

International
Review of
Contemporary Law



IADL
INTERNATIONAL ASSOCIATION
OF DEMOCRATIC LAWYERS

Revue
Internationale de
Droit Contemporain

Edited by the International Association of Democratic Lawyers
Vol. 2, No. 3 • December 2020

Éditée par l'Association Internationale des Juristes Démocrates
vol. 2, num. 3 • décembre 2020



In Honor of Ebru Timtik
and the struggle for fair trials in Turkey

Democracy and Feminism in the Era of COVID-19

With articles addressing: Ruth Bader Ginsburg • Coastal Erosion in Togo • Gender Violence in Puerto Rico • Shaheen Bagh and Women's Struggle in India • Acquittals at International Tribunals • The Universal Declaration of Human Rights • Red Feminism for the 21st Century • Neoliberalism and Democracy • Colonialism and Reparations • The Golden Dawn Trial



Table of Contents - Table des matières

From the Editor

Evelyn Dürmayer 3

On Ruth Bader Ginsburg

Marjorie Cohn 3

A life dedicated to justice and struggle: Ebru Timtik

Serife Ceren Uysal 4

To Use the Right to a Fair Trial/ Adil yargılanma hakkını kullanabilmek için

Aytac Ünsal 6

Une bienveillante escroquerie en temps de pandémie

Une rescapée 10

Violence against Women during Covid-19 Pandemic

Dinorah La Luz Feliciano 17

Togo/ Erosion cotière: Les femmes et jeunes filles du village de DOEVI KOPE très fragilisées

Bernard Anoumo Dodji Bokodjin et Nana Mariama Apou 20

Indian women revive non-violent civil disobedience movements against the extinguishment of citizenship rights

Niloufer Bhagwat 23

On Red Feminism: class, gender and historical materialism

Alfredo Campos 32

The Treatment of the ICTR Acquitted: The "Achilles Heel" of International Criminal Justice

Beth S. Lyons 43

After the Golden Dawn Trial

Ezgi Cakir interviews Thanasis Kampagiannis 59

Between memoricide and revisionism: subsidies towards a pedagogical turn on the Universal Declaration of Human Rights

Miguel Régio de Almeida 61

Neoliberalism and Democracy

António José Avelãs Nunes 68

La Kanaky, le droit à l'indépendance bafoué

Mireille Fanon-Mendes-France 79



Editor-in-chief/éditrice en chef: Evelyn Dürmayer
email: evelyn.duermayer@gmail.com
www.iadllaw.org

IADL, International Association of Democratic Lawyers, is a Non- Governmental Organization (NGO) with consultative status to ECOSOC and represented at UNESCO and UNICEF. The IADL was founded in 1946 by a gathering of lawyers who had survived the war against fascism and participated in the Nuremberg Trials.

The International Review of Contemporary Law is a digital legal journal published by IADL. It does not follow the mainstream, but instead analyzes legal questions in their cultural, economical, political and social context.

©2020 International Association of Democratic Lawyers

Design: Charlotte Kates

Cover Photos: Ebru Timtik /social media;
Women of Shaheen Bagh/Wikimedia Commons



From the Editor

Dear readers,

This is the second issue of the IADL Review in 2020. It is a project that reflects the whole year by dealing with fears, expectations and the many struggles ahead.

The issue begins with Marjorie Cohn mourning the death of Ruth Bader Ginsburg and warning of the conservative, right-wing majority on the United States Supreme Court. Next, Serife Ceren Uysal recalls the loss of Ebru Timtik, her mentor and friend, with the scent of strawberries. Aytac Ünsal then draws on examples from his brief career as a lawyer to explain the right to resist and the right to a fair trial. Aytac Ünsal had accompanied his colleague Ebru Timtik in her protest fast; he has been temporarily released. In the time of Covid-19, we present the text of an author who must remain anonymous; she describes the abuse of a woman by an attractive and charming man who turns out to be a brutal criminal and her eventual escape from his tyranny. This essay contains a lesson for all women.

Dinorah la Luz then denounces acts of violence against Puerto Rican women during the pandemic. Bernard Anoumo Dodji Bokodin and Nana Mariama Apou describe the

coastal erosion in Togo and its impact on women. Niloufer Bhagwat presents a contribution about a four-month Peaceful Civil Disobedience Movement against religious criteria for citizenship in India. Alfredo Campos next exposes a new Marxist concept of gender inequality. Beth Lyons relates her experiences with the International Criminal Tribunal for Rwanda and describes the controversial issue of acquittals. Ezgi Cakir interviews Thanasis Karpagiannis on the Golden Dawn Trial. Next we present a theoretical article by Miguel Almeida on the pedagogical turn of the Universal Declaration of Human Rights and the absence of subaltern researchers.

Antonio José Avelãs Nunes deconstructs neoliberalism and its link to globalization, the new Leviathan. Finally, using Kanaky as an example, Mireille Fanon-Mendes-France questions and accuses France and the UN of violating the right to self-determination.

I hope that the captivating complexity of the essays inspires our readers to deepen their discussions of these important issues.

Evelyn Dürmayer

On Ruth Bader Ginsburg

MARJORIE COHN

IADL joins progressive people in the United States and throughout the world in mourning the death of U.S. Supreme Court Justice Ruth Bader Ginsburg. During her 27 years on the high court, Justice Ginsburg distinguished herself as protector of the poor and the disenfranchised. She wrote landmark decisions – many of them in dissent – upholding the rights of women; lesbian, gay and transgendered people; immigrants; people of color; criminal defendants; people with mental disabilities; workers and the poor. Justice Ginsburg cast more liberal votes than any other justice in the Court's most significant cases. A leader in the fight for gender equality, she will long be remembered for her consistent commitment to freedom, justice and equality.

It is a travesty that Donald Trump appointed Amy Coney Barrett to take Ginsburg's seat on the Court. Barrett seeks

to strip health insurance from tens of millions of people and crush reproductive rights. She poses a serious threat to civil rights, including voting rights. With the addition of Barrett, the Court is now split 6 to 3 in favor of radical right wingers. Barrett is 48 years old and is likely to serve on the Court for several decades.

Marjorie Cohn is professor emerita at Thomas Jefferson School of Law, former president of the US National Lawyers Guild, and a member of the Bureau of the International Association of the Democratic Lawyers and the advisory board of Veterans of Peace. Professor Cohn writes frequent articles and provides legal and political commentary for television, radio and online publications. Her many books include Drones and Targeted Killing: Legal, Moral and Geopolitical Issues. See <https://marjoriecohn.com/>.



A life dedicated to justice and struggle: Ebru Timtik

SERIFE CEREN UYSAL

“Recovering collective memory is itself an act of struggle. It allows the generational currents of the white-capped river of our movement to flow together.”¹

I don't know how people in other countries decide to become lawyers, but those who decide to be a lawyer in Turkey are divided into two groups. The first group actually chooses a profession, they are looking for a job, just like people everywhere else probably needs to do and chose this profession. This choice does make them neither good nor bad, it is simply a decision about their career. What makes them good or bad is the choices they will make in their future career as a lawyer, who they will support, who they will work for, who they will defend.

However, another group chooses this profession because of the injustices they have witnessed throughout their lives and their anger over the pain they have observed. These people say, “I will become a lawyer, and I will defend those who are suffering under the ongoing injustice”. “I will fight so that the same does not happen again,” they say:

What have these people been through?

Of course, each country has its own collective memory of pain and trauma.

Those who were persecuted by Nazi fascism...

Those who witnessed the conditions of a civil war...

This list goes on and on, because the world is never a safe place for oppressed people, for the poor ones or for anyone oppressed by patriarchal structures or violence.

Therefore, I can claim that, at least for my generation in Turkey, that which we had to witness during our childhood and our youth determined the position we took in our professional life.

Imagine a Kurdish child who was subjected to forced migration, who saw its father, its uncle or other people in its village being executed by a gunfire. That Kurdish child needed to hide under the bed during the nights to be pro-

tected from falling bullets... How many nights? I do not know because this is not my story, I have never experienced this. I can only imagine how painful it is, and I can only imagine this through the eyes of my colleagues who have lived through these situations.

For example, think of another child, this child could have been me or thousands of other lawyers from Turkey. Her uncle, who was a teacher, was kidnapped from home at night by armed and masked men. The whole family searched for him in the police stations for 10 days. Official information was obtained after 10 days. When they visited him after 10 days, the tall, strong uncle could not stand on his feet because of the torture to which he had been subjected. Your uncle, who caresses your hair and hugs you every time he sees you, has no ability to raise his hand. Months have passed... Your uncle is still in prison. Everyone in the family is unhappy. Your cousin who is younger than you does not understand. Furious... Months later, the uncle was acquitted.

What remains in that little child's memory? Maybe fear remains, as well as the desire to do something against injustice. This child will become a lawyer and will try to prevent other uncles from being tortured. Let us give a name to this child and call her Ebru Timtik!

These are small and short stories, maybe not that significant. A young person graduates from university... The family is full of pride!

My family always said to me, become a lawyer! you can help people, and you'll be “safe”. To help people you need to be safe. This was the determination of my parents. But those cold walls of the courthouses hit us like a slap in the face. You want to submit a petition for your client. You get beaten.

You try to present a defence in the courtroom, but your words get interrupted.

There comes a moment when you have to occupy the courthouse because you cannot prevent your detained clients from being unlawfully kept at the police station.

¹ Feinberg, Leslie, “10th edition 2003 Author Afterword”, Excerpts Stone Butch Blues, 10th Anniversary Edition, 2003



Of course you help others, but your mother was not right, you are not at all safe. . On the contrary, your profession is perceived as a threat to the ones in power and you are declared a public enemy.

Your client is at the police station. You go and explain her about her legal rights and then leave the police station because you have done what you need to do. The next day, that beautiful woman, your client is transferred to the court-house. She's covered in blood, her nose is broken... You want to scream.

A curfew is announced in Kurdish provinces. You know that there is no legal basis. You decide to travel there to write a report and to observe the situation with your colleagues from abroad. Your only wish is to identify and report about the unlawfulness that has happened there, which takes you three days. You as a lawyer will listen to detect violations of rights. You listen to the mothers who could not take the bodies of their children who were shot to death. You see the doctors who are prevented from entering the region and who are suffering. The meetings last for hours. In the background of conversations, you hear gunshots from only a kilometre away. When you go back to the hotel at night, the gun shots do not stop.

Or you are told that three hundred and one workers died inside a mine, because of clear negligence by the owners. You meet with other lawyers and go to the city where the miners live in order to provide the workers' families with legal aid. Afterwards you are surrounded in the courtyard of the hotel where you are staying. You ask yourself if you are going to be beaten or burned alive there. You and your colleagues need to get out of there somehow. A few days pass and the lawyers are detained and tortured.

These are very short stories about being a lawyer in Turkey. These are short stories that reflect the life of Ebru. However, it is more than this. It is the story of living in Turkey. After Ebru's death, I have difficulty in making proper sentences. My voice trembles as I speak of United Nations principles, Human Rights Conventions, ECHR or other legal applications.

I just want to shout, Ebru died of hunger, for the right to a fair trial!

Yes, we did our best. But those who could fix the problem just watched and let her die.

Who is responsible for her death now?

I still believe there are reasons for hope. But we should start discussing the how we can contribute to change this injustice. Things can change if we can exchange our painful collective memories from land to land.

I am not just talking about solidarity, but I am also talking about a united struggle. Not just for saving the life of other Ebrus, but to protect every other person who is suffering under these injustices. To prevent torture, to prevent the extrajudicial executions, to be sure that no other children will have such memories. To be sure that no one will need to hold a hunger strike for demanding a fair trial.

I will never and ever forget Ebru. She was my lawyer when I was just an intern and was arrested. She was the strong woman there in that cold police station who, smiled at me with her eyes. Later, she was my comrade when I became a lawyer and joined the Progressive Lawyers Association. She was my companion. When I was travelling to a small city where there were a so-called work accidents. She was driving a car with only a three day driving licence. She was a person who was full of life! She loved life too much. I know this especially from the trip we made. She was full of anger and sadness, but she stopped in every corner where she saw a villager, who was selling her own products, near the road. I remember that she bought strawberries. The taste and smell of strawberries will always remind me Ebru. She fought like strawberries, modest but full of resistance.

Serife Ceren Uysal is a human rights lawyer from Istanbul. Her practice in Turkey, included several cases of systemic human rights violations. She has been an executive board member of the Progressive Lawyers Association since 2012. She is also an active member of the international relations committee of the association and represents the association in several international organisations. Part of her activities on the committee, involved she and her colleagues organizing numerous fact-finding and trial observation missions. Based in Vienna since December 2016, she took up the position of guest researcher at the Ludwig Boltzmann Institute for a year. She has participated in several conferences and seminars in different countries to draw attention to the situation in Turkey, particularly in relation to lawyers and human rights defenders. She was awarded the Dr. Georg Lebiszcak-Prize for Freedom of Speech in Austria. She is currently studying at the Gender Studies Masters Program of the University of Vienna, focusing on gender issues within the context of human rights law.



To Use the Right to a Fair Trial

AYTAC ÜNSAL

The Right to a Fair Trial, like every right, has taken its place in the legal texts fertilized by the blood of the people of the world. The people have had to struggle to attain judgments based on the law rather than judgments based on the interests of god rulers, tyrants, kings and sultans. Thousands of heads were laid under guillotines for the right to a fair trial to reach its present form.. The jurist is obliged to know the historical background of every right and to act in accordance with its meaning and an understanding of the sacrifices that led to its establishment. We act with this responsibility in mind. In our country, Turkey, the right to a fair trial is one of the rights that has not been implemented for a very long time. Trials are conducted through political courts, not on the basis of law, but on the basis of the interests of the state. It is impossible to call them judgments. A trial is legally aimed at distinguishing between what is unlawful and lawful, right and wrong, lie and truth. In our country, the process called the trial today consists of administrative procedures carried out by political committees.

