Human Rights Committee 2004). It stands to reason that if convicted persons cannot be subjected to violence (corporal punishment) as a form of punishment, then suspects or accused persons should similarly be protected against all acts of violence, irrespective of their sexual orientation. The idea that protecting LGBTI persons against violence and discrimination would bring about division clearly is untenable as states have an obligation to protect all persons within their jurisdiction against these human rights violations.

One should also not lose sight of the fact that the AU's primary human rights institution, the African Commission on Human and Peoples' Rights (African Commission), which exercises oversight jurisdiction over all the members of the African Group with respect to the realisation of human rights, passed a resolution in 2014 condemning violence against persons based on their real or perceived sexual orientation or gender identity (African Commission 2014). The resolution further urge member states 'to end all acts of violence and abuse, whether committed by state or non-state actors, including by enacting and effectively applying appropriate laws prohibiting and punishing all forms of violence' committed against persons on the basis of their real or perceived sexual orientation or gender identity (African Commission 2014). This is the very purpose for which the Independent Expert on SOGI rights was appointed. It is, thus, at best inaccurate that the Human Rights Council was campaigning for a new agenda on SOGI rights, which is within the exclusive jurisdiction of states.

The most notable disappointment in this impasse was South Africa, the perceived pioneers of constitutional protection for LGBTI rights on the

continent, which country appears to have eschewed on its commitment to the protection of LGBTI rights. South Africa has previously been instrumental in the struggle for LGBTI rights at the international level, spearheading the passage of the first Human Rights Council resolution for the protection of LGBTI rights in 2011 – South Africa and Mauritius are the only African countries that supported the resolution (Jordaan 2017; Nepaul 2016). South Africa supported a similar effort in 2014, at which the Human Rights Council mandated the Office of the High Commissioner for Human Rights to conduct a study on violence and discrimination based on sexual orientation and gender identity, citing its constitutional obligation to reduce discrimination and violence against LGBTI persons (Benjoy 2016; Human Rights Council 2014). Therefore, it is disappointing that South Africa abstained from voting on the Human Rights Council resolution that authorised the appointment of an Independent Expert on SOGI rights, requesting further discussion on the legality of the mandate (Alvelius, Oksman & Patanen 2016). South Africa missed an opportunity of putting human rights at the core of its foreign policy.

At the domestic level, the South African Human Rights Commission hosted the first regional seminar on 'Violence and Discrimination against Persons Based on Sexual Orientation, Gender Identity and Expression' in March 2016 (Lawyers for Human Rights 2016). Importantly, the Deputy Minister of Justice expressly encouraged other African countries to put an end to the discrimination and violence inflicted on the LGBTI community (Jeffrey 2016). The seminar also culminated in the adoption of the Ekurhuleni Declaration, which addresses issues such as violence and discrimination, health and psychosocial support, legal support and secondary victimisation within the criminal justice system. This event stands in direct contrast to South Africa's posturing before the Human Rights Council and represents an increased willingness by the government to engage in discussions related to the protection of SOGI rights.

On another positive note, the full bench of the Court of Appeal of Botswana on 16 March 2016 delivered its judgment in *Attorney General v Thuto Rammoge & 19 Others (LEGABIBO case)* upholding the 2014 decision of the High Court of Botswana (*Thuto Rammoge & 19 Others v The Attorney-General of Botswana 2014*), which ordered the government to register the organisation known as Lesbian, Gays and Bisexuals of Botswana (LEGABIBO) as a society in accordance with the Societies Act (Southern Africa Litigation Centre 2016). The registration had been refused on grounds that the Constitution did not recognise homosexuals and that the objects of the organisation were incompatible with peace, welfare and good order in Botswana. The High Court ruled that 'there was nothing inherently unlawful in lobbying or advocating for legislative reform to decriminalise same-sex sexual conduct' since lobbying and advocacy are protected by freedom of expression and freedom of association, 'and neither was this incompatible with peace, welfare, and good order' (*LEGABIBO case*). Consequently, the High Court held that the refusal to register LEGABIBO was in violation of freedom of expression and freedom of association, and ordered that LEGABIBO be registered (Legal Grounds III 2017). The Attorney-General appealed to the Court of Appeal, the apex court of Botswana, against this judgment. The Court of Appeal confirmed the decision of the High Court, holding that the refusal

to register LEGABIBO was irrational and unconstitutional as it infringed on the rights to freedom of association and assembly.

The decision of the Court is significant for many reasons, some of which are briefly highlighted. In a region usually characterised by homophobia and violence against LGBTI persons, it is important that the Court recognised that

[m]embers of the gay, lesbian and transgender community, although no doubt a small minority, and unacceptable to some on religious or other grounds, form part of the rich diversity of any nation and are fully entitled in Botswana, as in any other progressive state, to the constitutional protection of their dignity (*LEGABIBO* case).

This emphasises ‘the state’s duty to uphold basic rights and to ensure dignity, tolerance and acceptance for marginalised and unpopular groups’ (Esterhuizen 2016). It is also important that the Court recognised that it is not a crime to be a homosexual, in a country where same-sex intercourse is criminalised. This is an important distinction in separating the sexual orientation or gender identity of individuals from the sexual act.

It is particularly important that the Court recognised that LGBTI persons and their allies have the right to associate and advocate law reform, including the decriminalisation of same-sex intercourse. The *LEGABIBO* judgment adds to the steadily-growing number of cases on the African continent that uphold the rights of LGBTI persons to dignity, freedom of expression, association and assembly (see *Eric Gitari v Non-Governmental Organisations Co-ordination Board & 4 Others* 2015). The judgment provides significant impetus for the advancement of the right of LGBTI persons in Africa, and illustrates the importance of an independent judiciary in the protection of vulnerable groups in society (Esterhuizen 2016).

Finally, the judgment is ‘particularly important because it lays down an important precedent, by a respected apex court, whose reasoned judgment can be cited by advocates and organisations elsewhere on the African continent’ and could ‘potentially opens the way for the registration of similar NGOs in other countries’ (Centre for Human Rights (2b) 2016).

5 Women’s rights

The AU named 2016 the African Year of Human Rights with a particular focus on women’s rights. The year 2016, therefore, was an important year for women’s rights in Africa because, in addition to the AU declaration, it also marked the first year of the implementation of the 2030 Sustainable Development Goals which have significant implications for women’s rights. One would have expected that member states would, in keeping with this and their obligations under various AU human rights treaties, including the African Charter and its Protocol on the Rights of Women in Africa (African Women’s Protocol), adopt relevant legislation and programmes to give effect to women’s equality and other relevant women’s rights issues. However, reality did not reflect this optimistic view. Conflict and political violence in Burundi, Mali, Somalia, Central African Republic, South Sudan, Somalia, Northern Nigeria and the Eastern DRC continued to expose women and girls to, among others, sexual violence, human trafficking and slavery (Lwabukuna 2016).

In March 2016, the Nigerian Senate was presented with an opportunity to enact legislation on gender equality through the introduction of the Gender and Equal Opportunities Bill. The Bill sought to eliminate discrimination and violence against women and to protect women's equality in politics and public life, education, employment and inheritance, among others (Bagenal 2016; Guilbert 2016). However, the Bill was rejected by a majority of the members of the male-dominated Senate (only seven out of the 109 members of the Senate are women), who mostly cited religion and culture as the basis of their opposition. Following strong criticism from civil society and the general public, a revised version of the Bill, with less liberal provisions, was reintroduced in June 2016. The new Bill, for example, removes (a) the rights of women to confer their citizenship on their children; (b) their rights to acquire property during marriage; and (c) the mandatory minimum age of marriage, which had been set at 18 years in the previous Bill (Ogbonna 2016). The rejection of the Bill is a setback to Nigeria's efforts to meet its obligations under various human rights instruments, most notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Women's Protocol and the Agenda 2030 Sustainable Development Goals (SDGs). The rejection of the Bill also highlights the continued influence of patriarchy on the lives of women and, consequently, the necessity to ensure that more women participate in public life, especially on issues that directly affect their lives. This reinforces the need for the adoption of gender equality laws that provide important safeguards for affirmative action to ensure that women increasingly are equally represented in all spheres of public decision-making fora, including national legislatures.

In South Africa, many women reported that the Department of Home Affairs had changed their maiden surnames to their husbands' surnames without their consent. This had caused difficulties to women as the names on their identification cards or passports did not match the official government records after the unauthorised amendments. In some instances, this led to some women being denied access to their bank accounts and other services (Falaga 2016). The assumption that women must necessarily take the surnames of their husbands, even where they have expressly indicated otherwise, is a flagrant abuse of women's rights to autonomy and dignity, and evidences the continuous treatment of women as minors that are incapable of making relevant decisions for themselves. It took a public outcry and threats of court action for the Department of Home Affairs to reverse the unauthorised changes and to confirm that it was training its staff to 'ensure that staff biases and prejudice were eliminated in the capturing of information on the National Population Register' (*Africadaily* 2016).

On a positive note, the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) facilitated the amicable settlement of a claim instituted by the Institute for Human Rights and Development in Africa (IHRDA) against Malawi concerning childhood, which was defined by article 23 of the Malawian Constitution as comprising anyone below the age of 16 (*Institute for Human Rights and Development in Africa (IHRDA) v The Republic of Malawi (IHRDA case)*). IHRDA complained that this provision was in breach of the African Charter on the Rights and Welfare of the Child (African Children's Charter), which defines a child as anyone below 18 years (article 2) and

requires member states to adopt legislative and other measures to give effect to this obligation (article 1). The complainant further argued that this amounted to discrimination against children between 16 and 18 years who are left without protection, contrary to article 3 of the African Children's Charter (IHRDA case 2016). In a swift show of its commitment to protecting the rights of children, the Malawian authorities entered into an amicable settlement agreement with the IHRDA, which was subsequently adopted by the African Children's Committee. Malawi has subsequently amended the relevant constitutional provision to increase the age of childhood from 16 to 18 years (Nyarko & Jegede 2017) and increased the aged of marriage from 15 (with parental consent) to 18 years for both boys and girls (Girls Not Brides 2017; UN Women 2017) to make the Constitution compliant with the African Children's Charter. While this decision is an important win for children's rights in Malawi, generally, and, arguably, in Africa because of its jurisprudential effects, it is a particular important win for the rights of the girl child. The problem of child marriage remains a huge challenge in many African countries and disproportionately affects girls. Malawi has one of the highest rates of child marriage in the world, with about 46 per cent of girls married before they turn 18 (Girls Not Brides 2017). While socio-cultural and economic factors may be the biggest factors influencing the endurance of child marriage on the continent, the existence of legal provisions such as this, which allows children to legally become adults earlier, emboldens the performance of child marriages, as it legally enables children to get married, therefore leaving law enforcement and advocacy groups with little recourse. The removal of legal barriers and the harmonisation of domestic laws with international treaty obligations, therefore, are an important step in the fight against child marriage, which in many ways violates the rights of the girl child.