I have experienced numerous examples of this in my short time as a lawyer. My experience with this problem began when I completed my internship and before I started my law practice. On June 16, 2013, our phone rang and my lawyer friend, whom I was interning with, was called to a hospital in Okmeydanı, Istanbul. His client said a 14 year old boy, a relative, was shot by police. When we arrived at the hospital, we didn't see anyone at first. Five minutes later, a 14-year-old boy entered the hospital emergency room in his arms. He was unconscious and there were traces of blood on him. While this boy, whose name was Berkin Elvan, went to buy bread, he encountered the police who were throwing tear gas at people. Berkin Elvan, who was shot in the head with a pepper spray capsule, died after being in a coma for 269 days. Although seven years have passed, the police who shot him have not been punished.

One of the most important files I followed up with after I started my law practice was the case of Halkın Hukuk Bürosu Contemporary Lawyers Association, which was tried on December 2013. Nine lawyer friends were arrested due to their professional activities. During the hearings, it was discussed whether activities such as exercising the right to silence and attending his client's funeral constituted membership of the organization. I started my profession by witnessing that my colleagues' rights to a fair trial were violated. After that, I saw many more examples. I was the

lawyer for a young woman named Dilek Doğan, who told the police who entered her house illegally, to wear shoe covers and not to dirty her house, was shot and killed by the police. There were many illegalities during the trial. The police who were accused of the crime were especially protected by the state. All steps were taken so that he would not be arrested..

In May 2014, an explosion and collapse occurred in a mine in Soma. Three hundred and one miners lost their lives after being buried underground. Our substantial legal actions proved that the mine's boss buried the three hundred and one people alive so that 1 ton of coal would be extracted more cheaply. It was almost certain that the defendants would receive life sentences. The court panel was also convinced of the facts in the file. Meanwhile, government intervention came immediately. First, the court's panel of judges was changed. A judge who cleared the bosses in a different mine massacre was made the court president. Right after that, we, as the lawyers in the case, were arrested. As a result, the boss of the mine was acquitted.

There was a coup attempt in Turkey in 2016, after which the government declared a state of emergency. The implementation of the state of emergency was used entirely to liquidate and punish dissidents, socialists, and democrats. Academics and civil servants were dismissed without any legal justification. No legal avenues have been opened to appeal. During this period, the dismissed academic Nuriye Gülmen started protesting about her job being unlawfully taken away. She was constantly detained for actions she started alone. After the arrests, Nuriye Gülmen alone won the right to hold a sit-in. She started the protest by sitting alone. Then, an expelled teacher, Semih Özakça, joined her. The actions of the two instructors were met with interest by the public. After a while, thousands of people started to come to Ankara Yüksel Street, where the action took place. Those who were expelled turned their eyes to Ankara Yüksel Street. This interest frightened the government considerably. The Ministry of Interior printed a leaflet criticizing the two educators. The two were targeted unlawfully. The Minister of the Interior also made statements to the press about them. Shortly after this targeting, they were arrested despite their hunger strike. Two days before their first hearing, we as their lawyers, were arrested. As a result, the rights of the two educators to a fair trial were violated. We can add more cases in which we have defended our clients' rights to a fair trial, because in Turkey the right to a fair trial



is systematically violated.

While we were fighting these violations on behalf of our clients, we ourselves suffered the same violations. We were detained on the grounds that we were fighting for the right to a fair trial and acting as lawyers in the cases mentioned above. We were detained for nine days without any information being given to us. We were subjected to torture. Then, despite the lack of evidence against us, we were arrested. Basically, they were trying to prevent us from doing our job. Even though we were in prison, we continued to be lawyers. Our client 28-year-old Mustafa Koçak, who was under arrest in Izmir, started a death fast with the demand of a fair trial. He had received an aggravated life sentence without any evidence. There was only one confessor's gossip phrase, "he told me he was helping the action at a meatball restaurant". Another confessor who testified about him admitted that he was threatened by the National Intelligence Agency and the police, so he had to give false testimony about Mustafa. This statement was not considered by the court. Based on a single statement, Mustafa was buried in concrete for life at the age of 28. He did not accept this situation. He asked for the Right to a Fair Trial. He started the death fast. If I hadn't been in prison, we would have been Mustafa Koçak's lawyer. We were going to fight this injustice. They took our lawyer's robes away from us. We decided to defend our clients with our lives and substitute our very lives for the robes that had been taken. We started the death fast on April 5 to support Mustafa Kocak's demand for the right to a fair trial and the right of Grup Yorum to perform concerts and the right of all peoples living in Turkey to a fair trial. Our fundamental rights and freedoms were not implemented in our country. None of our rights are guaranteed. Our rights have been violated by arbitrariness and bullying. We wanted to be turned into unrighteous slaves, the living dead. We refused to be alive, dead. My comrade in justice who lost her life on a death fast is Ebru Timtik, As she said, "I did not choose the death fast. The judicial system has condemned the people's lawyers to death, because of the work you are involved in.

Professionally and politically, they wanted to kill us. I just decided on the shape of it. Will it be by resisting or going quietly?". in a three- panel trial, the government said, "We gave you the punishment. That's it." They did not allow any legal appeal. The court of appeals did not say anything concrete in its several-page decision. Social opposition was suppressed by the state terror that had been practiced for years. Making a press statement on the streets and squares was punished with severe penalties. In prison conditions, we had no choice but to resist with our bodies, the only weapon

we had. The Right to Fair Trial, which has been gained at great prices for centuries, now had to be protected at great prices. By starting the death fast, we have seen a very serious support with our struggle for law and Justice. Thousands, millions, have supported our demands and resistance. This showed how much the right to a fair trial was violated in Turkey. Our resistance has been supported by lawyers and peoples all over the world. This demonstrated how a current demand, the Right to Fair Trial, is all over the world.

The fact that we, as a people, have the right to resist when our Right to a Fair Trial is taken away from us and our rights are usurped arbitrarily. with millions of people has been reconsidered. The right to resist had found its place in the basic legal texts. It was a right to resist where there was suppression and oppression. We, as lawyers, have exercised that right. We have been reminded that this right is of importance and value and cannot be taken from us. Yes we died, Yes we got hurt. But we know that no right in history has been earned without paying a price. No rights were protected at no cost. This is a very concrete historical fact. Lawyer Ebru Timtik died to protect our rights. To put it more accurately, she was killed by a political power unwilling to ensure her Right to Fair Trial. She shook the whole world with her death. It became a symbol. Now lawyer Ebru Timtik informs lawyers and people with her life which underlines the facts. It reminds me of how important it is to live humanely, . And she asks, will we allow our rights to be usurped one by one without fighting, or will we protect our rights by using our right to resist? The answer to the question and the attitude we take will show whether we have fulfilled our legal responsibility. We, as all the Democratic, Progressive, revolutionary lawyers of the world, will continue to answer the question using our right to resist. And it is a fact that history and science show: we will win!

Aytac Ünsal graduated from Ankara Başkent University in 2012 and joined the Ankara Bar Association after his internship. Since then he has worked in the People's Law Office as a lawyer. He is also an active member of the Progressive Lawyers Association.

In 2017, he was unlawfully detained and arrested after three years of practicing law. He started a death fast together with a colleague and comrade, Ebru Timtik, demanding a fair trial after three years of unjust imprisonment. They also demanded a fair trial for all others who were suffering as a result of ongoing injustices. He was conditionally released on the 214th day of his hunger strike to death. After his release, he suspended his hunger strike on September 4. He is still being treated in Istanbul and has several health problems due to the long hunger strike. He remains at risk for rearrest when he completes his medical treatment.



Adil yargılanma hakkını kullanabilmek için

AYTAC ÜNSAL

Adil Yargılanma Hakkı; her hak gibi dünya halklarının kanlarıyla hukuk metinlerindeki yerini almıştır. Tanrı hükümdarların, tiranların keyfine, kralların, sultanların çıkarlarına bağlı olarak yapılan yargılamadan, kanuna ve hukuka bağlı olarak yapılan yargılamaya ulaşılması için halkların mücadele etmesi gerekmiştir. Adil yargılanma hakkının bir hak olarak bugün ki haline kavuşması için binlerce baş giyotinlerin altına yatırılmıştır. Hukukçu her hakkın tarihsel arka planını bilmek ve bu anlamın değeriyle hareket etmekle yükümlüdür.

Bizde bu sorumluluk ile hareket ettik. Ülkemizde yani Türkiye’de Adil Yargılanma Hakkı çok uzun süredir uygulanmayan haklardan biridir. Siyasi mahkemeler aracılığıyla hukuk esas alınarak değil, devletin çıkarları gözetilerek yargılamalar yapılmaktadır. Bunlara yargılama diyebilmekte mümkün değildir. Çünkü bir yargılama hukukun, hukuksuz olanla hukuki olanı, doğru ile yanlış, yalan ve gerçeği birbirinden ayırma amacı taşır. Ülkemizde ise bugün yargılama denilen işlem, siyasi komitelerin yürüttüğü idari işlemlerden ibarettir.

Kısa avukatlık yaşamımda bunun çok sayıda örneğini deneyimledim. Avukatlık mesleğine başlamadan önce stajımı gerçekleştirirken tanıklığım başladı. 16 Haziran 2013 tarihinde telefonlarımız çaldı. Yanında staj yaptığım avukat arkadaşım İstanbul Okmeydanı’nda bir hastaneye çağırılıyordu. Müvekkili, akrabası olan çocuğun polis tarafından vurulduğunu söylüyordu. Hastaneye gittiğimizde henüz kimseyi göremedik. 5 dakika sonra ise hastane aciline 14 yaşındaki çocuk kucaklarda girdi. Bilinci kapalıydı. Üzerinde kan izleri vardı. Adı Berkin Elvan olan bu çocuk ekmek almaya gittiği sırada sokaklarda halka biber gazı atan polislerle karşılaştı. Biber gazı kapsülüyle kafasından vurulan Berkin Elvan 269 gün komada kaldıktan sonra yaşamını yitirdi. Aradan 7 yıl geçmiş olmasına rağmen Berkin Elvan’ı vuran polisler cezalandırılmadı.

Avukatlığa başladığımda ilk takip ettiğim önemli dosyalardan biri 2013 Aralık ayında görülen Halkın Hukuk Bürosu Çağdaş Hukukçular Derneği davasıydı. 9 Avukat arkadaşımız mesleği faaliyetleri nedeniyle tutuklanmıştı. Duruşmalar sırasında, susma hakkı kullanırmak, müvekkilinin cenazesine katılmak gibi faaliyetlerin örgüt üyeliğini oluşturup oluşturmadığı tartışıldı. Mesleğime meslektaşlarımın adil yargılanma haklarının ihlal edildiğine tanıklık ederek başlamıştım.

Sonrasında ise birçok örnek gördüm. Evine hukuksuz bir

şekilde giren polislerin galoş giymelerini ve evlerini kirlilemelerini söyleyen Dilek Doğan isimdeki genç kadın polisler tarafından vurularak öldürüldü. Onun avukatlığını yaptım. Yargılama esnasında çok sayıda hukuksuzluk yaşandı. Sanık polis devlet tarafından özel olarak korundu. Tutuklanmaması için herşey yapıldı. Adil Yargılanma Hakkı ihlal edildi. 2014 Mayıs’ında Soma’da bir maden ocağında patlama ve çökme meydana geldi. 301 maden işçisi toprağın altında kalarak yaşamını yitirdi. Hukuki olarak çok büyük bir çaba sarf ettik. Maden patronunun 1 ton kömür daha ucuza çıkarılсын diye 301 insanı diri diri gömdüğünü kanıtladık. Dava da sanıkların müebbet hapis cezası alacağı hemen hemen kesin görülüyordu. Mahkeme heyeti de dosyadaki gerçeklere ikna olmuştu. Bu sırada hemen hükümet müdahalesi geldi. Önce mahkemenin hakim heyeti değiştirildi. Farklı maden katliamı dosyalarında patronları aklayan bir hakim mahkeme başkanı yapıldı. Hemen ardından dosyanın avukatları olan bizler tutuklandık. Sonuç itibarıyla madenin patronu beraat ettirildi. 2016 yılında Türkiye’de bir darbe girişimi yaşandı. Darbenin ardından ise iktidar OHAL ilan etti.

OHAL uygulaması tamamen muhalifleri, sosyalistleri, demokratları tasfiye etmek ve cezalandırmak için kullanıldı. Akademisyenler, memurlar hiçbir hukuki gerekçe gösterilmeden ihraç edildi. İtiraz edebilmek için hiçbir hukuki yol açılmadı. Bu süreçte ihraç edilen akademisyen Nuriye Gülmen işinin hukuksuzca elinden alınmasına karşı protesto eylemlerine başladı. Tek başına başladığı eylemlerde sürekli gözaltına alındı. Gözaltıların ardından Nuriye Gülmen tek başına, oturma eylemi yapma hakkını kazandı. Ve tek başına oturarak protesto eylemine başladı. Sonra yanına ihraç edilen öğretmen Semih Özakaça da katıldı. İki eğitimcinin gerçekleştirdiği eylem Türkiye’de halklar tarafından ilgiyle karşılandı. Eylemin gerçekleştiği Ankara Yüksel caddesine bir süre sonra binlerce insan gelmeye başladı. İhraç edilenler gözünü Ankara Yüksel caddesine çevirdi. Bu ilgi hükümeti oldukça korkuttu. İçişleri Bakanlığı iki eğitimci aleyhinde bir broşür bastırdı. İki eğitimci hukuksuzca hedef gösterildi. İçişleri Bakanı da iki eğitimci hakkında basına demeçler verdi. Bu hedef gösterme eyleminden kısa süre sonra iki eğitimci açlık grevinde olmalarına rağmen tutuklandılar. İlk duruşmalarından iki gün önce avukatları olan bizler tutuklandık. Sonuç olarak iki eğitimcinin adil yargılanma hakları ihlal edildi.

Müvekkillerimizin adil yargılanma haklarını savunduğumuz bu dosyaları arttırabiliriz. Çünkü Türkiye’de adil yargılanma



hakkı sistematik olarak ihlal edilmektedir. Bu ihlallere karşı mücadele ettiğimiz sırada bizde aynı ihlale maruz bırakıldık. Adil yargılanma hakkı için mücadele ettiğimiz, yukarıda adını saydığımız dosyalarda avukatlık yaptığımız gerekçesiyle gözaltına alındık. 9 gün tarafımıza hiçbir bilgilendirme yapılmadan gözaltında tutulduk. İşkenceye maruz bırakıldık. Ardından hakkımızda delil olmamasına rağmen tutuklandık. Temel olarak mesleğimizi yapmamıza engel olunmaya çalışıldı.

Biz hapishanede olsak da avukatlık yapmaya devam ettik. İzmir de tutuklu olarak bulunan 28 yaşındaki Mustafa Koçak adil yargılanma hakkı talebiyle ölüm orucuna başladı. Mustafa Koçak bizim müvekkilimizdi. Hakkında hiçbir delil olmadan ağırlaştırılmış müebbet hapis cezası almıştı. Sadece tek bir itirafçının “eyleme yardım ettiğini bana köfteci de söylemişti” tarzındaki dedikodu ifadesi vardı. Hakkında ifade vermiş bir diğer itirafçı ise MİT ve polis tarafından tehdit edildiğini bu nedenle Mustafa hakkında yalan ifade vermek zorunda kaldığını itiraf etmişti. Bu ifade mahkeme tarafından değerlendirilmedi. Tek bir ifadeye dayanarak Mustafa 28 yaşında ömür boyu betonların arasına gömüldü. Bu durumu kabul etmedi. Adil Yargılanma Hakkı istedi. Ölüm orucu eylemine başladı.

Hapishanede olmasaydım Mustafa Koçak'ın avukatlığını yapacaktık. Bu haksızlıkla mücadele edecektik. Avukatlık cübbemizi elimizden almışlardı. O zaman bizde canımızı cübbe yapacaktık. Müvekkillerimizi hayatlarımızla savunacaktık. Mustafa Koçak'ın adil yargılanma hakkı talebi ve Grup Yorum üyelerinin konser yapma haklarına destek olmak ve Türkiye'de yaşayan bütün halkların adil yargılanma hakkı için 5 Nisan günü ölüm orucuna başladık.

Ülkemizde temel haklarımız ve özgürlüklerimiz uygulanmıyordu. Hiçbir hakkımız güvence altında değildi. Haklarımız keyfiyet ve zorbalıkla ihlal ediliyordu. Hakkı olmayan kölelere, yaşayan ölümlere dönüştürülmek isteniyorduk. Yaşayan ölü olmayı reddettik. Ölüm orucunda yaşamını yitiren adalet yoldaşım Av. Ebru Timtik'in dediği gibi “Ölüm orucunu ben tercih etmedim. Halkın avukatlarını ölüme sizinde dahil olduğunuz yargı sistemi mahkum etti. Mesleki ve siyasi olarak bizi öldürmek istedi. Ben sadece bunun şekline karar verdim. Direnerek mi olacak yoksa sessiz sedasız mı?”. Evet, üç celse süren bir yargılamayla hükümet “size verdik cezayı gitti” dedi. Hiçbir hukuki itiraz yolu tanımadılar. İstinaf mahkemesi birkaç sayfalık kararında somut hiçbir şey söylemiyordu. Yıllardır uygulanan devlet terörüyle toplumsal muhalefet sindirilmişti. Sokaklarda meydanlarda basın açıklaması yapmak ağır cezalarla cezalandırılıyordu.

Hapishane koşullarında elimizdeki tek silahla bedenimizle direnmekten başka bir yolumuz kalmamıştı. Yüzyıllardır büyük bedellerle kazanılan Adil Yargılanma Hakkını şimdi de büyük bedellerle korumak gerekiyordu. Ölüm orucuna başlayarak hukuk ve adalet mücadelesi vermemizle birlikte çok ciddi bir destek gördük. Binlerce, milyonlarca insan talebimizi ve direnişimizi sahiplendiler. Bu durum Türkiye'de Adil Yargılanma Hakkının ne kadar çok ihlal edildiğini gösteriyordu. Direnişimiz tüm dünyada avukatlar ve halklar tarafından sahiplenildi. Bu durum Adil Yargılanma Hakkının tüm dünyada ne kadar güncel bir talep olduğunu gösteriyordu.

Milyonlarca insanla birlikte Adil Yargılanma Hakkımız elimizden alındığında, haklarımız keyflikle gasp edildiğinde halk olarak direnme hakkımız olduğu gerçeği yeniden bilincimize yazıldı. Direnme hakkı temel hukuki metinlerde kendine yer bulmuştu. Baskı ve zulmün olduğu yerde direnmek bir haktır. Bizde hukukçular olarak bu hakkımızı kullandık. Bu hakkın bizden alınamayacak önemde ve değerinde olduğunu hatırlattık.

Evet öldük. Evet sakatlandık, yaralandık. Ama biliyoruz ki tarihte hiçbir hak bedel ödemedi kazanılmadı. Hiçbir hak bedel ödemeksizin korunmadı. Bu çok somut tarihsel bir gerçektir. Hepimizin haklarını korumak için yaşamını yitirdi Av. Ebru Timtik. Daha doğru bir ifadeyle Adil Yargılanma Hakkını uygulamaktan aciz bir siyasi iktidar tarafından öldürüldü. Ölümüyle tüm dünyayı sarstı. Bir sembol haline geldi.

Şimdi Av. Ebru Timtik avukatlara, hukukçulara, insanlara canıyla anlatıyor. Gerçeklerin altını çiziyor. Adil Yargılanma Hakkı'nın, insanca yaşamının ne kadar önemli olduğunu hatırlatıyor. Ve soruyor mücadele etmeden haklarımızın bir gasp edilmesine izin mi vereceğiz yoksa direnme hakkımızı kullanarak haklarımızı koruyacak mıyız? Soruya vereceğimiz cevap ve alacağımız tavır hukukçu sorumluluğumuzu yerine getirip getirmediğimizi gösterecek.

Biz dünyanın tüm demokrat, ilerici, devrimci avukatları olarak soruyu direnme hakkımızı kullanarak cevaplamaya devam edeceğiz. Ve tarihin, bilimin gösterdiği bir gerçektir ki: Biz kazanacağız!



Une bienveillante escroquerie en temps de pandémie

UNE RESCAPÉE

Depuis quelques années déjà, on s'aperçoit que les pervers narcissiques sont partout et touchent dans les faits plus de monde que nous n'aurions pensé.

Presque chacun d'entre nous a déjà été confronté à ce type d'individu, que ce soit en famille, dans la vie privée ou dans la vie professionnelle.

Beaucoup de victimes ont commencé à se parler, à se raconter leurs histoires et à se soutenir.

Voici le témoignage de l'une d'entre elles, le but premier étant d'avertir d'autres femmes de ce que la nature humaine peut cacher de plus horrible, ensuite de faire le bilan de ce qu'a été cette mésaventure et ce qui a pu en ressortir.

Cette expérience peut aussi aider d'autres personnes à trouver la force de partir.

Le confinement du Covid 19 était le nid de cette effrayante histoire que je ne pensais vivre un jour.

Le Covid 19 a apporté avec lui beaucoup de malheurs, il s'est abattu sur la terre entière sans y être invité.

Des célébrations durant cette période, des séparations aussi, des naissances mais surtout le fantôme de la mort.

J'ai toujours pensé que la mort était la pire chose qui pouvait nous attendre, que ça soit nous qui quittons cette terre ou un être cher qui nous laissait derrière lui. Par le mot « mort », j'ai toujours pensé qu'il était mis fin à une vie qui mérite d'être vécue.

Il existe pourtant des souffrances bien plus douloureuses, plus poignantes et plus tragiques que la mort elle-même.

Des douleurs que rien ne peut apaiser tant il est ancré en nous cette idée négative que nous ne méritons pas de vivre. Au début du confinement imposé par le Covid 19, j'ai vécu ce que je pensais être au début, un nouveau départ, une chance de repartir à zéro, le droit d'être heureuse à nouveau.

Du haut de mes 38 ans, de mon statut d'avocate mais aussi et surtout de maman de deux enfants issus d'un premier

mariage je me suis retrouvée envers et contre tout dans un tourbillon maléfique, destructeur et tragique.

La pandémie couvre de son effroyable manteau tout doucement sans se soucier des frontières et des races toute la terre, en même temps le plan machiavélique d'un diable maquillé en gentil prétendant dessine ses dernières retouches pour faire de la vie d'une jeune femme pleine de vie et d'espoir et surtout d'amour, un véritable cauchemar. Il est difficile de bien expliquer les choses que nous n'avons pas vécues, mais je vais quand même essayer de décrire l'humiliation et la manipulation qui ont donné place à la douleur et à la solitude dans la vie d'une personne née pour ne jamais se laisser autant maltraitée et manipulée.

Issue d'une famille où père et mère nous ont inculqué le respect de soi avant le respect de l'autre, défenseuse des droits de l'homme en général et des droits des femmes en particulier, membre de plusieurs associations militant contre la discrimination faites aux femmes et pour finir maman de deux enfants.

Doucement et à pas sur, le diable déguisé en ange commença une torture psychologique pour effacer la personne que j'étais.

Comment ai-je pu accepter qu'un homme me rabaisse et taise la femme forte et intelligente qui était en moi.

Comment ai-je pu être aussi crédule et ne pas détecter ses intentions.

Comment n'ai-je pas pu voir venir le malheur à moi.

Des interrogations qui longtemps me hanteront.

Bien sûr que je ne pouvais voir venir, c'était un professionnel, un habitué, un virtuose de la ruse et de la malice, un maestro de l'escroquerie.

Doté d'un charme fou et d'un physique de tombeur, manipulant le verbe et les manières, mixant entre la sagesse et la culture, miroitant une situation financière stable et d'avenir.

Rien ne présageait que cet homme de 1m 87 aux cheveux



bruns et fins, fort et robuste, pas touché par la moindre marque de vieillesse puisse aussi bien manipuler mensonge, malveillance et escroquerie.

Un pervers narcissique comme le décrivent très bien les psychothérapeutes à la recherche de la proie idéale qu'était cette femme vulnérable, au cœur tendre, aux grandes valeurs, pleine de vie et d'espoir.

Il avait bien étudié au préalable le sujet que j'étais pour mieux le manipuler, il savait que mes enfants étaient ce qu'il y avait de plus cher pour moi et que leur réaction face à cette nouvelle union devait être validée en amont par eux.

Il s'y était tellement bien préparé et avait tellement mis tout en œuvre pour se faire aimer par eux qu'ils l'appelèrent naturellement et immédiatement « papa ».

Que peut influencer une maman plus que le bonheur de ses petits.

Des enfants frappés par un divorce douloureux, ne plus voir leurs parents vivre sous le même toit et ne plus les voir s'aimer surtout.

Des enfants à la recherche d'un nouvel équilibre dans le déséquilibre que crée un divorce, que ce parfait inconnu leur promet par un simple regard doux ou un geste bienveillant.

Arrivé en Algérie après une absence de plus de 30 ans, avec comme seule mission trouver cette perle qu'il saurait manipuler, écraser puis détruire pour mieux avoir d'elle tout ce qu'il voulait.

Venu de Suède, pays actif sur le plan international apportant son soutien aux transitions démocratiques et la défense de l'Etat de droit dans le monde, pays défenseur des droits des enfants et des femmes, qui lutte contre toutes formes de discrimination faites aux femmes.

Le confinement a donné à cet homme cette occasion unique de mieux concrétiser son plan déjà étudié.

Il m'avait été présenté par une amie avocate qui prétendait être sa parente et bien le connaître.

Parmi toutes celles qui lui ont été présentées, il avait jeté son dévolu sur moi, et j'ai vu à ce moment là, la flatterie d'être

l'élue.

Il précipita les événements pour que nous puissions nous marier un 17 Mars, quelle ironie le premier jour du confinement en Algérie.

Il disait être veuf depuis huit ans et pleurait sa défunte. Il disait l'avoir perdu d'un cancer très rare des ovaires et que leur fille souffrait de la même maladie et se débattait pour rester en vie.

Il les pleurait tellement bien que cela me rendait coupable de ne pouvoir atténuer ses peines.

Il disait être heureux de m'avoir trouvé moi et les enfants.

Lors de notre rencontre, cet homme représentait tout ce que je recherchais : doux, gentil, aux petits soins, galant, protecteur, instruit... Bref, je venais de rencontrer le Prince charmant

Avec mon entourage, il était tout le contraire de ce qu'il était par la suite avec moi : ouvert, séducteur, beau parleur... il savait flatter les gens. Mais l'envers de ce masque était sa lâcheté. Cet homme était fabuleux en apparence, mais d'une noirceur terrible à l'intérieur. Sous son visage chaleureux en surface régnaient le froid, le mépris et le dédain. Un rictus de triomphe s'affichait sur son visage lorsqu'il me voyait pleurer ou tomber à genoux le suppliant d'arrêter ces injures ou quand il croyait m'avoir totalement anéantie. Aucune compassion, humanité ou tendresse.

Il était tantôt très câlin, tantôt très méchant.

Mensonges incessants, regards méprisants... puis gentillette et cadeaux pour se faire pardonner mais finalement laisser place à une attitude glaciale. Il se plaçait toujours en victime et devenait blessant avec moi.

Le premier mois de noces était comme il l'avait prévu, dédié à me faire la cour à moi et à mes petits, à nous miroiter le bon père et le bon mari qu'il pouvait être.