In another case before the African Children's Committee with important implications for the rights of women, the African Centre of Justice and Peace Studies (ACPJS) and People's Legal Aid Centre (PLACE) challenged the decision of Sudan to revoke the citizenship of a young Sudanese woman who had been born to a Sudanese mother and a South Sudanese father (*African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v The Government of Republic of Sudan*). The sole basis for the revocation of citizenship was that her surname indicated that her father was from South Sudan. Sudan's Nationality Act of 1994 (as amended in 2006 and 2011) allows Sudanese men to automatically pass on their citizenship to their children at birth (sections 4(1)(b) and 4(2)), but children born to Sudanese women have to apply for citizenship (section 4(3)). This is despite the fact that the country's interim Constitution of 2005 provides that 'every person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship' (UNHCR 2014). This clearly amounts to discrimination against women regarding the ability to transfer their citizenship to their children on an equal basis with men, in addition to violating the rights of children to nationality. The Committee ruled the case admissible, but is yet to render its decision on the merits of the case. It is reasonable to expect that the Committee's decision will be in favour of the complainants, given the blatant nature of this discriminatory practice. What would be interesting to see is the extent to which the Committee will interpret the extent of the

state's obligations under the relevant provisions of the African Children's Charter.

Another important win for women's rights on the continent relates to the appointment of judges to the African Court on Human and Peoples' Rights. Even though there were four vacancies to be filled at the 27th ordinary session of the AU Assembly, only two judges – both women (Judges Ntyam Ondo Mengue from Cameroon and Marie Thérèse Mukamulisa from Rwanda) – were elected to the Court. Elections for the two other vacancies were postponed to the 28th session of the AU in January 2017, 'to ensure that only female candidates from the northern and southern regions of the AU were nominated for election' (Nyarko & Jegede 2017). Consequently, in January 2017, the AU Assembly elected two more female judges – Tujilane Rose Chizumila from Malawi and Bensaoula Chafika from Algeria – to fill the remaining vacancies on the African Court (African Court 2017).

This follows an earlier development where the AU deployed an 'all-woman' election observation team to monitor the parliamentary elections of Seychelles in September 2016. This was 'in line with the African Union's commemoration of the African Year of Human Rights with a Special Focus on the Rights of Women' (African Union 2016). The African Court now has a total number of five female judges on the bench as against six male judges. A balanced representation of women on the apex judicial body of the continent is important in drumming home the message that women have equal competencies to men when given the opportunities to excel, on a continent where patriarchal attitudes usually restrict women's participation in public life. It also provides an important avenue to ensure that women's voices and viewpoints are heard and taken into account when important decisions concerning human rights are made on the continent. International courts such as the African Court further enhance their normative legitimacy when their membership is composed of a balanced representation of sexes since representation is an important democratic value (Grossman 2012).

6 Protests, internet shutdowns and access to information

On 1 July 2016, Nigeria co-sponsored a Human Rights Council Resolution on the promotion, protection and enjoyment of human rights on the internet (UN Watch 2016). Among other things, this resolution seeks to 'promote and facilitate ... development of media and information and communication facilities and technologies in all countries'. Particularly, the resolution '[c]ondemns unequivocally measures [by governments] to intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law and calls on all states to refrain from and cease such measures'. This was followed in November by a resolution of the African Commission on a similar topic and particularly relating to internet shutdowns during elections (African Commission 2016).

Access to the internet has not only become an avenue for accessing information and expressing opinion, but also an important tool for democratic discourses. In recent years, the internet has become an important tool in the organisation of protests and strike actions aimed at

putting pressure on repressive regimes for the broadening of democratic spaces. This perhaps was more prominently seen during the Arab Spring, but also in recent times, in Ethiopia, Cameroon, Burkina Faso, Gabon and the DRC. Irrespective of various global and regional interventions, some governments continued to resort to restrictions on access to various social media tools and, in some cases, complete internet shutdowns to silence dissent. In Uganda, Gabon and The Gambia, various social media tools were restricted during elections, while in Ethiopia, Cameroon and the DRC restrictions on social media and, at some points, complete shutdowns of internet access were used, presumably as a means of controlling protests and cutting off ease of mobilisation using the internet.

States have usually contended that this restriction is necessary in some instances 'to quell public protests, violence and misinformation' (Mukeredzi 2016). While these may well be legitimate reasons for restricting internet access, states have in practice mostly used this as a means of quelling dissent rather than as a genuine measure of ensuring public order or safety. Restrictions to internet access violates several human rights, including the freedoms of expression, information and association, and stifles deliberations around important issues. Additionally, it has the potential to be used a means of concealing mass atrocities committed by government agents, making it difficult to document and hold perpetrators accountable.

Not only is the restriction of internet access a violation of human rights and an impediment to democratic discourse, it also has huge financial implications. Research has shown that restricting access to the internet costs many African economies millions of dollars (West 2016). African countries, therefore, should as far as possible refrain from restricting access to the internet, except in the extreme circumstances where there is genuine concern for public order or safety. Restrictions to internet access, thus, should be regulated by legislation that provides for judicial oversight over such executive actions that have the potential of restricting human rights. The internet has become an indispensable part of the lives of many people, and governments, therefore, should feel obligated to improve access rather than restricting it.

7 Conclusion

The landscape of democracy and human rights in sub-Saharan Africa during 2016 presents an uneven spectrum of progress, stagnation and retrogression. The democratisation project has made progress in many countries: Benin, Ghana, São Tomé and Príncipe and South Africa present a representative sample of these countries. After many years of stagnation, The Gambia arguably has set itself up on the path of democratic progress. In the middle of the spectrum are many states that continued to stagnate, with long-serving incumbents manipulating elections to extend their stay in power. Djibouti, the DRC, Equatorial Guinea and Uganda fall into this category. At the other end of the spectrum are states such as Zambia, which appear to have moved from decades of democratic progress into a period of retrogression.

In terms of developments in the African human rights system in support of democracy, the African Court delivered an important decision against

Côte d'Ivoire on the right to political participation and, in particular, the fair composition of electoral management bodies. It is hoped that this decision will influence the manner in which electoral management bodies are composed, not only in Côte d'Ivoire, but across the continent.

As far as accountability for mass atrocities is concerned, the AU's continued onslaught against the ICC started yielding results, with Burundi, The Gambia and South Africa withdrawing their membership of the ICC, even though The Gambia and South Africa have subsequently revoked their withdrawals. This, in addition to Rwanda's withdrawal of its declaration to the African Court's Protocol allowing direct access for individuals and NGOs, highlights the challenges to redress for human rights violations. However, on a positive note, the conviction and sentencing of former Chad dictator Hissène Habré presents hope that there still is a chance for accountability even decades after the commission of mass atrocities.

Even though national executives continue to be an impediment, national courts appear to be increasingly taking on the mantle of protection the rights of LGBTI people, especially in respect of the freedoms of association and assembly.

While the realisation of women's rights continues to face significant challenges at the national level, the AU showed encouraging signs of its commitment to gender equality. This was demonstrated by the deliberate decision of the AU Assembly to only elect female judges to the African Court in order to ensure gender balance on the Court.

Many states have used internet shutdown as a means of silencing dissent, especially during elections and protests. In addition to negatively affecting the rights to freedom of expression, information and association, internet shutdowns have also proven to have substantial financial consequences that could potentially negatively affect the realisation of economic, social and cultural rights. Consequently, states should only restrict access to the internet in extreme situations and, in any event, subject to judicial oversight to ensure that human rights are not negatively affected.

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Selected regional developments in human rights and democratisation during 2016: Referendums on the rise in Europe: Powerful tool of the populists or a step towards increased citizen participation in EU politics?

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Abstract: *This article provides an overview of different types of national referendums held in 2016 in European Union member states ranging from The Netherlands, the United Kingdom, Hungary and Italy, and discusses key political and legal issues arising from these referendums. It also examines the increased occurrence of referendums in the context of wider trends in Europe, such as the rise of populist parties and scepticism towards the EU. It finds that referendums were used as a protest vote, and are becoming more and more exploited as tools by Eurosceptic parties. The article further discusses the advantages and disadvantages of referendums in relation to concerns such as the democratic deficit in the EU and the increased anxiety of member states and their citizens over losing sovereignty to Brussels. There is a risk that referendums on EU-related matters in some cases can do more harm than good for democracy in Europe. Therefore, it is important to also strengthen and promote representative democracy.*

Key words: *European Union; democracy; referendums; populism; Dutch Ukraine-EU Association Agreement referendum; Brexit; Hungarian referendum; Italian constitutional referendum*

1 Introduction

A series of different types of national referendums held in 2016 in European Union (EU) member states, ranging from The Netherlands, the United Kingdom (UK), Hungary and Italy, deserve attention and offer valuable insights into the ongoing development of the European

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integration process. Three of four of these referendums were on EU-related matters, and also the fourth referendum implicitly involved issues affecting all of the EU's people. This article provides an overview of the referendums and discusses key political and legal issues arising from them. It also examines the increased occurrence of referendums in the context of wider trends in Europe, such as the rise of populist parties and scepticism towards the EU. Before moving on to the specifics of the four referendums, we provide a brief overview of the practice and types of referendums in Europe.

Investigating the historical dynamic of EU-related referendums, a recent study has revealed that until early 2017, there have been 60 referendums on EU-related matters. These can be distinguished into four main types: (i) *membership referendums*, including the frequently-used accession referendum and the rarely-deployed withdrawal referendum, as in the UK in 2016; (ii) *treaty revision referendums* generated by all six main rounds of treaty revision (from the Single European Act to the Lisbon Treaty); (iii) *policy referendums* held by EU member states on EU-related policy matters, but not about membership or treaty revisions, as in The Netherlands and Hungary in 2016; (iv) *third-country referendums* held on the topic of European integration by states that are neither EU member states nor candidate states, voting directly on an accession treaty (Mendez & Mendez 2017: 19).