Il semblait tourmenté et cachait des fantômes en lui, mais qu'il n'en avait pas, j'étais loin de me douter de la lourdeur du poids de ses secrets.

Une fois les choses bien installées, du jour au lendemain, il me fit assoir face à lui en l'absence des enfants



, me dévoilant qu'il avait été approché la veille de notre mariage par des gens qui lui voulaient du bien et voulaient l'empêcher de m'épouser sous prétexte que j'étais la pire chose qui pouvait lui arriver alors qu'il connaissait très peu de gens en Algérie.

Il disait que j'étais une femme sans aucun respect de ma personne et que j'étais le déshonneur de ma famille, que j'avais mauvaise réputation dans mon milieu professionnel et associatif et que tout mon entourage parlait de moi.

Il disait que mes plus proches n'osaient pas me dire le fond réel de leurs pensées à mon égard.

Il avait dessiné un profil de ma personne que nul ne connaissait, pas même moi.

Avec les éléments qu'il me donnait et qu'il avait récolté en me piratant tous mes comptes professionnels et personnels, il arrivait à me faire croire même à des choses que je savais n'avoir jamais commises, je me sentais frappée d'un sortilège maléfique.

Il avait volé mon intimité, violé ma vie privée de toutes ces années passées, photos, écrits, discussions....Il en était arrivé à ma vie la plus intime avec mon ex mari.

Il avait eu accès à mes finances, mes projets, mes écrits, mes photos en piratant mes comptes facebook, whatsapp, viber et boîte mail pour me faire chanter par la suite en me menaçant de les divulguer dans mon milieu, il disait qu'il détruirait ma carrière si je ne me pliais pas à ses exigences.

Il disait m'avoir épousé par charité afin de sauver mes enfants de la honte qu'une mère comme moi pouvait leur apporter dans leur vie future.

Dévalorisation, manipulation qui conduisent souvent à l'isolement et à la culpabilité. Des personnalités qu'il vaut mieux éviter de croiser et qui, par manque de confiance en elles, peuvent détruire leurs victimes.

Ceci était le processus qu'il avait utilisé pour me pousser à fermer mon cabinet, m'éloigner de ma profession, de mes clients et de mes collègues.

Il me fit résilier les conventions que j'avais signé aux autres avocats qui travaillaient avec moi, m'avait fait vendre mon mobilier de bureau et ma voiture sous prétexte que je de-

vais couper tout contact avec ce monde où j'étais si mal vue d'après lui et par la même occasion me purifier pour lui.

Moi l'avocate connue, respectée et aimée, moi qui était pressentie pour être élue membre du conseil de l'ordre je n'arrivais pas à croire ce qui m'arrivait, je ne me nourrissais plus. Je ne dormais quasiment plus, parce que j'avais toujours peur. Je n'étais jamais tranquille, l'esprit tourmenté, la peur au ventre, la honte, j'étais totalement paralysée, je ne savais plus quoi faire, le quitter et courir le risque qu'il mette à exécution ses menaces, rester et mourir de l'intérieur, je voulais juste que tout redevienne comme avant.

Il disait qu'il me tuerait si je le quittais ou si j'alertais ma famille, il disait qu'il ferait du mal à ma mère qui vivait seule et qu'il tuerait le père de mes enfants.

Il m'était très difficile de prendre une décision à ce moment là, j'avais mes deux enfants avec moi.

Je voyais que son regard était complètement noir et j'avais peur pour eux aussi.

Il m'interdisait de sortir sans lui ou de rester sans sa présence, il écoutait et enregistrait toutes mes conversations téléphoniques.

C'était un enfer, je temporisais, réfléchissais, peinais à trouver mon essor. Je ne savais plus que faire.

Si nous ne vivions pas dans un monde où une femme divorcée n'était pas perçue comme une pestiférée, ces idées ne se seraient jamais développées ainsi dans ma tête de femme dont la condition est dictée par des hommes.

Des notions de masculinité et de féminité imposées par la société dès le jeune âge ainsi que la normalisation et l'encouragement de la violence qui font que les femmes pensent elles-mêmes à un moment donné de leur vie avoir fait quelque chose de mal.

Les croyances et attitudes négatives enracinées à l'égard des femmes, qui font que ces mêmes femmes sont déjà marginalisées et vulnérables à leur venue au monde.

Le contexte et les causes de la victimisation des femmes tel que l'inégalité entre les sexes, le déséquilibre du pouvoir, les attitudes myosines, les structures sociales patriarcales et la discrimination systémique peuvent engendrer les formes



les plus extrêmes de violence contre les femmes.

Il parvint donc aisément à manipuler ma personne et me faire accepter que tout ce que j'ai pu faire ou accomplir durant ma vie antérieure sur le plan professionnel et personnel surtout n'était qu'échec.

Il disait que j'avais raté l'éducation de mes enfants, que j'avais détruit mon couple et que j'étais une mauvaise avocate, en somme une mauvaise personne.

Ces mots raisonnaient comme un écho dans ma tête, je ne comprenais pas ce qui m'arrivait, je ne supportais plus l'image qu'il renvoyait de moi et qu'il disait que les autres pensaient, je ne m'aimais plus tout simplement.

Quoi de plus horrible que de se sentir coincée, bloquée face à une réalité, divorcer après à peine un mois de mariage précipité où toute ma famille et proches me disaient de prendre mon temps ou rester et supporter des insultes, des injures et un regard négatif sur soi.

Le confinement dû au Covid était là, installé et donnait plus de force au monstre avec qui je cohabitais.

Il augmentait d'intensité chaque jour à la même vitesse que cette pandémie se propageait.

Les cas de Covid augmentaient dans le monde et sa force mentale se nourrissait de cela.

Il soufflait le chaud et le froid dans ma vie, il décidait de mon humeur et dessinait les traits d'angoisse et de peine sur mon visage que je dissimulais aux miens.

J'étais captive, de lui déjà mais aussi et surtout de la société et de ce qu'elle pourrait penser de moi si je décidais de divorcer une seconde fois.

Il savait mes faiblesses, il connaissait mon éducation, il avait étudié et disséqué ma personnalité bien avant de m'avoir choisie.

Il savait où frapper et comment le faire et à quel moment.

Il sauta à un cap supérieur, il commença à toucher à mon ex mari, le père de mes enfants, il voulait détruire la relation qu'il avait avec les petits, et il y parvenait tellement bien vu l'absence de ce dernier dans la vie de ses enfants.

Ces petits avaient besoin de combler le manque de présence de leur père et quoi de mieux comme aubaine pour lui, essayer de s'accaparer leurs cœurs innocents qui l'aimaient vraiment.

Il leur donnait amour, affection et attention, mais il avait un but derrière tous ces agissements.

Il faisait cela et en parallèle me menaçait de tuer leur père si je ne le laissais pas agir ainsi pour l'effacer de leur mémoire.

Il souhaitait formater nos vies, Il voulait que je n'ai jamais eu de passé avec celui avec qui j'ai été mariée douze ans.

Il m'interdisait de communiquer avec lui, même pour la question des enfants. Il les lui remettait lui-même lors du droit de visite sans que j'avais le droit d'être présente.

Il disait qu'il doutait de ma fidélité et de mes intentions, il disait que nous étions encore ensemble mon ex mari et moi et que nous voulions lui voler ses biens et son argent, qui par la suite je découvris qu'il ne possédait pas.

Il voulait effacer le nom de mon ex mari partout où il figurait, il déchira mon passeport, mes cartes bancaires, ma carte d'identité, ma carte professionnelle et mon permis de conduire, partout où le nom de mon passé apparaissait.

Il avait besoin de se prouver et que je lui prouve surtout que ce passage de ma vie n'avait jamais existé alors que je n'avais divorcé que depuis un an et demi.

Je voyais de plus en plus clair dans son jeu et dans ce qu'il s'apprêtait à faire de moi, effacer ma personne et me faire obéir au doigt et à l'œil après avoir réussi à m'isoler des miens.

Une fois certaine de ses intentions, il fallait que je trouve le moyen d'y échapper, peu importe les dégâts, je n'avais plus le choix.

J'ai réussi à m'ôter de la tête que d'éviter de divorcer une deuxième fois était une absurdité et que je devais au contraire vite m'en aller.

Il fallait que je sauve ma vie et celle de mes enfants.

Il fallait aussi que je mette un terme au cauchemar que je



vivais.

Il fallait que je sorte de ce tourbillon dans lequel je me suis si facilement laissée emporter.

J'ai alors commencé à m'opposer à lui, à essayer de sortir de son chantage incessant. Mais ça ne lui avait pas plu du tout.

J'ai dû fuir de chez moi pour échapper à ses griffes.

Et puis vint ce fameux 17 juillet, jamais je n'avais vu son regard aussi noir, là je me suis dit : « il va finir par me tuer »

Quatre mois jour pour jour depuis notre mariage, alors que ce vendredi s'annonçait des plus ordinaires, je décidais que c'était ce jour là et pas un autre,

Mon corps et ma tête surtout, me dictaient de m'enfuir, de partir vite et loin, ils me disaient que je ne survivrais pas au delà de cette date là.

C'est en chemise de nuit et en claquettes que je quittais le domicile, avec moi ma résolution à sauver ma vie et celle de mes enfants.

La dernière image de son regard sombre posé sur moi de loin me faisait froid dans le dos.

Il me regardait de derrière le comptoir de la cuisine alors que je m'apprêtais à m'enfuir.

Il n'avait pas vu venir la scène, il ne pensait pas que sa si parfaite proie aurait le courage et l'audace surtout de partir ainsi.

Je l'enfermais à l'intérieur de la maison en laissant la clé sur le verrou, j'avais si peur qu'il me rattrape.

Je descendis aussi vite que j'ai pu les six étages de l'immeuble que même dans un ascenseur me paraissaient avoir pris une éternité à franchir, j'arrivais devant le gardien de la résidence en pleurs et en tremblant, je cherchais de l'aide et ne savais à qui m'adresser.

J'appelais mon frère mais je savais était loin, à ma grande surprise je le vis arriver très vite et avec renfort.

Une bonne partie des hommes de ma famille était là, prêts

à me soutenir et à me sauver de ce monstre.

Ma première réaction en les voyant ; des cris et des pleurs de soulagement.

Moi qui ne leur avait rien raconté ni montré je découvre qu'ils étaient soucieux pour moi et qu'ils faisaient de leur côté des recherches sur lui, ils étaient inquiets et savaient que quelque chose ne tournait pas rond.

Ils étaient là, tous prêts à m'aider.

Nous montâmes tous afin de le confronter à ce qu'il avait fait.

Grande fut sa surprise voyant débarquer les agents de sécurité et ma famille.

Ma jeune et unique sœur était là aussi, du haut de ses 1m57, elle le fit taire et assoir pour lui énumérer tout ce qu'elle avait découvert sur lui alors que je la croyais ignorer tout de mon calvaire.

Il n'arrivait pas encore à intégrer l'idée qu'il venait d'être démasqué et que nous savions tout de ses pratiques frauduleuses et malsaines.

Ma sœur avait toutes les informations sur lui venant de Suède.

Il était mis devant le fait accompli, il devait coopérer et me rendre mes biens volés sous la menace, les documents qu'il m'avait fait signer sous chantage.

Il n'en fit rien, tel un condamné qui n'avait plus rien à perdre, il préféra nier et refusa de me restituer ce qui était à moi.

De ce pas je me dirigeais vers la gendarmerie pour y déposer une plainte, ces derniers et sous prétexte que j'étais son épouse avaient refusé au départ de prendre ma déposition me mettant face une réalité certaine que cette société n'était pas là pour protéger ces épouses maltraitées, violentées verbalement ou physiquement.

Etant avocate, je me permis d'insister sur l'obligation de prendre au sérieux ma requête sinon nous serions devant un cas de non assistance à personne en danger.



Une fois ma déposition prise, j'insistais pour me faire accompagner au domicile conjugal pour y prendre quelques affaires.

Avec beaucoup d'insistance, ils acceptèrent de m'y rejoindre.

Une fois sur place, ils me permirent de prendre au moins mes papiers et ceux de mes enfants.

Je sortis de cette maison, soulagée de retrouver ma liberté et d'être en vie simplement.

Une fois chez ma famille, mon corps de femme soumise et séquestrée se laissa s'exprimer, une grosse fatigue envahit mon corps, mes jambes ne me tenaient plus, j'étais étourdie et je n'arrivais plus à rien soulever de mes mains.

Voilà comment le corps et l'esprit d'une femme qui a subi pareil traitement réagi.

Cette période de confinement a permis que des hommes comme lui voir pire utilisent l'enferment physique pour atteindre l'enferment psychologique et émotionnel qui lui est bien plus fort et plus vicieux.

Priver une personne de sa liberté de sortir, de penser, de parler et de vivre sa vie normalement.

Une fois le corps reposé et les idées bien mûries, je commençais un travail de détective, comment faire tomber cet individu et le rendre hors d'état de nuire.

C'était ma mission, je me la suis attribuée, j'avais décidé que je serai sa dernière victime.

Personne ne tombera plus entre les mains de cet individu, je m'en étais fait la promesse, je n'avais plus rien à perdre, je devais venger toutes ces femmes et moi-même aussi.

J'avais besoin d'accomplir quelque chose d'extraordinaire pour reprendre confiance en moi.

Je contactais par le biais de l'ambassade de la Suède des personnes qui le connaissaient, les découvertes tombèrent l'une après l'autre.

Celui qui prétendait être veuf, ne l'était pas, il était divorcé d'une femme qui l'avait quitté car il l'a battait et la mal-

traitait, il avait fait de la prison en Suède pour ces raisons là, cette fille dont il parlait et qu'il pleurait car elle était soignée disant atteinte d'un cancer, n'avait aucun problème de santé, cette fille refusait tout simplement de parler à un père dangereux qui maltraitait sa mère, cette femme qu'il disait avoir perdu d'un cancer.