Not surprisingly, most of these referendums were related to membership issues, but the most important ones for the EU have been called for essentially partisan reasons. As of 2016, partisan considerations have alarmingly represented the most common motive for holding EU-related referendums. Coinciding with a bigger trend towards politicisation of the EU, the same study has found that 'there is an accelerating rate of failure associated with EU-related referendums. Since the advent of the Great Recession, failure has become the new norm' (Mendez & Mendez 2017: 11). Emphasis is put on the fact that 'we are entering a new phase in the practice of direct democracy in the EU', which seems as yet vastly uncharted territory. Since the mid-2000s, referendums (and how to deal with them) have come to play an ever more central role in considerations of the EU's constitutional and political future. One of the most contentious aspects of the EU's direct democratic setting is the rise of the *treaty revision referendum*. The Union's rules for changing treaties require unanimous ratification by all member states. Therefore, in the case of a negative referendum such change cannot take place. Nonetheless, other types of referendums emerging in the contemporary setting may be regarded as potentially more challenging. Since 2010 the *policy referendum* has become the most dominant type, representing 75 per cent of referendum activity. In surveying the contemporary policy referendum scene, however, a basic comparison is elaborated. The policy referendums in Denmark (2000 and 2015) and Ireland (2012) were triggered by constitutional factors and took place in countries with ample experience in EU-related referendums. The Greek and Hungarian policy referendums of 2015 and 2016, by contrast, exemplify 'a potentially new type of referendum held for partisan motives', whereas the Dutch 2016 policy referendum constitutes the EU's first citizen-initiated referendum on EU matters with a direct extraterritorial effect, which was used as 'a strategic weapon' to convey Eurosceptic political preferences (Mendez & Mendez 2017: 24-26, 30-31, 54, 58).

2 Dutch Ukraine-European Union Association Agreement Referendum

On 6 April 2016, Dutch voters took to the polls to answer the referendum question ‘Are you for or against the Approval Act of the Association Agreement between the European Union and Ukraine?’ This agreement aimed, *inter alia*, at creating closer political and economic ties between the EU and Ukraine in areas such as economic policy, exchange of information, potential visa-free travel, enhancing political dialogue and close co-operation in all areas of mutual interest, as well as reinforcing the rule of law and respect for human rights and fundamental freedoms. The various parts of the treaty were signed in March and June 2014. It is a so-called ‘mixed’ agreement that includes provisions falling under the competences of both the EU and its member states. Most of the ‘political’ chapters were provisionally applied since November 2014, while the provisional application of the ‘trade’ part commenced in January 2016. In any event, such application could concern only treaty provisions falling under the EU competences, while the Association Agreement would only enter into force in its entirety once ratified by all EU member states. In this regard, all other national parliaments of the member states had ratified the treaty by April 2016, while the entry into force of the Dutch Approval Act (and, therefore, The Netherlands’ ratification of the agreement) was suspended owing to the referendum procedure.

The Dutch House of Representatives (on 7 April 2015) and the Dutch Senate (on 7 July 2015) had already adopted the Approval Act for the ratification of the EU-Ukraine Association Agreement. However, 61,1 per cent of the Dutch referendum voters rejected the Approval Act and thereby the EU-Ukraine Association Agreement; 38,1 per cent voted in favour.¹ With a voter turnout of 32,2 per cent, the minimum requirement for the referendum to be valid (30 per cent) was barely met (BBC News 2016). From a legal point of view, the referendum was advisory, suspensory and non-binding. However, according to the centre-right liberal Prime Minister, Mark Rutte, it was politically impossible for his unpopular government to ignore such results and to ratify the treaty in its current form (Reuters 2016).

Following the referendum procedure, the Dutch government had to adopt a law repealing the Approval Act or a law confirming it. On 30 May 2017, the Dutch Senate adopted the ratification of this agreement. Almost two-thirds of the senators voted for it, while the opposition came mainly from far-left and far-right parties. Ultimately, the EU-Ukraine Association Agreement entered into force on 1 September 2017.

It is worth noting that a negotiation of guarantees regarding the interpretation of the Association Agreement was initiated following the Dutch ‘No’ to the Approval Act. After taking note of the outcome of this referendum and the concerns conveyed by the Dutch Prime Minister during the European Council meeting of December 2016, the Dutch government worked towards the member states adopting a common understanding that this agreement did not open up prospects for Ukraine’s

1 Whether the Dutch rejected only the Approval Act or also the Association Agreement is subject to debate, see Van der Loo 8 April 2008.

membership; that it did not lead to any further financial aid being given to Ukraine; and that it would not lead to any obligation in terms of military assistance.² However, this annexed explanatory declaration did not find the support of Dutch opposition parties campaigning against the treaty, as the latter was not amended.

3 UK-EU membership referendum

On 23 June 2016, the British referendum took place to decide whether the UK should leave or remain in the EU. Fifty-two percent of referendum voters decided in favour of a 'Brexit' from the EU, and 48 per cent voted to remain in the EU. The voter turnout was 72 per cent. In both England and Wales, 53 per cent voted to leave the EU, while in Northern Ireland and Scotland, the majority voted to remain in the EU (56 per cent in Northern Ireland; 62 per cent in Scotland) (BBC News (undated)).

The referendum about whether to remain in or leave the EU, based on a renegotiated membership deal with the EU, was part of an election promise made by then Prime Minister David Cameron and the Conservative Party. After winning the general elections in 2015, the government introduced the European Referendum Act 2015 to parliament, and Cameron started renegotiations with the EU on key issues such as immigration and safeguards for non-Eurozone member states. Cameron was satisfied with the renegotiated UK membership deal and started campaigning for the UK to remain in the EU (Wright 2016). However, the cross-party Vote/Leave campaign proved strong, with Nigel Farage of the rising far-right, Eurosceptic UK Independence Party (UKIP) and then mayor of London, Boris Johnson, of the Conservative Party emerging as figure heads of the Leave campaign.

Following the shocking result of the referendum, Cameron announced his resignation. Boris Johnson, a key figure in advocating Brexit and seen by many as Cameron's successor, announced that he did not intend to run for Prime Minister, and the Conservatives instead elected Theresa May, who assumed office on 13 July 2016. Nigel Farage, a highly-controversial figure in his support of Brexit, also resigned from his position as leader of the UKIP.

The outcome of the vote did not only shake up the British parties. The result was widely seen as a defeat for the EU and caused many to speculate whether other member states would follow the example of the UK, given the rise of Eurosceptic parties across the continent. In the aftermath of the vote and following the plunge of the British pound, it also became clear that many Leave voters did not understand the consequences of their vote, and soon started to experience 'Regrexit' (Sinclair 2016). On the day following the referendum, the two main questions on the EU in the UK were 'What does it mean to leave the EU?' and 'What is the EU?' (Tamblyn 2016). This shows that the success of the Leave campaign was only

2 See Decision of the Heads of State and Government of the 28 member states of the European Union, meeting within the European Council, on the Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part, Annex of the European Council Conclusions of 15 December 2016 (European Council, 15 December 2016a).

partially related to concerns about the EU, but was rather the result of a combination of factors that include grievances over immigrants that seem to threaten social cohesion and economic fears that are reinforced by 'inequality of income, opportunity and power' (Chu 2016).

4 Hungarian referendum

On 2 October 2016, a referendum on whether Hungary should accept an EU quota system for relocating migrants took place.³ The government of the conservative Prime Minister, Viktor Orbán, initiated the vote and heavily campaigned against accepting the resettlement quotas.⁴ His campaign focused prominently on concerns that Islamic State of Iraq and the Levant (ISIL) terrorists posed as migrants in 2015 while returning from Syria along the 'Balkan route' of Eastern EU member states. The majority of referendum voters (nearly 98 per cent) agreed, but the voter turnout (40,4 per cent) was too low to meet the validity threshold of 50 per cent (BBC News 2016). This result was mostly due to the democratic opposition parties and civil society organisations urging Hungarians not to participate or to vote in an invalid manner.

It is worth noting that the Hungarian vote came as the Austrian Minister for Europe, Integration and Foreign Affairs, Sebastian Kurtz, said that the EU should abandon its plan to distribute 160 000 refugees among member states. He cautioned that disagreement over the plan could threaten 'the cohesion of the entire European Union', and warned against western countries such as Germany taking the 'moral high ground' counter to the more recently-joined eastern member states, which refused the primarily Muslim refugees as a threat to their Christian identity and culture (Rothwell et al 2016).

5 Italian constitutional referendum

On 4 December 2016, the referendum on the constitutional reform, proposed by the government of then Prime Minister Matteo Renzi and

3 It was at a press conference on 24 February 2016 that Prime Minister Viktor Orbán announced the government's decision to call a referendum on the 'compulsory resettlement quotas', noting that the head of Cabinet had referred the referendum question to the National Election Commission for confirmation. The latter confirmed it in its decision 14/2016 on 29 February 2016. The endorsed question was: 'Do you want the European Union to be able to mandate the obligatory resettlement of non-Hungarian citizens into Hungary even without the approval of the National Assembly?' See Harris 2016.