La situation financière qu'il s'était créée n'existait que dans sa tête, il ne possédait rien de tout ce qu'il se vendait, c'était un homme qui vivait des allocations du pays qui l'hébergeait, il vivait dans une de ces zones rurales où les étrangers étaient tassés, il n'avait pas de doctorat comme il voulait bien se faire croire et n'avait jamais fréquenté les grandes universités qu'il me décrivait.

Il avait brossé de lui un profil qui pourrait attirer des victimes qui ne pourraient se douter de ses projets mal saints.

Une fois ces découvertes faites, je déposais plainte avec l'aide des ténors de notre barreau auprès de la chambre d'instruction du tribunal compétant.

Mon statut d'avocat aida à accélérer l'ouverture de l'instruction, la gendarmerie convoqua ce dernier pour prendre sa déposition, il nia bien sûr tous les faits qui lui étaient reprochés et bien plus que cela, m'accusa moi de lui avoir volé ses biens, de m'être attaqué à lui.

J'avais remis toutes les preuves que j'avais récolté, nul ne laissait place au doute, cet homme était un habitué, un professionnel, il y avait en sa possession des dizaines de flashs disques et cartes mémoires contenant des découvertes incroyables, des photos de femmes de plusieurs nationalités qu'il avait récolté afin de les faire chanter et leur extirper des fonds, des photos d'elles nues ou en petites tenues, dans des postures indécentes ou dans l'intimité, il y avait aussi des photos de fillettes mineurs nues, des messages d'aveux de ses femmes où elles dévoilaient leurs vies à cet homme, il y avait une quinzaine de cartes bancaires, des passeports d'autres femmes séquestrées auparavant et menacées par lui, des femmes qu'il avait obligé à tatouer son nom sur leurs corps tel un fermier marquant son bétail.

Des sites de piratage et des modes d'emploi de piratage.

Je n'arrivais pas à croire tout ce que j'avais trouvé, je baignais dans un cauchemar, comment cet homme avait échappé jusqu'ici à la justice.



Avec tout ce que j'avais récolté, je me dirigeais vers les endroits et hôtels où il avait déjà séjourné, j'allais de découvertes en découvertes, il avait laissé des traces partout où il était passé.

Je remis entre les mains de la justice tout ce que j'ai pu récolter pensant accélérer le processus.

Hélas, il est resté tout un mois sans être jamais inquiété dans la maison que nous louions et où toutes mes affaires et celles des enfants se trouvaient encore, mes meubles et autres accessoires, jouets et linge de maison, tout était resté derrière nous.

Il était là bas à comploter pour son départ.

Pendant ce temps là, il continuait à me harceler avec ses écrits et messages, il était tantôt menaçant et tantôt menaçait de se suicider, je vivais dans l'angoisse. Pendant près de deux mois après ma sortie de la maison, il me harcelait tous les jours. Il n'a jamais réussi à me faire revenir à lui.

Un mois jour pour jour après m'être enfui de ses jougs, il m'envoya des photos de lui quittant l'Algérie et arrivant en Allemagne, il venait de quitter le pays alors que deux de ses passeports lui avaient été enlevés par la gendarmerie à la demande du parquet.

On découvrit par la suite qu'il avait en sa possession d'autres passeports qu'il avait dissimulés.

Une fois cette information confirmée, l'instruction demanda une commission rogatoire, les témoins ont été auditionnés et le dossier sur le point d'être clôturé, un mandat d'arrêt est dans l'attente d'être signé.

Aujourd'hui, je me reconstruis au quotidien. J'ai beaucoup travaillé sur moi pour comprendre les raisons qui m'ont conduites vers ce genre d'individu. Je suis consciente d'avoir ma part de responsabilité. J'ai perdu confiance en moi, mais je crois toujours au bonheur. Cet homme a longtemps continué à m'envoyer des messages et des photos souvenirs de nous. Je fais tout pour l'ignorer car je sais que c'est la seule chose à faire. J'interviens sur des groupes d'entraide pour tenter d'aider d'autres victimes. Cet article est fait pour aider les victimes et informer le plus de monde possible de ce que sont les Pervers narcissiques et à quel point ils sont néfastes pour leur entourage.

Cette histoire a été un véritable électrochoc qui m'a ouvert les yeux. J'ai réalisé que plus jamais je ne serais victime de ce genre d'individu. Aujourd'hui, je me réveille d'un long cauchemar. C'est encore parfois douloureux, mais à 38 ans même si j'ai dû tout recommencer. Cette histoire n'a pas réussi à détruire la personne que je suis, ma famille et mes véritables amis sont auprès de moi et n'ont jamais cessé de me soutenir, j'ai rouvert mon cabinet, retrouvé mes collègues et mes clients et repris ma carrière là où elle s'était arrêtée.

Même si je dois tout recommencer à zéro, je me sens la force de le faire, j'ai beaucoup de projets et une envie de vivre phénoménale. Une énergie incroyable refait surface.

L'envie de vengeance et le sentiment d'injustice s'estompent. Enfin, je commence l'écriture d'un livre pour témoigner et dénoncer les pervers narcissiques, ces monstres.

Ce qui est à retenir aujourd'hui c'est que quand on est victime, on n'est pas coupable.

Pendant cette pandémie, alors que le monde entier se débat face à cette maladie dont nous ignorons presque tout, des personnes et des femmes en particulier souffrent de maltraitements de tout genre, le Covid 19 a été un foyer favorable pour laisser germer certaines idées déjà présentes dans les têtes de certaines personnes pour pouvoir enfin les concrétiser.

Le Covid 19 disparaîtra, tôt ou tard et nous reviendrons à une vie normale mais les maltraitements de tous genres faites aux femmes ne sont pas prêtes à cesser tant que les dispositions mises en place pour les protéger ces femmes ne sont pas appliquées comme elles le devraient et tant que les mentalités misogynes ne cesseront d'exister.

Une rescapée



Violence against Women during Covid-19 Pandemic

DINORAH LA LUZ FELICIANO

In this essay¹ I will show that official statistics are likely to under-report gender violence during times of social disruption and isolation. While several agencies are getting fewer reports of violence during the Covid-19 pandemic, this may simply be due, among other factors, to an increase in unreported cases, in order to counter-balance this blind spot, I will review mental health research that strongly suggests violence is more likely to increase under the stress of isolation and reduced resources.

Violence against Women Statistics

Women's organizations have identified gender violence in the United States as a major problem during this pandemic.² However, there are few estimates of gender violence in Puerto Rico. In the first phase of the island's confinement to combat Covid-19 (March 15 to May 6, 2020), non-governmental organizations (NGOs) reported 919 cases of gender-related violence,³ compared to 1,046 cases for (all of)(the same period in) 2019.⁴

During the first month of confinement (March 15th to April 19, 2020), the Puerto Rico Police Department's official statistics also suggested a decrease in gender violence. They reported 643 cases, compared to 725 cases during the same period in 2019. The decline was reported in most municipalities.⁵ In densely populated metropolitan areas, there was a slight decrease in violence against women. For example, during this one month period, the capital city of San Juan reported 74 cases in 2020, and 76 cases in 2019. The city of Carolina was an exception, it reported an in-

crease of 5 detected cases.⁶

Limitations to the Public Health Data

In assessing the reliability of these statistics, one must consider factors common to other disasters on the Island, such as hurricanes:

1. Calls to the police were not registered because police stations were closed,
2. The police had new, pressing priorities due to the disaster,
3. Courts of law were closed.
4. Women's shelters were closed, due to physical damage or the loss of operating funds.
5. Government's offices were closed, including women's assistance agencies.
6. Women lost faith in social systems, due to the disappearance of multiple services.

After hurricane María (September 2017), women's shelters and NGOs that serve abused women reported an increase in cases. Likewise, the Police Department reported a 6% increase in this type of violence. However, analyses indicated that this was an under-estimate.⁷ It should be noted that the above six consequences of natural disasters are also likely to reduce government and NGO services for women at risk during the pandemic.

Psycho-Social Factors in Violence against Women

1 I want to thank Evelyn Dürmayer, Editor in Chief for her recommendation to write this article, and the IADL Review Board for publishing it. I also want to acknowledge the contribution of doctors Noelani Colón-Honda and John Poole for their interviews, taking the time to review this article, and for their recommendations, specially to Dr. Poole and Mrs. Olga Poole. I also want to thank Ms. Rosana Actis, press secretary of the AAJ, and a political activist from Argentina for her assistance in supplying the references on gender issues. Obviously, any errors are mine alone.

2 Although, there are other cases where victims can be at risk, like dating violence, sexual assault, stalking, apart from the so called "domestic" violence, this essay will examine only the cases of violence in the home, where there is less space or opportunity to escape. For other cases, see the U. S. Department of Justice report, which shows that in the United States the effects on victims of domestic violence, dating violence, sexual assault, and stalking is a constant concern in this Covid-19 crisis. [<https://www.justice.gov/ovw/blog/pandemic-punctuates-19th-annual-national-sexual-assault-awareness-and-prevention-month>] U. S. Department of Justice, Office of Violence Against Women Blog, Pandemic Punctuates 19th Annual National Sexual Assault Awareness and Prevention Month, Laura L. Rogers, Principal Deputy Director, Office of Violence Against Women, April 20, 2020.

3 "Más de 900 incidentes de violencia de género en Puerto Rico durante el COVID-19," EFE News San Juan, May 11, 2020.

4 Women's groups like Coordinadora Paz para las Mujeres, said that there are serious doubts about these numbers, because cases have increased, according to Vilma González of Coordinadora, *id*.

5 "Siguen en aumento los casos de violencia doméstica", *Metro Puerto Rico*, April 20, 2020.

6 *Id*.

7 Claire Tighe & Larren Gurley, "Datos oficiales de violencia contra la mujer en Puerto Rico no son confiables después del huracán María," Noticel, May 7, 2018, [<https://periodismoinvestigativo.com/2018/05/datos-oficiales-de-violencia-contra-la-mujer-en-puerto-rico-no-son-confiables-despes-del-huracan-maria/>].



Restrictions enacted by departments of public health to keep the virus from spreading have affected all relationships. Widespread stresses and collateral consequences of this pandemic have included: continuing spread of severe or fatal illness, loss of work, financial uncertainty, confinement, diminished supportive relationships, failure of governments to prepare, and widespread personal and political disagreements about the right courses of action. All of these factors compound the public health crisis.⁸

Many healthcare professionals have suggested that social distancing during the pandemic amplifies the risk of violence against women confined in their homes.⁹ Since gender violence is a psycho-social problem, one must consider not only statistics, but also the personality factors that explain the violence, especially in an already abusive situation. Confinement by the pandemic parallels other well-studied phenomena,¹⁰ including hostage situations, the battered women's syndrome described by Lenore Walker,¹¹ and Steven Morgan's conjugal terrorism theory.¹²

Walker argues that violence tends to escalate when an already violent partner is under stress. She describes how abusive partners typically have cycles of violence, where intimidation, verbal and physical abuse escalate, followed by periods of forgiveness or reconciliation. Stressors such as economic uncertainty and confinement for long periods of time cause the abuser to feel he is losing control, triggering an increase in violence. Walker references the research by Martin Seligman, in which mild electric shocks were given to dogs; some dogs had a switch to turn off the shock and

some did not.¹³ Over time, the latter dogs did not try to escape, even after they were freed. They became submissive and passive, in a condition of "learned helplessness."¹⁴ Likewise, battered women's syndrome has been classified as a post-traumatic stress disorder, with intense fear, terror and learned helplessness.^{15 16}

Morgan's conjugal terrorism theory, argues that women who are battered become hostages of their helplessness and are predisposed to accept their destiny. The aggressor, who has a perception of power and superiority, tries to control the family by using indiscriminate violence. Morgan's studies on aggression and violence also show that ecological situations of constraint or limited physical space further distort how people relate to each other.

To spell out the likely effects of the pandemic on these dynamics, I interviewed two psychologists, Dr. Noelani Colón-Honda¹⁷ and Dr. John H. Poole.¹⁸ Colón reported that stress often triggers episodes of abuse, and that heightened stress may shorten and intensify the cycle of abuse. Poole reported that a primary intervention in domestic conflicts is to de-escalate angry confrontations with "time outs", providing space and time for emotions to calm. When partners are confined in their homes, this kind of moderation is nearly impossible. He noted that many abusers were victims of abuse and excess punishment in childhood. This history makes them hyper-vigilant of people trying to control them. So, when medical and government authorities decree pandemic restrictions, the abuser is prone to feel he is being punished all over again,

8 Amanda Taub, "A New Covid-19 Crisis: Domestic Abuse Rises Worldwide Movement restrictions aimed to stop the spread of the coronavirus may be making violence in homes more frequent, more severe and more dangerous," *The Interpreter*, N. Y. Times, April 6, 2020, updated April 14, 2020.

9 Andrew M. Campbell, "An increasing risk of family violence during the Covid-19 pandemic: Strengthening community collaborations to save lives," *Science Direct Forensic Science International: Reports 2* (2020) 100089, [https://doi.org/10.1016/J.FSIR.2020.100089].

10 You have other theories like, for example, Dutton and Painter's traumatic bonding (Donald G. Dutton & Susan L. Painter, "Traumatic Bonding: The Development of Emotional Attachments in Battered Women and Other Relationships of Intermittent Abuse," 6 *Victimology*, Nos. 1-4, 139-155 (1981); or, Graham & Rawlings, "Stockholm Syndrome," *U.P.I.*, Feb. 20, 1991. See, also, the discussion of these theories as they relate to women who kill in Dinorah La Luz- Feliciano, "Mujeres maltratadas: de víctimas a victimarias- aspectos sociales, psicológicos y jurídicos," 63 (3) *Rev. Jur. U.P.R.* 679- 728 (1994).

11 Lenore E. Walker, *The Battered Woman*, N.Y.: Harper & Row, 1979.

12 Steven Morgan, *Conjugal Terrorism: A Psychological and Community Treatment Model of Wife Abuse*, Palo Alto, Calif.: R & E Research Associates (1982), at 22-30.

13 Martin Seligman "Learned helplessness". *Ann. Rev. Med.* 23:407-412 (1972) [doi:10.1146/annurev.me.23.020172.002203]. Reference provided by Dr. John Poole.

14 *Id.*, at 45-46.

15 During this pandemic, psychologists are indicating that people are feeling helpless, anxious, and have similar symptoms of "cabin fever", where people do not want to leave their homes because they perceive they could be in danger (actual danger or not.) Marie Hartwell- Walker, *Coping with Cabin Fever*, *Psych Central*, April 9, 2020 [https://psychcentral.com/lib/coping-with-cabin-fever/].

16 Walker, *supra*, at 42 *et seq.*

17 Noelani Colón-Honda Ph.D., telephone interview, August 16, 2020. Dr Colón is an I/O psychologist at the University of Puerto Rico, Bayamón Campus. In Dr. Colón's opinion the cycle of domestic violence would probably shorten during confinement, and clinical studies are needed to back this conclusion.

18 John H. Poole, M.S., Ph.D., telephone interview, August 17, 2020. Dr. Poole is a neuropsychology researcher and clinician, formerly at the U.S. Department of Veterans Health Care System and the University of California San Francisco, specializing in the diagnosis and treatment of brain disorders and trauma, including from war and sexual abuse.



triggering both rebellion against authorities and intensified abuse of their partner.

Conclusions

During the pandemic, victims of gender-related violence have become isolated from the support of agencies, women's groups, and shelters -- with reduced opportunities to report incidents of abuse. To compound the isolation, because the abuser cannot "cool down", the cycle of violence in abusive relationships is likely to become shorter and more intense. This may even push borderline cases into abuse. Similar to cases of post-traumatic stress, victims are at risk of helplessness due to their absence of resources, and abusers are prone to feel trapped and inflict this on their partner. All of these factors contribute both to an underreporting of cases, and to a likely increase in gender-related violence during the Covid-19 pandemic.

Dinorah La Luz received a Ph. D. in Philosophy (History), a Master of Laws (LL. M.) in Comparative Law, and a Certificate from the Institute of International and Comparative Law in Geneva and Strasbourg. She was a legal translator in the Supreme Court of Puerto Rico, and a professor of Human Rights, Constitutional Rights, and Criminology at the university level, and a History and Grammar, Usage, and Writing professor in a film institute. She has been active in non-governmental organizations as a legal consultant, and as an active member of NGOs that have an advisory status at the United Nations, for example, the American Association of Jurists (executive committee), the Latin-American and Caribbean Committee for Women's Rights (CLADEM), Puerto Rico Chapter (as a joint coordinator), and Amnesty International (legal board), among others. She had the opportunity of doing voluntary work for organizations like the Pro Bono Legal Advocates in San Diego, and locally, in the International Section of the Commission for Constitutional and Human Rights of the Puerto Rico Bar Association (as a Commissioner).

She has participated as an editor of Spanish articles for organizations like the International Association of Democratic Lawyers and the American Association of Jurists. Professor La Luz has various publications, to wit, *The Case of Puerto Rico under the United Nations Charter*, *INTERNATIONAL REVIEW OF CONTEMPORARY LAW/REVUE INTERNATIONALE DE DROIT CONTEMPORAIN. SPECIAL EDITION ON THE 70TH YEARS OF THE UNITED NATIONS CHARTER. INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS* 1 (2), (June 2016): 25- 32; *Concerns of Women in Armed Conflict Situations in Latin Amer-*

ica, Askin, Kelly D., and Doreen M. Koenig, eds., *3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 325 (Transnational Pub., 2001), and *Mujeres maltratadas: de víctimas a victimarias: aspectos sociales, psicológicos y jurídicos* (Battered women who kill: social, psychological and legal aspects), *UNIVERSITY OF PUERTO RICO LAW JOURNAL* 63 (3) (1994): 679-728, for which she was awarded a second prize. Her forthcoming publications include, among others, *Reparaciones en el sistema interamericano de derechos humanos* (Reparations in the Interamerican System of Human Rights), and her bilingual *GLOSSARY OF INSURANCE TERMS*, in its third edition.



Togo/ Erosion cotiere: Les femmes et jeunes filles du village de DOEVI KOPE très fragilisées.

BERNARD ANOUMO DODJI BOKODJIN ET NANA MARIAMA APOU

RESUME :

L'érosion côtière fait de ravages sur les côtes de Lomé, notamment dans la commune de Baguida, dont le Village de Doèvi Kope. Le présent article met en exergue les conséquences néfastes d'une manière générale sur les habitants dudit village et particulièrement sur les jeunes filles et les femmes. Et cette contribution démontre d'une part que ce phénomène, entrave la réalisation de l'Objectif de Développement Durable (ODD) 5 avec des effets corollaires sur d'autres ODDs. De plus, cet article illustre la situation d'une jeune fille et d'une femme victime de l'érosion côtière à empiéter entre autre sur leur autonomisation et éducation. Finalement, non seulement l'article fait ressortir quelques approches de solutions à ce phénomène que les jeunes filles et les jeunes femmes subissent, mais aussi on note l'engagement de quelques acteurs dans la recherche de solutions, dont le NADDAF à travers ses actions et son plaidoyer tourné vers un développement durable.

Mots clés : érosion côtière, autonomisation de la femme et la jeune fille, éducation, droits de l'homme, victimes, plaidoyer, indemnisation.

ABSTRACT:

Coastal erosion is wreaking havoc on the coasts of Lomé, particularly in the commune of Baguida, including the village of Doèvicope. Coastal erosion with harmful consequences. First of all, this article highlights the harmful consequences in a broad manner on the residents of the said village and particularly on young girls and women. Then it demonstrates on the one hand that this phenomenon hinders the achievement of Sustainable Development Goal (SDG), number five (5) with corollary effects on other SDGs. In addition, this article illustrates the situation of a young girl and a woman victim of coastal erosion and how this impinges on their empowerment and education, among others. Finally, not only does the article highlight some solutions approaches to the consequences of this phenomenon that young girls and young women experience, but also, we note the commitment of some actors in the search for solutions, including NADDAF through its actions and advocacy focused on sustainable development.

Key words: coastal erosion, empowerment of women and girls, education, human right, victims, advocacy, compensation.

Par D'une superficie de 56 600 km², le Togo est un petit pays de l'Afrique de l'Ouest entre le Bénin à l'Est, le Ghana à l'Ouest et le Burkina Faso au Nord. Tout le Sud est occupé par l'Océan Atlantique. Les espaces côtiers de l'Afrique de l'Ouest sont en proie à une importante érosion côtière depuis des décennies dont le Togo n'est pas épargné. Un mal qui a commencé depuis les années 70 relativement au projet de construction du Port Autonome de Lomé (PAL). Il s'agit d'un phénomène aux impacts négatifs sur la vie humaine, les activités socioéconomiques et les infrastructures, entravant ainsi le développement durable¹. Bien que ce soit un phénomène naturel, les actes humains sont venus aggraver provoquant d'énormes dégâts sur la côte togolaise. Au rang des communes qui sont plus affectées, celle de GOLFE 6 (Baguida) notamment le village de DOEVI KOPE² en est

une illustration parfaite.

Sur le plan environnemental, l'érosion côtière a entraîné la disparition d'une grande partie du territoire du village, obligeant 86% de la population du village à changer de domicile au moins 4 fois sur les 8 dernières années. Les prévisions prédisent des hausses importantes de la mer dans les prochaines décennies : l'élévation du niveau de la mer par rapport à 1986-2005 sera probablement compris entre 0,10 et 0,17 m à l'horizon 2025, entre 0,19 et 0,34 m à l'horizon 2050, entre 0,29 et 0,55 m à l'horizon 2075 et entre 0,33 et 0,75 m à l'horizon 2100³.

En termes d'accès aux infrastructures et services sociaux de base, le village ne dispose que d'un seul forage, obligeant

1 DOEVI KOPE est un village de la commune du Golfe 6, situé sur le littoral togolais, cette portion (11,2%) du territoire national qui concentre 45% de la population du pays.

2 Du fait de son positionnement, des pressions entropiques, dues notamment aux activités économiques, et des dynamiques naturelles, les 1500 habitants de DOEVI KOPE sont confrontés à de nombreux défis de développement posés par l'érosion côtière :

3 Troisième communication Nationale du Togo sur le Changement climatique au titre de la Convention Cadre des Nations Unies sur les Changement Climatiques en octobre 2015



ainsi les femmes et les jeunes filles à consacrer beaucoup de temps aux corvées d'eau. En outre, le village ne dispose ni de centre de santé, pour les soins primaires, ni d'infrastructures d'assainissement. La seule école primaire existante se trouve à moins d'une dizaine de mètres de l'océan ce qui a amené à son abandon cette année. Sur le plan social, le bouleversement de la dynamique familiale au sein du ménage dû au fréquent déménagement, la précarisation des moyens de subsistance ont entraîné des maux sociaux (tabagisme, grossesse précoce, mariage précoce, banditisme, ...) dont les premières victimes sont les jeunes et les jeunes filles. Ce qui est source d'inégalité entre les hommes et les femmes de la commune.

Sur le plan économique, la population active de DOEVI KOPE se consomme essentiellement aux activités halieutiques – pêche pour les hommes, transformation et vente des produits pour les femmes. La baisse continue du rendement des produits de pêche, l'inadéquation du matériel de travail et le changement fréquent de domicile ont impacté l'autonomisation des femmes dont la majeure partie sont devenues des ouvrières dans de petites exploitations maraîchères. Déjà précaire, cette situation s'est fragilisée avec la crise de la COVID-19 depuis le mois de mars 2020.

Selon l'étude de l'association Nouvelles Alternatives pour le Développement Durable en Afrique (NADDAF)⁴ Doévi Kopé dans le cadre de projet AVENIR⁵, la plupart des personnes ont dû changer entre deux et trois fois de logement et même au-delà, comme ce fut le cas du chef de village. Les habitants n'ont plus accès à leur propre maison, faute de maisons, ils s'entassent dans des baraques fragiles, composées de béton et de branchages. À côté de ces précédentes conséquences, les habitants sont confrontés par le manque d'eau potable, par le chômage, la peur face à la montée des eaux de façon quotidienne, la perte de vies humaines. En particulier, cette érosion côtière n'épargne pas les femmes et les filles. Elle constitue pour ces dernières, une cause qui entrave leur autonomisation, leur éducation et épanouissement. Un film documentaire⁶ réalisé par NADDAF montre des témoignages suivants :

Pour Lawè, jeune fille de 20 ans, de Doévi Kopé, elle a connu des déménagements sans cesse et l'envahissement des biens par la mer. Cette orpheline de père, s'est déjà déplacée 6

fois. Depuis très petite, elle fait face déjà à ce phénomène. Malheureusement, quand elle a grandi, elle a remarqué que la situation ne fait que s'aggraver. Comme conséquence, la jeune fille ambitieuse, n'est plus en mesure de poursuivre ses études ou de suivre une formation faute de moyens pour payer sa scolarité. Les effets de l'avancée de la mer, ne se limitent pas à elle seule. L'érosion côtière, est la cause de la perte d'emploi de son père, entraînant la mort de ce dernier. Sa mère, ne pouvant plus prendre seule en charge la famille, Lawè est obligée d'aider leur mère à subvenir aux besoins de la famille. Une mère qui a aussi subi les conséquences de ce phénomène, son activité génératrice de revenus est empiétée. La jeune fille semble perdre espoir face aux promesses des acteurs relatives aux actions pour les aider à sortir de cette situation qui sont restées sans suite. D'autres femmes se trouvent également dans une situation pareille.

Dans la même dynamique, les enfants de Mme « A » qui est devenue veuve, son mari avait trouvé la mort comme le père de Lawè, ne vont plus à l'école. Une situation qui oblige Mme A à prendre en charge d'une manière totale la famille. Revendeuse, elle n'arrive pas à s'en sortir pour subvenir aux besoins de la famille. Elle est submergée par des dettes relatives aux crédits que les organismes lui accordent. Malgré cela elle se bat avec la gestion de son entreprise et recourt au crédit pour nourrir ses enfants. En déplacement pour une troisième fois et accueillie pour une quatrième par une bonne volonté temporaire, où se loger constitue toujours car elles sont obligées de quitter les lieux suite à l'intervention de la bonne volonté. D'une part l'autonomisation de ces femmes et filles, l'éducation des jeunes filles et des enfants sont empiétées, ce qui constitue un frein à la réalisation de l'Objectif de Développement Durable N°5. D'autre part on note une violation des droits humains. Par-dessus, la santé de ces jeunes filles et femmes est fragilisée.

En d'autres termes, face à cette érosion côtière, les droits des habitants victimes en tant qu'être humain sont violés, notamment ceux des filles et femmes. Il convient non seulement de mener des actions pour éviter l'avancée de la mer mais aussi des actions en vue de réparer des dommages causés par l'érosion côtière aux habitants victimes. Cette dernière action est bien celle que mène NADDAF, mettant l'homme au cœur de ses actions.

4 NADDAF est une association de droits TOGOLAIS qui travaille depuis 2014 sur les droits des victimes de l'érosion côtière et lutte pour leurs prises en charge par le gouvernement. Plus d'informations sur www.naddaf.org

5 Actions des Volontaires Européens et Nationaux Investis pour la Résilience, projet financé par l'Union Européenne et mise en œuvre par France Volontaires au Togo, Sénégal et en Guinée.

6 Le film documentaire a été réalisé dans le cadre du projet VENIR et présente la situation des femmes et jeunes filles victimes de l'érosion côtière à DOEVI KOPE.