4 At the same time, four petitions for the review of the administrative decision about the referendum were lodged with the Hungarian Supreme Court, which was decided on 3 May 2016. The three issues considered by the Court during these appellate proceedings were whether the referendum question referred to commitments under inter-national agreements; whether the question fell within the remit of the Hungarian Parliament; and whether the question was unambiguous. The referendum question was found to comply with the Hungarian Constitution and the Referendum Act and, accordingly, the Court approved the relevant National Election Commission's decision. See Juhasz 50.

approved by the Italian Parliament earlier the same year,⁵ had a high turnout of 65,47 per cent, with 59,11 per cent of voters against and 40,89 per cent in favour (Ministero dell'Interno (undated)). The Italian electorate was called to approve or reject the constitutional review Bill concerning provisions to overcome 'perfect' bicameralism; reduce the number of parliamentarians; contain costs arising from institutional activities; eliminate the National Council for Economics and Labour; and review Title V, Part II of the Italian Constitution. This major reform would have amended a third of the Constitution (47 provisions out of a total 139) and overhauled the national parliamentary system by differentiating in composition and functions the two chambers as well as revising the division of powers between state, regions and administrative entities.⁶ The most common objections raised by Italian jurists are the following: first, the introduction of a complex article describing several differentiated legislative procedures, potentially less efficient and creating confusion about the two chambers' competences, with a risk of disputes between them, which in turn might need to be brought up to, and settled by, the Italian Constitutional Court (paradoxically against the declared intention to simplify the dynamics of the Constitution, in general, and of the law-making process, in particular); second, doubts concerning the ability of mayors and members of regional assemblies to serve also as actively present and informed (part-time) senators; third, the potential disproportionate increase of governmental power with regard to the opposition as a result of the combination of constitutional reform with the rigid electoral system in force at that time (as the *Italicum* would have granted the ensuing winning party 54 per cent of the parliamentary seats even if its actual share of votes were considerably smaller).⁷

It must be emphasised that this referendum generated intense debate and a high level of polarisation in both the Italian party system and in society. Most political parties were against it, including some important groups within the very Democratic Party contributing to the constitutional reform. The latter was presented by Renzi as a crucial aspect of his agenda aimed at streamlining decision-making procedures, hoping that the lift deriving from a 'Yes' could have enabled him to re-invigorate the slow implementation of his reform plans. However, the decrease of his government's support rating (mostly owing to the country's weak economic growth and low level of gross domestic product (GDP) per capita, as well as its high unemployment rate) was exploited by the opposition parties calling for a 'No' vote during the referendum campaign.

5 On 8 April 2014, the Constitutional Review Bill was introduced in the Senate and, after several amendments, received first approval on 13 October 2015 (Senate) and 11 January 2016 (Chamber of Deputies). Its second and final approval on 20 January 2016 (Senate) and 12 April 2016 (Chamber of Deputies) did not reach a qualified majority of two-thirds. Therefore, in accordance with article 138 of the Italian Constitution, a referendum (without quorum) was called after the formal request of more than one fifth of the members of both houses.

6 The core content of the reform relied on the following points: only the lower chamber would be directly elected and would maintain a 'confidence relationship' with the executive, while the reformed Senate would have reduced legislative powers and be composed of mayors and members of regional assemblies (who would not vote on motions of confidence); the government would be allowed to ask the lower chamber to examine draft Bills in 85 days, but its power to pass decree laws would be constrained; instruments of direct democracy would be reinforced; a range of competences devolved to regions in 2001 would return to the state. For a comment, see Guidi 2016.

7 See Rodotà 2016), Pasquino 2016, Celotto 2016 and Scarpetta 2016.

A large part of the electorate did vote 'No' to express serious discontent about the government's policies. At the same time, another part feared that their defeat in the referendum would create long-lasting political instability in view of the existing fragmented opposition.

However, the significance of the referendum went beyond the substance of the proposed constitutional reform. Renzi had promised to resign if Italians rejected this reform, which in effect led to the referendum becoming a plebiscite on the Prime Minister. Given this outlook, some international commentators highlighted a risk for more political and economic uncertainty for the country with implications for its future in the Eurozone and beyond (Harris 2016; JH 2016). After Renzi's resignation, the new Italian government has been challenged by a worsening sovereign debt issue, a fragile banking system, and tangled public finances, besides the task of approving a new electoral law (Jones 2016).

6 What do these cases mean?

One feature all of these referendums have in common is that in various ways their outcomes pose problems for the EU. Some of the pitfalls of the increased use of referendums are outlined below.

Brexit and the Dutch referendum make it clear that the referendums were only partially concerned with the actual yes/no question at stake. Instead, voters used this opportunity to demonstrate their discontent with the status quo, with the policies of the governments in power, and with policy making in Brussels. The referendums were used as a protest vote. According to newspaper accounts, Dutch voters 'said they were opposing not only the treaty but wider European policymaking on matters ranging from the migrant crisis to economics' (Reuters 2016). The fact that, following the Brexit decision, many people even had to Google what the EU is also highlights the fact that large sections of the Leave voters used the poll as an economic vote of protest against government policies that have over decades increased income inequality. Although the case of Hungary is different in that the referendum result supported the stance of the government on migrant relocation quotas, it is still clear that Hungarian voters are not satisfied with policies at EU level. By having tied his political fate to the outcome of the Italian referendum on constitutional reform, Renzi also gave voters a chance to express their disapproval of government policies, particularly when it comes to reviving the economy. Furthermore, referendums increasingly are used as tools for Eurosceptic parties. In her day, Margaret Thatcher called referendums 'a device of dictators and demagogues' (Economist 2015). The situation today underlines the usefulness of referendums as a tool for populist politicians, who use it to spread fear and advance their own agenda.

The Dutch referendum came shortly after the introduction of the national Advisory Referendum Act in The Netherlands in July 2015, which allows the Dutch public to submit most types of primary laws (that have already been approved by the parliament) to a referendum, provided that at least 300 000 signatures can be collected in favour of such a vote. The Eurosceptic political group Citizen's Committee EU realised that the EU-Ukraine Association Agreement was one of the first opportunities to make

use of the new Bill, and they mobilised to gather the necessary signatures. It was a move motivated by concerns over losing sovereignty to the EU, as evidenced by statements made by the initiators of the referendum: 'We don't care about Ukraine at all. A Brexit-referendum is not possible at this point, so we use all other means possible to put pressure on the relationship between The Netherlands and the EU' (Pardijs 2016).

In the UK, the UKIP was created with one key policy at the centre of its platform: to leave the EU. In recent years, it successfully exploited concerns over immigration, which for several years had been on the rise in the UK, to rally popular support against EU policies and in favour of leaving the EU.

In Hungary, the situation is even more complicated, as the current Prime Minister can arguably be counted among the more Eurosceptic politicians. Viktor Orbán used the referendum on the EU migration quota for his own anti-EU agenda, also trying to claim sovereignty back from the EU: 'Mr Orbán says he is leading what he calls a counter-revolution against EU centralisation, a pushback against Brussels' bossiness' (BBC News 2016). A twofold legal and political particularity may help to explain why the referendum was negatively received by other member states as a betrayal of the 'principle of loyal co-operation' embodied in EU treaties. First, the referendum was organised after the conclusion of community negotiations. The Hungarian authorities submitted their rejection of 'the solidarity mechanisms on refugees' in October 2016, a full year after it had been agreed by a qualified majority of EU interior ministers,⁸ and after having lodged an appeal against it with the European Court of Justice in December 2015.⁹ Second, the Hungarian referendum's core aim was not to give voice to the people for it to clear up an apparently unresolved position on a European issue; it was initiated to invite the population to vote 'No to Europe' (and to the EU migrant quota). Therefore, the Hungarian referendum was intended, and perceived, as a tool in a power confrontation in negotiations between EU member states, through a basic instrumentalisation of the concerned people 'as part of a weak to strong deterrence strategy'. The majority voting 'No' did not modify such power relations and did not advance the Hungarian authorities' negotiation position. Rather, it made relations between governments and people more tense, as it supported contradictory positions, thus accentuating voters' sense of frustration (Bertoncini 2017: 11-12).

In the case of Italy, despite Renzi's criticism against EU-imposed austerity measures, his government coalition held a more pro-European stance than most of the opposition parties. Tying his resignation as Prime Minister to the referendum on constitutional reform fuelled international concerns for several reasons, such as a political stalemate in Italy following its rejection; the likelihood of new elections or (in any case) the benefit to

8 The relocation decision of September 2015 was adopted based on a qualified majority voting (rather than unanimity), and Slovakia, Hungary, the Czech Republic and Romania voted against it. It referred to the relocation of an additional 120 000 asylum seekers from Greece, Italy and other member states who may potentially request it. They were to be distributed according to Commission calculations based on member states' size and wealth, with Hungary obliged to take 1 294 people and Slovakia to take 902. See European Council 2015.

9 On 6 September 2017, the ECJ decided that the EU Council decision of September 2015 was valid (Zalan 2017).

anti-establishment and Eurosceptic groups such as the Five-Star movement (who even advocated a referendum on leaving the Euro); and potentially destabilising effects on the Italian economy (risking to again become a target for financial speculation, as in 2011) and by extension across the Eurozone and beyond. The position expressed by US President Barack Obama and the encouragement by German Chancellor Angela Merkel were emblematic in this regard, and, while their effectiveness as instruments for exercising direct pressure remains uncertain, their interest in avoiding shockwaves across an already weak system is clear.¹⁰

Populist, anti-establishment and Eurosceptic parties are not only on the rise in the countries discussed here. Across Europe, 'insurgent' parties are increasingly gaining popular support and are using referendums as a powerful tool. Researchers of the European Council on Foreign Relations (ECFR) found in a 2016 report that these parties have planned 34 popular referendums 'on subjects from their country's membership to the EU to specific policy issues such as refugee relocation quotas' (Dennison & Pardijs 2016). There is some good news here, however, since the European Council on Foreign Relations (ECFR) researchers found that while challenger parties may be able to change the system, the system can also change them, making them more moderate once they are in power, as was the case with Greece's Syriza Party, the Finn Party in Finland, and the Patriotic Front in Bulgaria (Pardijs 2016).

However, this does not mean that the EU should lean back and calmly watch the rise of populist parties. The increased use of referendums in the EU and on EU matters in recent years highlights several issues that the EU has been grappling with for quite some time now. This leads to a further crucial question: Can referendums help the EU address concerns such as a lack of transparency, democratic deficit, and increased anxiety of member states and their populations over losing sovereignty to what are seen as out-of-touch, elitist decision makers in Brussels?

Referendums do allow for more direct citizen participation and can counter voter apathy because they create public debate on EU policies. Therefore, it might be tempting for the EU and national governments to favour referendums, particularly at a time when most establishment parties are challenged by populist movements and need to prove that they are representing the masses. But referendums are anti-democratic as well. With a threshold of only 30 per cent of voter turnout, which was barely met in the referendum on the EU-Ukraine deal in The Netherlands, the outcome can hardly be seen as representative of the position of the wider public. In the UK, the decision to leave the EU was to a large degree determined by voters in the older age brackets. A controversial study argues that many of these older Leave voters have died since the referendum (Bowden 2016). Whether or not the cited numbers are accurate, what remains true is that many young Britons complain that the Brexit decision leaves them to suffer disproportionately from the policies

10 Indeed, Italy has been and is still considered a relevant partner in the Atlantic Alliance, with the potential to play an equilibrium role within the increasing contrasts with Russia. The third economy of the 27 EU member states has been seen as fundamentally important to maintain a credible European system frightened by Brexit. It has also remained decisive for the geopolitical equilibrium in the Mediterranean and Middle East. See Armellini 2016.

voted for by their older compatriots. In this way, referendums are undermining democracy by creating divisions rather than helping to solve policy problems. There is also the danger that complexities of policy issues are not sufficiently taken into consideration, as referendums look at policy issues in isolation (Economist 2016).

Referendum outcomes are also notoriously unpredictable, especially when citizens are asked questions on the EU (Economist 2015). In times of crises and populist backlashes, which the EU is currently experiencing, the unpredictability of referendums can become particularly dangerous for the European project. Governments sign treaties which are then ratified by legislatures, and adding referendums to this mix complicates the matter of agreeing on transnational policies even further. Europe-wide policies can be blocked by minorities in small countries, as was the case with the Dutch Ukraine referendum (Economist 2016).

Furthermore, it is worth considering that referendums have generally been organised at the discretion of national authorities,¹¹ while the Dutch referendum was based on a popular initiative, displaying a novelty that might undermine the smooth running of the EU. The 61 per cent of voters rejecting the EU-Ukraine Association Agreement expressed the Dutch people's mistrust of their own political representatives as well as of the questioned European agreement. However, this did not alter the power relations established among the member states whose national parliaments had already approved the treaty, as the European Council of December 2016 showed.¹² The low turnout of 32 per cent also denoted the doubtfulness of a political modification at the European level. However, should this type of referendum grow in The Netherlands or in other member states, it would weaken the credibility of national authorities' commitments with their European counterparts and thus challenge the legitimate and effective functioning of the EU. It might easily fuel the resentment of the consulted citizens, whose views might not have primacy over the will expressed by other citizens within the EU. Indeed, increasing the turnout threshold for the validity of this type of referendum would reduce the problem in question,¹³ as would excluding from its field of application those rules on the functioning of the EU, which by definition concern all member states.

Implementing such measures to restrict referendums might seem beneficial, but they should be combined with serious efforts to strengthen and promote representative democracy. Direct democracy may work in small countries such as Switzerland and Liechtenstein, but it is hard to imagine a functioning Europe based on referendums. Its greater democratisation would require reinforcing parliamentary representatives'

11 This has its exception in the case of a referendum *de jure* required for constitutional reasons, for instance, if in Ireland there is a transfer of sovereignty over to the EU.

12 The European Council reconfirmed its commitment to international law and the territorial integrity of Ukraine as well as the conclusion of the EU-Ukraine Association Agreement, including the establishment of a Deep and Comprehensive Free Trade Area. At the press conference after the meeting, President Donald Tusk said: 'Now the responsibility lies with The Netherlands. The ratification is important not only for Ukraine, but also for Europe's geopolitical standing and credibility. We are counting on our Dutch colleagues' (European Council 2016b).

13 The invalidity of the referendum on the relocation of refugees organised by Viktor Orbán relied on its failure to mobilise at least 50% of the registered voters, which appears a democratic, minimum rationale.

control over their national authorities as well as transparency in European decision-making processes. Considering that many extremist and Eurosceptic parties all over the continent are currently exploiting such mechanisms, putting a stop to the referendum craze in Europe would seem a good idea. However, such a step would merely treat a symptom of the EU's current troubles. The underlying causes of anti-EU votes and of the rise of populist political movements run much deeper and are not simply fixed by restricting referendums.

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Selected regional developments in human rights and democratisation in the Asia Pacific during 2016: Been 'down' so long, it looks like 'up' from here

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Abstract: This report card of protecting human rights and advancing democracy in the Asia Pacific during the year 2016 is mixed. On the one hand, the year will be remembered for the brutal actions in the Philippines war on drugs and the mass expulsion of the Rohingya. These severe events all occurred in democratic countries with strong popular support, demonstrating how democracy is manipulated to take away the rights of some groups. The fabricated security threats are used to solidify a political base and win elections. On the other hand, there were also other landmarks in 2016, such as 11 ratifications of human rights treaties across the region, and successful court cases. In the coming years, human rights defenders may see these developments as a turning point. Treaty ratification and the activities of the UN special procedures are positive signs for human rights protection, although actual implementation is critical. States have embraced instruments with which they are comfortable, but on other matters, such as political rights and freedom of expression, they remain more reluctant. In the context of these significant threats to human rights, there is disappointment that regional mechanisms (in particular, ASEAN, SAARC and PIF) did little, and it was left to the UN to monitor and coax Asia Pacific states to act in protecting rights.

Key words: Duterte's war on drugs; expulsion of Rohingya, rise of religious extremism; ratification of human rights treaties; ASEAN; SAARC; PIF

1 Introduction

There is an air of gloom throughout the reviews of the Asia Pacific in the year 2016. In their annual surveys, human rights and democracy organisations, such as Amnesty International (AI), Human Rights Watch (HRW) and Freedom House (Amnesty International 2017; Puddington & Roylance 2017; Roth 2017; Tamang & Bakken 2017), all note with despair

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the attacks on democracy and human rights, alongside the rise of populist leaders. There are some common features to the retreat of human rights as noted in the annual reports: the shrinking space for civil society; limits to civil rights through restrictive laws; and the shameless violation of human rights without fear of repercussions. Migrants, refugees, ethnic minorities and the poor have all been blamed for a variety of social and economic problems, in particular by populist leaders. As this overview of regional developments in the Asia Pacific notes, many countries across the region are retreating from their obligations to human rights. The election of Donald Trump, with his sympathy for white supremacists, the blame he puts on Mexican migrants, and his retreat from international standards on peace and the environment, has come to symbolise the threat to human rights. In the Asia Pacific region, these threats are best exemplified by the election of Rodrigo Duterte in the Philippines, who instigated a programme of extra-judicial killing, resulting in as many as 7 000 deaths.¹ Unfortunately, the Philippines was not the only country to witness a dramatic slide in the protection of human rights and democracy, with the ethnic cleansing of the Rohingya and the rise of religious extremist violence as two other notable challenges.

The rise of populism and attacks on democracy are in some respects novel. The year 2016 witnessed the emergence of a form of democracy which, ironically, uses the democratic process itself to take away the very values of democracy from the people: People vote in regimes that dismantle checks and balances, reduce people's participation, and avoid obligations to their own citizens. While this may not be a new phenomenon, it has rarely been as pervasive as in 2016. A transformation is underway in the politics of the region where abuses of military and authoritarian government continue, but under democratic governments that replicate activities of previous military regimes. The actions of a democratically-elected Duterte in many ways mirror the abuses of power of the Marcos military regime in the Philippines from the late 1960s to the 1980s.

Rather than merely focusing on the cases where human rights and democracy are failing, this review explores if, and how, the downturn in human rights and democracy may turn around. The catalogue of violations and challenges has been extensively detailed in other annual reports by organisations such as AI and HRW, and there is little doubt regarding the problems faced. However, is 2016 the year where the bottom has been reached and, finally, there will be a turning point? What are the advances made (if any), the lessons learned, and the challenges to be faced? In some countries small advances have been made in democracy, and human rights have improved in some sectors. The section on the United Nations (UN) in this review notes that states continue to ratify human rights treaties. At the domestic level, as discussed in the democratisation section, courts have supported human rights with successful cases against the police and governments. For some groups, such as women, children and the poor, improvements continue to be made. Yet, how significant are these

1 While the numbers are disputed, most organisations put the death toll for 2016 at around 6 000 to 8 000. AI and HRW put the figure at around 7 000 (Amnesty International 2017a; Human Rights Watch 2017a). The official figures from the Government of the Philippines are 2 206 killed by the police, and 4 049 killed in vigilante killings (Palatino 2017)

advances? It could be a case that it has been ‘down’ so long for human rights defenders that anything looks ‘up’. There is a purpose to discussing how to look up at these small, but positive, developments. Although 2016 is a year of significant violations of rights and a decline in democracy, it is important not to lose sight of how human rights have been defended and democracy promoted.

There are lessons to be learned from this context. For example, human rights defenders should be more sensitised as to how security threats are created, as negative views on migrants, drug dealers and religious minorities are circulated through social media by politicians and other pressure groups. The new landscape of social media, which has done much to invigorate civil society, is also the space where racist and sexist values are instilled and enflamed. An important question is: How do human rights and democracy activists respond to the popular support of gross human rights violations? What went wrong in the democratisation process for the people, and even in some cases civil society, to turn on themselves and support undemocratic values? These lessons reinforce the importance of human rights education. The general public easily subscribe to discriminatory views without considering people’s rights because, in part, human rights are seen as a fringe topic held only by an elitist marginalised group. The mainstreaming of rights in education can lead to more robust social discourses that confront discriminatory and violent behaviour. The year 2016 demonstrated that gains in human rights and democracy can quickly be lost because the language and values of rights and democracy are still not widespread and entrenched in the community.

This overview of regional developments in the Asia Pacific has four sections. The first section discusses three case studies that epitomise the threats to human rights and democracy in the region: Duterte’s war on drugs; the expulsion of the Rohingya; and the rise of religious extremism and its attacks on religious freedom. These severe situations all occur in democratic countries with strong popular support, demonstrating how democracy is manipulated to take away the rights of some groups. The fabricated security threats (drug dealers or Muslims) are used to solidify a political base and win elections. The second section examines the status of democracy and the rule of law in the region, demonstrating both advances and steps backward. The third section examines how the major regional bodies in the Asia Pacific – the South Asian Association for Regional Co-operation (SAARC); the Association of Southeast Asian Nations (ASEAN); and the Pacific Islands Forum (PIF) – are developing human rights and democracy. The final section discusses the Asia Pacific at the UN.