La situation de ces femmes et jeunes filles doit être prise en charge rapidement par le gouvernement du Togo, en plus des autres victimes, sinon dans quelques mois le village tout entier risque de disparaître dans la mer. L'Etat doit jouer sa responsabilité et protéger ses citoyens. Ce serait une bonne chose pour ces communautés désemparées.

Pour l'heure, face à cette urgence et la gravité de la situation, NADDAF mène des actions de plaidoyer et de mobilisation des autorités pour parvenir à sortir les communautés de cette situation et favoriser l'autonomisation des femmes et des jeunes filles. Déjà en juillet dernier, avec un appui financier de l'Union Européenne, 315 ménages soit plus de 1000 personnes ont reçu des kits alimentaires et sanitaires dans le cadre toujours du projet AVENIR porté par l'association NADDAF. Une action salubre, mais qui sonne comme une goutte d'eau dans l'océan face aux défis présents. Vivement que le gouvernement réagisse ...





Indian women revive non-violent civil disobedience movements against the extinguishment of citizenship rights

NILOUFER BHAGWAT

ABSTRACT:

On 11 December 2019 one of the largest peaceful Civil Disobedience Movements in India after Indian Independence in defence of the Constitution and Constitutional rights began under the leadership of Indian Muslim women in Delhi. It was supported by millions of people of all religious denominations who opposed religious criteria as a basis of citizenship. This movement had many similarities to Mahatma Gandhi's Civil Disobedience Movements. Braving the bitter cold days and nights the movement was united and, supported by students of leading universities. It lasted for four months until it was dispersed by the government.

Winter nights are long and dark in northern India. The political darkness was unrelieved by any determined movement to roll back an authoritarian state, which had merged with Indian corporate and global financial and transnational interests. In this situation, even the days of 2019 seemed unusually long.

After the euphoria of the parliamentary election in 2019, on which 60 billion was expended, and for which electronic voting machines were used though discarded in a many parts of the world due to vulnerability to hacking, and prohibited from electoral use even by the German Constitutional Court; once again a paralysis of mainstream opposition political parties set in.

The political and civic space in India for over three decades was increasingly taken over by Non-Governmental Organizations (NGOs), generously funded by corporate foundations and financial institutions. Representatives of NGOs were high profile, promoted by the corporate print and television media, even as political parties were reined in by the same corporate donors, to project that there was no alternative to neo-liberal economic policies. The role assigned to Non-Governmental Organizations by corporate foundations with few exceptions, was to divert public attention from the political, economic and social crisis at the heart of the democratic and republican constitutional system, the direct consequence of the merger of corporate and state power resulting in a collapse of democratic institutions, by deliberate fragmenting of issues, to prevent an understanding of this problem at the heart of the political system.

In 2013 and 2014, NGOs in India established in different spheres, were bank rolled by corporate foundations and other agencies in collaboration with 'Deep State' players,

to influence the electorate, using an anti-corruption movement, '**India Against Corruption**', promoted by the corporate media to install a government wholly controlled by Indian corporate interests and global capital. The strategic plan was to place the entire assets, revenues and resources of India, at the service of leading high profile Indian Companies, transnational corporations and the financial centres of global capital facing a severe systemic debt crisis and collapse. Thereafter, every public sector undertaking in India, was targeted by the government for privatization, including public sector banks. Taxes such as GST to be shared by the Union of India with diverse states of the Indian union, by centralizing collection, were also to be diverted. Capital flight was organized to global financial centres, in particular the UK, through bank frauds and non-performing assets of banks, that is bank loans not returned, primarily by the major corporate and financial sector. Simultaneously tributes were paid to arms corporations of the world, in the form of massive import of arms, with substantial benefits to Indian Oligarchs, the middle men in some of these transactions, to ensure continued support to the government of these powerful Companies among others.

The political diversion for this 'genocidal', economic and financial project, imposing widespread unemployment, hunger and distress, as a consequence of the seizure of bank savings, revenues and financial liquidity of the country, and of middle income citizens, working classes and the peasantry; was an orchestrated hate campaign against minorities, historically useful to all fascist dispensations, to fragment the unity of citizens, successfully used at the time of the earlier 'Great Depression' by fascist parties and movements, including in Europe.

Since India has a federal constitutional system, with reve-



nues shared between the Union and the states, that is the provincial governments; it was necessary for the Bharatiya Janata party, which is the ruling party at the national level, to politically and consequently financially control every province in the country, if it was to effectively carry out the agenda entrusted to it.

It was in these circumstances that political diversions were necessary, to divert attention from the core financial and economic agenda. A diversionary move and major controversy was created by the BJP - RSS, the leading political party in the NDA ruling alliance in the central government, relating to the National Register of Citizens in the province of Assam, in the sensitive North-East of India, which has a historical backdrop. In 1985 a separate National Register of Citizens for the province of Assam was wrongly conceded by the Congress Government, though it was done with a bona fide objective to end the violence against the hapless Bengali linguistic minority, Hindus and Muslims, internal migrants from the Indian province of Bengal, victims of the murderous attacks by a chauvinist and violent movement, launched by the All Assam Students Union, one of the front organizations, of the All Assam Gana Sangram Parishad, the umbrella organization, to rid the provincial state of Assam of its internal migrants from India; primarily from the Indian state of Bengal, from a few other provinces of India and from Nepal. Hundreds of Bengalis in Assam and non-Assamese citizens of India, were brutally killed in these attacks, including a few officials of the government of India.

The Bengalis in Assam were attacked by the Assamese, as they were the linguistic and cultural minority in the State of Assam, regarded as rivals for jobs, land and political office. The Assamese violent chauvinist movements, desired to oust the Bengalis from Assam, though they were Indian citizens, on the pretext that they were 'foreigners' or 'Bangladeshis' from Bangladesh. This chauvinist appeal was also useful for electoral purposes, to capture power at the provincial level. This propaganda was continued by the Asom Gana Parishad formed after the Assam Accord of 1985, and by the BJP- RSS party, to incite feelings of hostility against alleged 'Bangladeshi' infiltration, as a political diversion from vital economic and social issues, to consolidate its 'Hindutva' base.

The Indian Bengali speaking people of Assam, both Hindus and Muslims, targeted as 'foreigners', were in fact internal migrants from other parts of India, brought to As-

sam by the British East India Company in the 18 and 19 centuries, to work on plantations, in the railways, on mines, in prospecting for gas and oil, among other projects, and for administrative purposes, from the adjacent then united province of Bengal, where the East India Company first established a political and military foothold. The province of Assam at that time was sparsely populated. Later the integration of a whole district from Bengal into the province of Assam, during the British partition of Bengal, added to the increase in the Bengali speaking population of the province of Assam.

The Bharatiya Janata Party (BJP) in government at the national level in India since 2014, and earlier when in power in 1998 as part of the NDA alliance, allied with the chauvinist movement of the Asom Gana Parishad, and supported its chauvinist platform primarily as an instrument of political 'Divide and Rule'. The Bharatiya Janata party is the political front of the, Rashtriya Sevak Sangh(RSS) and its front organizations. The RSS was established in 1925, with members recruited primarily from those sections of the upper castes, serving financial interests of British capital, commercial interests of Indian Companies, and interests of the caste and class of financiers opposed to the Mahatma Gandhi's program of social emancipation of the deprived and discriminated against castes, then categorized by orthodox society as lower castes/classes. The RSS acknowledged that their militant movement was inspired by the fascist models of Mussolini and the Nazi party. From its inception the RSS and the Hindu Mahasabha advanced the two nation theory, propagating that only Hindus by culture and religion are entitled to citizenship in India. The Muslim League and the Jamiat-e-Islami and their front organizations, which also belonged to the upper classes of those Muslims serving British capital, supported the creation of a Muslim State of Pakistan, on the basis of the same theory as the RSS and Hindu Mahasabha, that Muslims are a separate nation. These parties served British Imperialism and were its instruments for the partition of India into two states; uniting to form provincial governments and voting jointly for partition in the Bengal and Sind assemblies. The Indian National Congress led by Mahatma Gandhi among other prominent leaders, including the Indian Pakhtoon Muslim leader Khan Abdul Gaffar Khan, known as the 'Frontier Gandhi' from the then North Western Frontier Province of British ruled India (now Pakhtun-Khwa in Pakistan); Maulana Azad who had also been elected President of the Indian National Congress during the freedom struggle, and regional leaders like Sheikh Abdullah of the



province of Jammu and Kashmir, were committed to a united egalitarian and secular India, and had the support of all religious groups and diverse castes and communities in India. Consequently, at the end of a long Indian 'Freedom struggle' with enormous sacrifices made, the Constitution of India was enacted, which ensured equality to all, with no discrimination constitutionally permissible on the basis of religion, caste, race or gender and guaranteed reservations in parliament, legislatures, in state educational institutions, and in government and public employment, for those castes/classes socially and economically discriminated against in India for centuries. The people of India rejected the theory that Hindus and Muslims are separate nations. India has the second largest Muslim population in the world after Indonesia.

Despite the provisions of the Constitution of India, the BJP-RSS ruling party from 2014, with the intention of forming a government in the province of Assam, in alliance with two regional chauvinist organizations, the Asom Gana Parishad and the Bodoland Peoples Front, once again resorted to communal and sectarian propaganda in respect of the National Register of Assam, propagating that Bengalis in Assam were 'Bangladeshi', by implication Muslim infiltrators into India, referred to as '*termites*', required to be thrown out; while assuring the majority population of India, that they would ensure that no Bengali Hindu would be declared a foreigner; and that a National Register of Citizens and a National Population Register, on the lines of the National Register of Citizens in Assam, would be extended to the whole of India, with the mandatory requirement of documentary proof of the date of birth and place of birth of both parents, as evidence required for registration as a citizen in the Register, to weed out alleged '**foreigners**'. This was followed in January 2019, by a '**Model Detention Manual**' sent to all the provinces, that called for the setting up of 'one detention centre' in the city or district where new immigration check posts were to be located.

This propaganda disturbed the entire country, as birth and death records had been regularized in India only in the last five decades. Before that records were not meticulously maintained, in particular in rural India, and lost or damaged, as people changed their residences or were affected by natural disasters. Since the national census conducted a population survey from time to time, and Indian citizens were duly registered on electoral rolls, issued 'Aadhar' electronic identification numbers, implemented by

both the Congress and BJP parties; with the biometric data and finger imprints of all citizens electronically recorded, a financially profitable exercise, outsourced to Nandan Nilekani of the Infosys Indian Tech Company advised by the Bill and Melinda Gates Foundation; this exercise was seen as *prima facie* superfluous and unnecessary. The colossal financial outlay required, with the Indian economy in a fragile state, was also prohibitive. The real objective of the government was to create another diversion, increase insecurity and create a divide, to camouflage the economic and financial policies pauperizing Indian citizens. This policy was seen by people as a strategy to divest scores of citizens of their citizenship, to deliberately abandon citizens to the whims and fancies of lower level bureaucrats, with scope for endless and unaffordable expensive litigation, in the eventuality of exclusion of citizens on technical grounds, from this National Register of Citizens.

In the province of Assam itself, though the Assam Accord has been signed on 15th August 1985, 'to detect, delete and deport' foreigners, for more than 25 years thereafter there was no serious move to declare Bengali internal migrants in Assam, as 'foreigners', though a few foreigners Tribunals had been established to carry out the exercise, and from time to time, some internal migrants from Bengal were declared foreigners; however on appeal these decisions were set aside. The intelligentsia in Assam, and the two provincial governments formed by the Asom Gana Parishad were aware that most of the Bengali migrants, both Hindus and Muslims, were Indian citizens from the adjacent Indian province of Bengal, along with some internal migrants from Nepal and from other provinces of the Indian Union, majority of whom had lived in Assam for more than a century, even before Indian independence and the partition of India.

Events took a different turn in 2013, when a Bench of the Supreme Court, with the Senior Judge of the Bench from the province of Assam, politically ambitious, later Chief Justice of India, directed the Union of India and the State of Assam to expeditiously update the National Register of Citizens of Assam, involving the cases of millions of mainly Indian Bengali and other internal migrants, pending for determination before the ad hoc foreigners Tribunals established in Assam under the Illegal Migrants (Determination of) Tribunal Act, 1983. Several orders were passed by this Bench of the Supreme Court, in two writ petitions filed directly to the Supreme Court, by an organisation of Assamese employees, the Asom Public Works and by the



Assam Sanmilita Mahasangh. The Petitions curiously were placed only before this Bench of the Supreme Court from time to time, to expedite the process of declaring the internal migrants from India, as 'foreigners'. The formation of the BJP government at the centre in 2014, assisted the entire process of rendering stateless hundreds of thousands of Indian Bengalis in Assam and other internal migrants in India and Nepal, who had migrated to Assam from other provinces in India.

The Supreme Court overlooked, that the so called 'Foreigners Tribunals' set up in Assam, were not courts or statutory quasi-judicial bodies with a fixed tenure. The so called ad hoc foreigners Tribunals of Assam were manned by lawyers of a few years standing, arbitrarily and indiscriminately recruited, without a fixed judicial tenure, and the necessary judicial training and experience to determine as serious an issue as citizenship. The procedures followed by the ad hoc Tribunals in Assam were irregular and seriously flawed.

Finally on the directions of the Supreme Court of India, approximately 40 lakhs, that is 4 million Indian Bengali and other internal migrants into Assam, from other states of the Indian Union, and some from Nepal, who along with their ancestors had lived for over a century in Assam, were placed on a draft list of 'foreigners' in 2018, directed to be disenfranchised, removed from electoral rolls and debarred from holding political and public office, with their property rights in jeopardy. The decision was subject to appeal, with a statutory period of limitation period of 120 days given for filing appeal. Many of those declared 'foreigners', were already exhausted by the terror of the illegal procedures of the Tribunals, the endless hunt for documents and the harassment of poorer Bengalis by corrupt elements in the Assam Border Police Force

By August 2019 the list of approximately 40 lakhs of those earlier declared 'foreigners', that is approximately 4 million mainly Bengali migrants, Hindus and Muslims, was reduced to 1,36,149 migrants, finally declared 'foreigners' and placed in a final special list subject to appeal. **Sixty percent of those declared 'foreigners' were women** as they were the most disadvantaged without access to documents.