2 Threats to human rights and democracy

2.1 Case one: Rodrigo Duterte and the ‘war on drugs’

Rodrigo Duterte was elected President of the Philippines in May, and sworn in in June 2016, after a very close campaign where he won with only 39 per cent of the votes, with the next two challengers receiving 23 and 21 per cent and essentially splitting the opposition votes. His campaign received attention because of his off-handed comments about supporting rape, jokes about disabled people, and his plans to fight crime. In many ways, his statements and his campaign mirror those of other

populist politicians, such as Donald Trump in the United States (USA), Abdel Fattah al-Sisi of Egypt, and Recep Tayyip Erdoğan of Turkey. All these figures highlight threats to security as a central election issue, often isolating migrants, criminals and terrorists as the main threats. Also, like these other leaders, Duterte may be populist, but not popular, in that they win not with the majority of votes (or through a fair election), but with enough of a minority to win government.² During the campaign, Duterte pledged to eradicate drugs by promising to kill thousands of drug dealers. Upon ascending to power in 2016, police operations under the Oplan: Double Barrel campaign, and killings by vigilante groups, led to an estimated 7 000 deaths in 2016, with the killings continuing in 2017 (Human Rights Watch 2017a). Duterte, a lawyer who served as a government official and mayor for over 20 years, has been complicit in the violent campaign with his use of irreverent language, on-air naming-and-shaming of drug personalities, and offers to pardon any policeman charged with extra-judicial killing (Mendez 2016). As was noted in the media at the time: ‘Duterte has been consistent about his support for the active targeting of criminals, from his time as mayor of Davao, and now as President, in his “war on drugs”’ (Reyes 2016: 125). There has been little response to the excessive use of violence, and only recently, in mid-2017, have a handful of policemen been punished. One case of the murder of three teenagers (Carl Arnaiz, Kian Delos Santos and Reynaldo de Guzman) in August 2016 resulted in the transfer of post for the senior policemen involved. The widespread criticism of the teenagers’ murders shows that public support for the war is declining as many see it as targeting the poor, triggering a drop in his recent popularity ratings (Ballaran 2017; Kine 2017).

Apart from the ‘war on drugs’, Duterte has proposed other policies counterproductive and contradictory to human rights principles. A Bill reinstating the death penalty for drug-related cases was proposed in 2016 (and passed in March 2017) by his allies in the House of Representatives. The law makers decided to sideline serious cases, such as rape, treason, and plunder, to fast-track the passage and avoid running into a heated debate regarding which crimes are ‘heinous’ (Cayabyab 2017; Corrales 2017). The passage of the Bill was pushed through regardless of the fact that the Philippines had ratified the International Covenant on Civil and Political Rights (ICCPR)’s Second Optional Protocol to abolish the death penalty. Earlier in March, the House of Representatives introduced a Bill lowering the age of criminal liability from 15 to nine years. It aimed to address the supposed soaring numbers of children working as drug couriers, but it was later scrapped for a substitute Bill requiring child offenders aged nine to 14 years to be turned over to local social welfare development officers (Dumlao 2017; Panti 2017).

Not surprisingly ASEAN, with its institutional culture of non-interference, has been quiet about Duterte. No ASEAN leader has critically commented on Duterte regardless of the fact that the violence is widespread and systematic. The international community and global civil society have been vocal on the violations during the first year of his rule,

2 Duterte won with only 39% of the votes because more moderate candidates split the opposition vote in the Philippines’ first-past-the-post system. In the USA, Trump won the presidency, although losing the popular vote. Erdoğan and al-Sisi won elections that were not considered free and fair.

to the level that Human Rights Watch, and some independent activists, claim that he should face the International Criminal Court (ICC) on charges of crimes against humanity (Human Rights Watch 2017a: 20). At the national level, Duterte has a strong voting base influential enough to make him politically safe in his actions. This base arises from the continued belief in 'strongman' politics in the Philippines, which is also found in other Southeast Asian countries, dating back to supporters of President Marcos, Lee Kwan Yew and Suharto. Some commentators note this with disbelief, as Reyes comments: 'Duterte's persona as a leader who actively targets criminals and uses the power of the state as means to pursue his end of killing criminals is a sharp contradiction to the kind of leadership that had been imagined in post-Marcos regimes' (Reyes 2016: 129). The politics of the base, a standard in populism, allows for these violations to continue.

2.2 Case two: Rohingya expulsion

The 2016 expulsion of the Rohingya is the latest mass expulsion of this ethnic and religious group from Myanmar by the government and the military. There have been previous expulsions with over one million Rohingya refugees already outside of Myanmar, mostly living in Bangladesh but also found in other countries.³ In Bangladesh, the majority live in refugee camps in Cox's Bazar District, where it is estimated that as of June 2016, about 300 000 Rohingya are in makeshift and temporary sheds. Refugees are also found in other areas of Bangladesh, such as Chittagong (Kaladan News 2016).

The Rohingya are a minority ethnic group, mostly Muslim, in Myanmar's Northern Rakhine state. They have faced historical persecution and are denied citizenship by the government of Myanmar, who claim that the ethnic group is from Bangladesh. The persecution of the ethnic minority has manifested in both physical violence from state military forces and institutionalised discrimination in the form of 'restrictions on marriage, family planning, employment, education, religious choice, and freedom of movement' (Albert 2017). The latest expulsion was triggered by an event on 9 October 2016, when a group of several hundred Rohingya insurgents launched an attack on a border guard police base along the Myanmar-Bangladesh border. Nine police officers were killed by the Muslim men, who were 'armed mostly with knives and slingshots and about 30 firearms' (Albert 2017). The attackers also raided other posts, taking with them firearms and rounds of ammunition. The Myanmar military responded with raids on Rohingya villages, setting houses on fire, destroying crops, committing systematic rapes and murders, and enforced displacement. Government forces cut off humanitarian aid to the Rohingya internally-displaced people (IDPs) in a bid to capture those who were responsible for the attacks (Human Rights Watch 2016). As reported in the *New York Times*, 'much of northern Rakhine remained inaccessible to international relief agencies because of the military operations and travel restrictions ... thousands of Rohingya people [were also not] permitted to leave their villages' (Ives 2016). These events have been described as

3 The largest groups of Rohingya refugees outside of Bangladesh are found in Indonesia, Thailand and Malaysia. There are refugee populations in Saudi Arabia, and resettled refugees in many Western countries. The UNHCR reports that as of October 2016, there were 54 856 Rohingya refugees and asylum seekers in Malaysia (Kang 2016).

'ethnic cleansing' by some prominent UN figures, and as genocide by some civil society activists.⁴

ASEAN's response, much like its response to the Philippines war on drugs, has been muted. As the Council on Foreign Relations notes: 'ASEAN itself has been silent on the plight of the Rohingya and on the growing numbers of asylum seekers in member countries, largely because of its members' commitment to the principle of non-interference in each other's internal affairs' (Albert 2017). The response is compounded by weak protection for refugees, with few South and Southeast Asian states ratifying the Refugee Convention. A further problem is that the crisis occurred at the border between Southeast and South Asia (and thus between the territories of ASEAN and SAARC), with both regions considering the problem not one of their making.

The Myanmar government denies allegations of human rights violations. However, the democratically-elected government is in a difficult position. The Myanmar military, with its long history of brutal repression of ethnic minorities, such as that against the Karen, Shan, and the current war in Kachin State, have the capacity to undertake a campaign of ethnic cleansing. The democratically-elected government of Aung San Suu Kyi does not have the power to control the military, nor is there popular support for the Rohingya, with most people supporting their expulsion. This is a difficult choice for these elected officials: To side with the Rohingya would mean losing popular support, and most likely their elected positions, and facing off against the military may also end their political career. By remaining silent on the issue, they stay in government and may initiate change from the inside, which some claim to do. However, many overseas critics see this as too little to stop what is becoming a genocide.

2.3 Case three: Strengthening of religious extremism

Commonly religious extremism is wrongly associated with Islam. It is important to note that, particularly in the Asia Pacific region, extremism is found in all major religions. The violence against the Rohingya is fuelled, in part, by a growing Buddhist extremist movement in Myanmar, led by the Mandalay-based monk Wiranthu. The success the Hindu nationalist Bharatiya Janata Party (BJP) with the election in 2014 of its leader, Narendra Modi, to be Prime Minister in India, is parallel to the rise in religious violence against Christians and Muslims, with around one violent attack a day in the country (Curry 2018). The BJP, like other religious extremists groups, hold beliefs that their religion is under threat from both liberal secularists and opposing religions. Extremist groups are strongly nationalistic, and they reject advances made to women and children's rights in the past decades, particularly in women's equality and family law. The consequences of these beliefs are attacks against women and children, attacks on religious communities and their places of worship, and threats to the security of those who support democracy and human rights.

4 The term 'ethnic cleansing' has been used by UN Human Rights Commissioner Zeid Ra'ad Al Hussein, and the UNHCR head in Bangladesh (Holmes 2016). Malaysia's Prime Minister, Najib Razak, has publically used the term 'genocide'.

In Pakistan, attacks are more frequent after the Pakistan Islamic party was elected in 2013 upon a mandate of implementing Shari'a law (Physician for Social Responsibility 2015). As a result, violence has increased against women and religious minorities. The violence itself is not novel, as violence has been consistently increasing, from a recorded 6 761 attacks in 2000 to 28 982 in 2011 (Ispahani 2017). What has changed is government complicity (often through inactivity) in the violence and the rise of powerful home-grown extremist groups. As a result, there is little chance for extremism to be controlled because of an inactive government and areas that are no longer controlled by the government (Crawford 2016). The instability in Pakistan and Afghanistan is further exacerbated by the neighbouring armed conflicts. These countries also had to contend with massive numbers of forced migrants from armed conflicts. Pakistan has an estimated 1,3 million refugees and a further 1 million IDPs according to the United Nations High Commissioner for Refugees (UNHCR), numbers similar to those entering the entire continent of Europe. Each of these conflicts is the result of religious extremist groups, with the Islamic State, Taliban and Al-Qaida the most well-known. Furthermore, extremism has contributed to refugee and IDP numbers in Myanmar and the Philippines.

Another target of religious extremism is the lesbian, gay, bi-sexual, transgender and intersex (LGBTI) community. In Bangladesh, two prominent gay activists were murdered by members of an Islamic extremist group, Ansarullah Bangla Team (Rahman 2017). The Indonesian province of Aceh criminalised homosexuality in 2014, punishable by public whipping.⁵ Similarly, religious views are used to justify denying people's rights or silencing minorities. The crime of blasphemy (or insulting religion) is found in a number of countries in the region, and is used to silence or jail members of minority groups. As an example, a recent Bill in Indonesia to abolish child marriages was withdrawn in January after having been criticised by Council of Islamic Ideology, an advisory body to the parliament on Islamic law as being 'anti-Islamic' and 'blasphemous' (Human Rights Watch 2017c). Similarly, a law to stop child marriages in Malaysia in early 2017 did not receive the necessary votes, partly, as stated by Shabudin Yahaya, a former Shari'a court judge and member of the ruling Barisan Nasional coalition: 'Girls reach puberty at the age of nine or 12. And at that time, their body is already akin to them being 18 years old. So physically and spiritually, it is not a barrier for the girl to marry' (Haas 2017). Violence against women is widespread in extremist groups, with the most famous case the attempted murder of the child girl activist, Malala Yusuf Zai, by the Pakistani splinter group of the Taliban, commonly known as Tahreek Taliban Pakistan (TTP). This group also is known for openly flogging girls that do not comply with dress codes (Dawn 2009; Perry 2016). Threats against women's security, such as honour killing, forced marriage and a denial of basic rights to education and movement, have little chance of being eradicated because of the influence of the extremist groups.

Religious radicalisation is also challenging basic democratic standards. Although Indonesia is known for its religious tolerance, the conservative

5 While no whippings were carried out in 2016, two men were whipped for homosexuality in March 2017.

application of Shari'a law in Aceh and the rise of conservative Islamic political groups have threatened democracy (Rasakotta 2017). In Aceh, a total of 339 people were lashed for violations of Shari'a law in 2016 (Human Rights Watch 2017b). At the end of the year, during the election for the Jakarta governor, Islamic groups alleged that the popular Christian governor had committed blasphemy. He was facing two years' punishment for blasphemy against Quran, a punishment which was eventually handed out in 2017 (*The Atlantic* 2017). One critic noted that the election 'became a referendum on the future of Indonesia's ethno-religious diversity and tolerance after unwanted intervention by a number of radical Islamist groups, most notably the Islamic Defenders Front (FPI)' (Arifianto 2017).

As these three cases demonstrate, 2016 has not been a good year for rights and democracy. There is no solution in sight yet for those threatened by the war on drugs, the expulsion of the Rohingya and threats by extremist groups. From these case studies of the worst violations of rights, the review now turns to assess the status of democracy.

3 Overview of democracy: A democratic rollback

The loss of democratic freedom is seen in the Philippines, Indonesia, Thailand and Cambodia. However, developments in Nepal, South Korea, Taiwan and Sri Lanka show that authoritarianism can be challenged. It could be debated that this process is a phenomenon similar to Huntington's 'waves', where democratic advances are followed by periods of democratic regression (Huntington 1991). There is an increase in 'guided' or 'limited' models of democracy. Yet, democracy, even in its weakened form, still exists in the majority of Asia Pacific countries. According to Freedom House rankings, there are a majority of free states (17 free and 14 partly free of the 39 ranked) in the region (Freedom House 2017: 14). There were seven national elections in the Asia Pacific. Of these, three elections in Hong Kong, South Korea and Taiwan importantly saw an increase in support for pro-democracy and rights parties. In Hong Kong, a group of young activists, known for their role in the 2014 Umbrella Movement, a social movement similar in outlook to the occupy movements in other parts of the world, gained seats in the government. In both Taiwan and South Korea, democratic progressive parties increased their number of elected members.

Regardless of these positive developments, there are still states with an almost total lack of democracy, such as Thailand, Laos, North Korea and China. However, democracy has not disappeared in these states. Thailand is a useful case study to show how democratic elements continue regardless of military control. Thailand emerged from decades of military dictatorship in 1992 into a period of democracy. Underpinned by a strong rights-based Constitution in 1997, democracy then was restricted first, by the rise of a populist regime under the Thaksin Shinawatra (who initiated his own 'war on drugs' similar to Duterte, with its predictable violations and failures) and second, by military *coups* in 2006 and 2014. In 2016, Thailand is still under the dictatorship, with no guarantee from the military Junta for an election and no effective political participation, and it would seem that democracy has disappeared. Yet, civil society is active, human rights are taught in some institutions, human rights violations are discussed and debated in a variety of forums, and a political opposition

does exist, though obviously under threat. While it may be too much to claim these as democratic achievements, there are organisations, cultures and knowledge solidly in place and even expanding, and which cannot be erased by the military government regardless of how hard they try. Democracy has not been eradicated, as even the military government acknowledges that it is delaying (but never eliminating) the plan for an election. This may be an overly optimistic view of democracy under dictatorships (the cases of North Korea and China being vastly different from that of Thailand), but it does show that democracy does not merely involve elections, who won them, and who holds power. Democracy is also the organisations, cultures, and knowledge.

The democracy movement in Malaysia illustrates the power of organisations, cultures and knowledge in demanding democracy. The Malaysian Bersih movement (*bersih* meaning 'clean' in Malay) is perhaps the strongest democracy movement in the Asia Pacific. Bersih is organised as a social movement working toward the democratisation of Malaysia by protesting the corruption and the unfair electoral system. It has held five rallies, with numbers estimated at around 100 000 for the most recent rally in November 2016. Bersih are protesting the growing undemocratic government of Prime Minister Najib Razak and his United Malay National Organisation (UMNO) party, which holds power even though losing the popular vote in the last election (with 47 per cent of the votes compared to the opposition's 51 per cent). UMNO is attempting to consolidate its power by introducing anti-democratic laws and attacking political opponents. Even in this environment of growing authoritarianism, the Bersih rallies have been an avenue for hundreds of thousands of Malaysians to express their opposition to the government and their desire for democracy and rights. Part of the success of Bersih is that it highlights issues which have been addressed in few other places. The restrictive Malaysian media, which is either controlled by or highly sympathetic to the government, avoids criticising the current government. A major issue avoided by the media is the recent corruption scandal involving the Prime Minister who was found to have about US \$700 million in his personal bank account which had reportedly been taken from the Malaysian sovereign wealth fund, IMDB (Wright & Clark 2015; Maza 2016). The national media has not touched on this issue (with the exception of *Malaysiakini*, perhaps the only non-government controlled media platform), but it has become one of the rallying points for the Bersih movement. It has not come without costs for people in Bersih, as 15 prominent activists and members were arrested, under the supposed 'anti-terrorist' Security Offences (Special Measures) Act (SOSMA).

Similar democracy movements can be found in many Asia Pacific countries. In Cambodia, a youthful democracy movement has challenged the control on power of the established Cambodian People's Party (CPP). The popularity of the CPP dropped from 59 per cent in the 2008 elections to 48 per cent in the 2013 elections.⁶ The youth vote and social media are considered the forces that have caused the growing strength of the opposition parties (Wallace 2016). The erosion of support has been addressed by the CPP with the suppression of the opposition movement

6 The declining popularity of the CPP continued in the 2017 commune elections where the opposition parties gained around 2 500 Commune Chiefs and Councillors.

that continued in 2017 when most opposition politicians were in exile or jail, or had moved to the CPP.

The Cambodian example reveals that an active media does influence and consolidate democracy through supporting people's participation, but this is a space which is closing. Civil society and media groups are operating under increased restrictions across most of the region, much like restrictions found in the other regions covered in this *Journal*, such as on freedom of the press, rights to association and assembly. Nevertheless, it is worth noting two restrictions that feature in the Asia Pacific: first, the requirements to register civil society organisations, in particular organisations receiving foreign funding. The purpose is not to ensure standards, but to target human rights and democracy organisations and brand them as being influenced by foreign powers and needing heightened surveillance. A second important phenomenon is government activity in social media: Governments no longer attempt to block or censor; instead they create their own social media presence in competition. The most famous case is Russia's attempts to influence elections in the USA (and also France, Ukraine and Latvia). In the Asia Pacific, China may be the most famous manipulator of the social media, but right-wing pro-government groups have a very active social media presence in Thailand, Indonesia and India. Indeed, 2016 was the year when Facebook went from a relatively innocent social media platform to a potentially dangerous tool in the hands of religious extremists and anti-democracy movements.

The year 2016 is also a reminder that democracy is not just about elections, but also necessarily a system where people can participate politically and have their views represented. It is a system based on civil rights: the rule of law; justice; and checks and balances. In some cases the developments in law and the protection bodies enforcing these laws tell a mixed story. Advances were made in establishing and enforcing democracy and rights principles. For example, the ratification of the Convention against Torture (CAT) in Fiji is important, although it may not have much significance unless enforced. The level of democracy in Fiji has for many years been criticised, and even with the military government winning the election in 2014, the attacks on political opponents have not diminished. The police and military forces have been known to use torture and inhuman treatment on criminal suspects, leading to five deaths in the past decade. The ratification of the CAT may not bring about an immediate solution to these problems, but it can both highlight this problem (and in a sense work as human rights promotion as protection), and also provide future advocates with a tool to limit the abusive power of states. A similar example is the Philippines, which ratified CAT in 1986, but it was not until 2009 that a law on the prevention of torture came into being, but this law was first used in 2016. In this case, a policeman was convicted of torture under this Act (Amnesty International 2016b). There are two ways of interpreting this: It either took 30 years from ratification to finally protecting this right, or 2016 was the year in which courts were enabled to make a decision on torture. Giving significance to this case may be claiming developments yet to be consolidated, but it should be recognised that there is a law against torture which the courts are willing to enforce. For Fiji, only in future years will it be seen whether the ratification leads to enforcement, but an impact may be seen in the fact that the police force no longer feel that they are immune to charges of torture.

Similar milestones were reached with Sri Lanka ratifying the Convention on the Protection of People from Enforced Disappearance (CED), although by the end of 2016 it had yet to be adopted into national law. Sri Lanka, with around 100 000 people still having disappeared, has much to do to respond to this violation, such as informing the family of those disappeared, and convicting those complicit in the activity during their decade-long war with the Tamil Tigers. Similar small, but positive, advances were made with regard to anti-discrimination law in Japan against hate speech and *Buraku* discrimination (the *Buraku* are an historic untouchable caste).

A number of Asia Pacific states ratified treaties during 2016, with the Convention on Rights of Persons with Disabilities having been ratified by five states.⁷ These are small advances for human rights in the region, and may be a case of human rights being ‘down so long, anything looks up’. However, converting these rights into law does offer opportunities in the future for people to claim them.

4 Regional institutional developments

4.1 Association of Southeast Asian Nations

In Southeast Asia, the regional human rights mechanism receives widely-divergent assessments of its ability to promote and protect human rights. 2016 was a year when human rights bodies – the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) – met regularly, passed resolutions, and openly addressed human rights issues. One advancement to regional legal standards is in the area of trafficking in persons, with the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP) receiving the necessary ratification to enter into force.⁸ The ACTIP is also the first binding regional convention on trafficking, and shows a willingness on the part of ASEAN states to build a legal infrastructure, although it is not clear how much this convention will add to the already-existing near-universal ratification of the Palermo Protocol across ASEAN. However, it was also a year where the sole focus of activities was the promotion and not the protection of rights, exemplified by the failure to discuss some of the most serious issues, such as the Rohingya expulsion or the war on drugs.

The AICHR held its twentieth meeting in February, and during 2016 it held meetings on media freedom, combating trafficking, and accrediting non-governmental organisations (NGOs) with consultative status. Several new projects were initiated in areas such as child rights, advancing gender, peace and security in ASEAN, and developing guidelines to address victims of trafficking in accordance with the ACTIP. As far as the ACWC is concerned, meetings were held on early childhood care; women’s

⁷ Section four details ratification in the region.

⁸ The treaty was signed on 21 November 2015 in Kuala Lumpur, Malaysia, and came into force on 8 March 2017, which was 30 days after the deposit of the sixth instrument of ratification by the Philippines. The other states that have ratified the treaty are Vietnam, Myanmar, Malaysia, Thailand, Singapore and Indonesia.

empowerment; a law review on identifying victims of trafficking; and a baseline study on child protection systems. Apart from these two bodies, other ASEAN organisations worked on rights-related issues, such as the ASEAN-Occupational Safety and Health Network (on strengthening labour and safety inspections); the ASEAN Work Plan on Education; the ASEAN Work Plan on Youth (youth employment and resilience); and the ASEAN Committee on Women (on gender equality, the elimination of violence against women, and economic empowerment). The ASEAN University Network-Human Rights Education (AUN-HRE) was active in lecturer training on human rights and developing curricula, including an undergraduate textbook on human rights, for use in ASEAN universities. While this is an impressive list of activities, it should be remembered that these bodies only promote rights, and any appeals made by victims of rights abuses were not acted upon.

4.2 South Asian Association for Regional Co-operation and human rights

Regional co-operation in South Asia continues to pose significant problems, and in 2016 SAARC failed to achieve any significant milestones. Formed in 1983, SAARC is one of the youngest regional associations in the Asia Pacific. Nowhere in its charter does it specifically mention human rights, although many of its objectives implicitly support human rights. The SAARC Charter is framed by the importance of economic, social and cultural development – in the 1980s this was one of the poorest regions in the world – and its opening articles are on promoting welfare and improving the quality of life. The objectives are sympathetic to human rights as they mention providing all individuals with the opportunity to live in dignity and to realise their full potential. However, currently balancing the rights of people in a period of accelerated development is challenging. South Asia has about a quarter of the world's population, and about 13.5 per cent of its population lives in extreme poverty (World Bank 2015). There are many human rights violations in the region resulting from the clash between rapid development and human rights, such as child labour, forced labour, human trafficking, conflicts over resources, violence against female workers, and the extra-judicial detention or enforced disappearances of environment and labour activists. Despite having a common platform to address these issues, SAARC as yet does not have any separate and specific human rights programme, nor does it produce policy or create mechanisms to work on the protection of human rights. As noted by Basnet, '[s]ub-regional co-operation is still at a very rudimentary stage, and there is little evidence of any real desire to act on a subregional basis' (Basnet 2014). There are no initiatives in its summits to address violations of human rights, nor any explicit political commitment to meet their obligations.

Civil society, human rights activists and academics in SAARC countries advocate the creation of a SAARC human rights mechanism, with many using ASEAN's AICHR as a suggested model,⁹ but political, religious and cultural differences in the region make co-operation on this issue difficult. Three key challenges generally given are the conflict between India and Pakistan; the non-existence of a human rights agenda in the SAARC

9 For example, see Forum Asia (2017).

Charter; and the provision for non-interference in the internal issues of member states (Junejo 2017). The annual summit has now already been cancelled for two years because of the political rivalry between India and Pakistan, and official representatives of India have been publically denouncing the role of SAARC. It may be a long time before SAARC will develop a human rights mechanism, leaving the national level protection mechanisms (with only two credited national human rights commissions) or the UN system (with no South Asian state agreeing to treaty body communications mechanisms) as the main protection bodies.

4.3 Pacific Islands Forum

While the Pacific Islands Forum (PIF) is relatively small in terms of population, it is an old organisation (having been established in 1971, or four years after ASEAN). It covers a large area of the Asia Pacific, and has been relatively dynamic with regard to human rights. The PIF is a regional organisation of 16 Pacific Islands states, and Australia and New Zealand. Although it has neither a human rights mechanism nor a specific human rights programme, it has a working group on the establishment of a mechanism, it deals indirectly with human rights through the divisions of development and politics, and it is the only organisation in the region to suspend a member (in this case Fiji) for not holding an election.

At the Forty-Seventh Pacific Island Forum, held in Pohnpei, Micronesia, in September 2016, human rights issues were discussed in the context of violations in West Papua by the Indonesian government. The Forum Secretary-General, Dame Meg Taylor of Papua New Guinea, stated that the issue would remain on the agenda despite being sensitive for Australia and Papua New Guinea because of their relationship with Indonesia. Also identified at the forum were the following priorities related to human rights: persons with disabilities; regional mobility regarding issues of migration; and the environment, in particular the management of ocean resources. The Pacific Framework for the Rights of Persons with Disabilities (PFRPD) was also endorsed in 2016 to promote the rights of persons with disabilities.

The environment and climate change are issues central to the many low-lying Pacific islands. In October 2016, the Pacific Islands Forum produced the Framework for Resilient Development in the Pacific (FRDP) which addresses numerous key issues related to climate change and disaster risk management. To ensure ocean management, the Pohnpei Oceans Statement: A Course to Sustainability was endorsed by the leaders. Pacific leaders gave support to the Marshall islands in their battle with the United States over managing the negative impact of the US Nuclear Testing Programme. The Australian-led Regional Assistance Mission to Solomon Islands (RAMSI) ended successfully in 2017. Operating since 2003 to stop a civil conflict, RAMSI has ensured peace in the Solomons. In other development areas, Samoa took the lead in the region by being the first Pacific country and Small Island Developing State to submit its National Voluntary Report on the Sustainable Development Goals (SDGs).

5 Asia Pacific countries in the United Nations human rights system

During the period of the second cycle of the Universal Periodic Report in 2016, six Asia Pacific countries were reviewed, namely, Papua New Guinea; Samoa; Singapore; the Solomon Islands; Thailand; and Timor-Leste. In terms of recommendations emanating from this review, Singapore and Thailand received the most recommendations (278 and 291 respectively), with Singapore accepting under half of these (126) and Thailand accepting over two-thirds (209). Timor-Leste accepted the most, accepting 173 out of 181 recommendations. It is not surprising to find Singapore rejecting the most recommendations, as Singapore is known for its hard line on not ratifying treaties (it has one of the worst records in the Asia Pacific of only ratifying four of the 18 treaties and Optional Protocols).

As far as human rights treaty ratification is concerned, there were 11 ratifications across the region in 2016. Five of these were for the Convention on the Rights of Persons with Disabilities (Brunei Darussalam, North Korea, Micronesia, Samoa and Sri-Lanka). Similarly, Brunei Darussalam and Samoa agreed to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC). Samoa also ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OP-SC), and accepted the inquiry procedure under the Optional Protocol to the Convention on the Rights of the Child (CRC-OP-IC). As mentioned previously, Fiji ratified the Convention against Torture, and Sri Lanka ratified the Convention on Enforced Disappearance. Some of these ratifications are notable in that they occurred in countries where ratification can have an impact on the protection of rights, such as disappearances in Sri Lanka, and Pakistan's ratification of the Optional Protocol on children in armed conflict. Myanmar's ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (which was ratified in 2017 but signed in 2016) is an important development in the protection of rights as this is the first of the four Southeast Asia 'problem' states to have ratified either the ICCPR or ICESCR (the other three being Singapore, Malaysia and Brunei). Fiji's ratification of the CAT is also important, given the concerns expressed about the Fijian police's use of torture, as detailed in a 2016 report by Amnesty International which expressed concern about the fact that 'security forces have resorted to using excessive and unnecessary violence against suspected criminals or escaped prisoners in policing operations' (Amnesty International 2016).

In other areas, there was active monitoring of rights in the Asia Pacific at the UN level. There were many calls by Special Rapporteurs and other bodies to establish a commission of inquiry into the Rohingya situation, which eventually occurred in 2017. Other special mechanisms related to the Asia Pacific include the continuing mandates of the Special Rapporteurs for North Korea, Cambodia and Myanmar. The Human Rights Council appointed an independent expert from Thailand on the Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity. The appointment of this independent expert is a significant move towards the rights of LGBTIs, and comes after much

debate at the UN. Mechanisms such as the UPR, Special Rapporteurs, fact-finding missions and commissions of inquiry play a very important role in the region because of the lack of a strong regional mechanism. For many human rights defenders, the UN is the only way of ensuring the promotion and protection of human rights.

6 Conclusion

This report card for the region is mixed: On the one hand, the year 2016 will be remembered for the brutal actions in the Philippines war on drugs and the mass expulsion of the Rohingya, but in coming years, human rights defenders may see the treaty ratifications and successful court cases as a turning point. Treaty ratification and the activities of the UN special procedures are positive signs for human rights protection, although actual implementation is critical. States have embraced instruments with which they are comfortable, but regarding other matters, such as political rights and freedom of expression, they are more reluctant. In the context of these significant threats to human rights, it is disappointing that regional mechanisms did little, and it was left to the UN to monitor and coax Asia Pacific states to act in protecting rights.

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