The class background of the internal migrants illegally declared 'foreigners', largely agricultural labor, poor peasantry, working class, lower middle class and a few from middle

income groups, with restricted financial resources for the endless rounds of litigation, heightened their insecurity and abandonment by the Indian state. Their plight at first concealed by the corporate media, became widely known in the country through the alternative electronic media, increasing the resentment against the National Register of Citizens and the National Population Register, announced by the Home Minister for the whole of India.

There was an even grimmer aspect to the tragedy of Indian internal migrants into the Indian province of Assam. The Supreme Court also monitored the process which had illegally begun by the provincial government of Assam, to imprison those internal migrants categorized as 'foreigners' by ad hoc Tribunals. A former civil servant, appointed by the Indian Human Rights Commission to assist the Commission on this issue, submitted in an affidavit to the Supreme Court, that the prisons for the migrants declared 'foreigners' in Assam, were little better than concentration camps, where they were held incommunicado, not permitted any contact with their relatives to obtain assistance, and that the Supreme Court should intervene and direct the Union of India and the state of Assam to release those imprisoned.

The arbitrariness of the entire procedure adopted was exposed, when a decorated veteran of India's Armed Forces from Assam, was interned in a detention centre for foreigners, and a few members of the family of a former President of India, an Assamese Muslim, and relatives of a few legislators of Assam, also found themselves on the list. There were increasingly suicides of those who had been illegally declared as 'foreigners', merely due to technical discrepancies in their documents, such as incorrect spelling of names and surnames.

Five Rapporteurs of the UN Human Rights Council, the Vice Chair of the working group on arbitrary detention, the Special Rapporteur on the promotion and protection of the right to freedom of expression, the Special Rapporteur on minority issues, the Rapporteur on freedom of religion and belief, and the Special Rapporteur on contemporary forms of racial discrimination, xenophobia and related intolerance, who were monitoring the situation in Assam, addressed a communication to Sushma Swaraj, Minister of External Affairs in the Government of India, headed by Prime Minister Modi, communicating that the disenfranchisement of Bengali and other Indian citizens, by irregularly categorizing them as 'foreigners', was in vio-



lation of the International Human Rights Convention, the International Covenant on Civil and Political Rights and the Convention of the Elimination of all forms of Racism. This communication called on the Government of India to end statelessness and the practices and policies that render people stateless.

In an attempt to overcome the political chaos and anarchy in Assam, arising from the declaration of hundreds of thousands of Indian Bengalis, Hindus and Muslims as 'foreigners', unjustly rendered stateless; in particular the large number of 'Bengali Hindus' in the list of 'foreigners', which is reported to have been even more than the list of Bengali Muslims declared 'foreigners'; the BJP –RSS led NDA alliance government, hastily enacted the Citizenship Amendment Act, 2019, to grant Hindu Bengalis rights to citizenship, while denying the Indian Muslim Bengali the same rights and privileges by a subterfuge, declaring that all the Hindu Bengali migrants declared 'foreigners', had sought asylum in India due to religious persecution in Bangladesh. The reality was that these were Indian Bengalis and not Bangladeshis.

This amendment act was passed with the support of both Houses of Parliament, though the BJP at the relevant time did not have a majority in the Rajya Sabha, the Upper House of parliament. The Constitution Amendment Act, 2019, provides, that any person belonging to the Hindu, Sikh, Christian, Jain, Buddhist or Parsi (Zoroastrian) faith, who has faced religious persecution or has apprehension of religious persecution, in countries of origin such as Afghanistan, Pakistan or Bangladesh, is eligible to apply for citizenship under the Citizenship Amendment Act, 2019, if the internal migration into India has taken place before December 31, 2014. For these applicants for Indian citizenship, the statutory waiting period for citizenship was halved. The Constitution of India and the Citizenship Amendment Act 1955, before the 2019 amendment, did not confer citizenship on the basis of religion.

Muslims were excluded from the ambit of the Citizenship Amendment Act, despite the political history of South Asia of the last several decades, with Muslims fleeing from military dictatorships and theocratic fascist regimes from Afghanistan, Pakistan and Bangladesh, seeking asylum and refuge in India, including members of the family of President Sheikh Mujibur Rehman assassinated in Bangladesh and the family of former President Najibullah of Afghanistan, killed in the UN premises at Kabul after he had

stepped down under a UN sponsored agreement; along with hundreds of their followers and members of their political parties. Significantly in no other region of the world have as many heads of states or former heads of States been assassinated as frequently as in South Asia, including in India, the former 'Jewel' in the British crown, evidence of subversion of the penetration of the National Security establishments and internal and foreign Intelligence Agencies of India, Bangladesh, Pakistan, Afghanistan, Nepal and Sri Lanka, by Imperial powers, for control of the resources, markets, revenues of former colonies, and the drug trade of Afghanistan for laundering into International financial institutions and banks

Three days after the Constitution Amendment Act, 2019, was passed by Parliament, on December 11, 2019, at noon, an unusual and spontaneous non-violent civil disobedience movement began, a protest against the Constitution Amendment Act, 2019, the National Register of Citizens and the National Population Register. This movement in some respects was similar to Mahatma Gandhi's famous civil disobedience movements, which would begin with a few selected volunteers, and then spread across the country with hundreds of thousands volunteering and thereafter millions, leading to national liberation.

At first, a group of approximately 10 to 15 women gathered, in an attempt to blockade a road on the six lane highway bordering a Muslim dominated neighborhood in South East Delhi, known as 'Shaheen Bagh'. The word spread. Within a few days there were hundreds at the site, which increased to hundreds of thousands visiting the site in solidarity. Within a few weeks there were hundreds of 'Shaheen Baghs' all over the country, from North to South, from the Western to the Eastern provinces of India, with hundreds of thousands of women supported by students of major universities and other citizens joining in the non-violent and peaceful demonstrations, opposing the Constitution Amendment Act, 2019, the National Register of Citizens, and the National Population Register on roads, in public places and public squares all over the country, totaling millions. The protest was no longer confined only to the issue of the National Register for Citizens, other political and economic issues were also raised. The issues raised in this massive Civil Disobedience Movement, were more relevant to the citizens of India than the debates of mainstream political parties on this issue.

The images from Shaheen Bagh were unusual. These were



women never before seen on political platforms, or in the audiences of political meetings of mainstream political parties, or NGOs or other civil society organizations. The women who had spontaneously gathered were essentially home makers, emerging from the shelter of their homes in simple middle class, lower middle class, and working peoples localities, taking the lead, supported by women students, for a peaceful protest, a '**satyagraha**', described by Mahatma Gandhi as a 'struggle for truth' or the 'force of truth'.

The site of the civil disobedience movement was 'Shaheen Bagh', a locality predominantly, but not entirely inhabited by the Muslim minority. Neither was this a strictly feminist congregation. The women politically aroused, did not perceive any contradictions between their traditional roles as nurturers and home makers, and their political rights as citizens, admitting that they had entered the political space of the country for the first time. Predominantly Muslim, they were not protesting exclusively for any religious group, and were joined within weeks by women and men of every religious faith in the country. Their demands addressed to the Prime Minister of India, were simple and direct: *"We are citizens. Our ancestors fought for the freedom of the country. All of us of whatever faith belong to this country. It is the Constitution which has given us our citizenship rights, no government can take these rights away. We will not submit our documents for scrutiny under the National Register of Citizens, as this is unconstitutional. The Citizenship Amendment Act discriminates and divides citizenship on the basis of religion. Roll back the Citizenship Amendment Act, the National Register of Citizens, the National Population Register. Who else should we make demands to except to the Prime Minister. We have gathered here because we feel that it is time for us to protest, even students in the country are not safe from physical and murderous attacks."*

These were references to the brutal attack on the students of Jamia Millia Islamia Central University, among other Universities, where students had been attacked. Students of Jamia Millia Islamia, were brutally beaten in the library, washrooms and hostels, for protesting against the Citizenship Amendment Act, the National Register of Citizens and the National Population Register outside their campus. Severely injured students were arrested and denied medical treatment, until their parents joined by other citizens, organized a peaceful protest demonstration of thousands, in the middle of the night outside the Police Station, and young lawyers took the lead in extending legal assistance.

In the days, weeks, and months that followed, the women of Shaheen Bagh were still there, at the peaceful road blockade under a makeshift canopy, sitting on the ground every day and every night, in the height of winter, aware that they had inspired the entire country by their example, as protests were being held in all major cities and even in small towns and rural hamlets. There was no flagging of their spirit or determination. The women were not led by any political party, or any NGO or civil society organization, nor were they funded. There were no leaders or orators at Shaheen Bagh. Every woman present who desired to, was entitled to express herself and convey her viewpoint to the print and TV correspondents and representatives of the alternative media, who arrived at the scene of a protest, which could no longer be ignored. Basic assistance was generously contributed by neighborhoods and all communities, as the word spread throughout New Delhi and the country. Doctors voluntarily set up medical clinics aware that the women were there out in the cold, many with babies in arms and young children. Members of the Sikh community from the Punjab organized a community kitchen or 'langar' as it is known for weeks, to serve simple meals to those protesting. Delegations arrived from Northern provinces, from the predominantly tribal heartland of the country, and from Dalit organisations representing those historically, socially and economically discriminated against in India.

The appeals for non-violence and unity in the struggle, their clear understanding of what was at stake, the articulation of citizenship rights, and what constituted nationhood and commitment to society; the intertwining of art, culture, music and the poetry of resistance, with the day to day needs of continuing the struggle in which they had taken the lead, was radically very different from what has been passed off hitherto as political awakening of women.

The attire was diverse. Women with their heads modestly covered as in many parts of India; many with head scarves, others bare headed, students in modern attire. Providing a backdrop were men, old, middle aged and young, at a suitable distance, yet eager to assist in logistic roles. The congregation grew from strength to strength. It was visible to the whole of India, that Muslim women, unjustly pitied and stereotyped as backward; as confined to the kitchen, with patriarchal traditions and without a voice in their homes, had taken the lead in a united struggle of women and men, of young and old, of the majority and the minority, of students, middle classes and lower middle classes; of workers,



professionals and cultural artists. Despite the statement of Prime Minister Narendra Modi disowning them, exclaiming: **“... from one look at their dress you will know who they are...”**, they did not disown him. Demanding answers as citizens, from their Prime Minister, and a roll back of unconstitutional decisions and laws, **‘ in writing ‘**. Neither did they disperse, when the Chief Justice of the Supreme Court observed, that the Supreme Court would be ready to hear a Petition on the violence on students at Jamia Millia Islamia University, if all protestors dispersed.

This was far from all. The Constitution of India on which scores of political leaders had taken their oath of office from the date of its promulgation; a document framed by revolutionary democrats, the majority of whom had participated in the anti-Imperialist and anti-colonial struggle referred to in India as ‘ the Freedom Movement’ and who believed that constitution making was too important a task to be restricted only to lawyers; this Constitution was brought into this dusty roadside blockade of Shaheen Bagh converted into a public square, and its Preamble read aloud.

A venerable former Judge of the Supreme Court in the ninth decade of his life observed :

“This is the beginning of a different political movement. This has never happened before, the reading from the Constitution of India by simple citizens in a public square during a peaceful protest. The Constitution will no longer be the monopoly of Judges, lawyers and law makers it is now amidst the people.”

That is the significance of the civil disobedience movement of the women of Shaheen Bagh. They had raised the political discourse for the core issues; for justice, political, economic and social, and were far ahead of mainstream political parties in India and its intellectuals. There was another important political achievement, the Muslim minority community was no longer in the clutches of false political leaders or those maulanas and ulemas who had a vested interest in keeping them self-absorbed, or those extending token sympathy with their ‘victimhood’. With this movement, the Muslim minority community in India had broken out of its siege, ceased to see themselves as victims, supplicants or second class citizens, despite daily demonization, murderous attacks, and unjust imprisonment of their youth. They were back in the political arena, as in the days of the freedom struggle, and in the decades immediately after independence, battling politically on all issues

shoulder to shoulder, as citizens.

These are tragic, difficult, and yet historic times for us in India. Winds of change are about to transform and alter our traditional and stagnant political beliefs, and our entire way of life as a society. Remarkable developments are taking place. Indian Muslim women, young and old, have arisen in defense of the entire country, for all religious groups; for persecuted Kashmiri Pandits and Kashmiri Muslims, for Bengali Hindus and Bengali Muslims disenfranchised and rendered stateless in Assam, for the protection of citizenship rights of the entire country and on wider issues of poverty, unemployment, and the safety of women and students. The movement was a resounding success impacting 11 provincial governments of, as public support for the movement was massive. All these state governments declared, with resolutions passed in most of the eleven Legislative Assemblies, that their province would not be implementing the National Register of Citizens. Was it as simple. No struggle is. Tyranny does not disappear silently into the night, neither does fascism. There were several attempts to create violence at the site. Shots were fired at the peaceful protest. A youth assisting the protestors had his hand brutally slashed. Yet the women remained at Shaheen Bagh, braving bitterly cold winds and rain, and they were still there in March 2020, when spring arrived.

As the political struggle spread to the entire country, the government was afraid, Muslim women of Shaheen Bagh could not be permitted to continue to inspire nationwide protests. This was a revival of civil disobedience on a nationwide scale not seen since Indian independence. The attacks began with hate speech directed against the protestors by BJP-RSS local leaders of Delhi calling upon their storm troopers to teach those at Shaheen Bagh, a lesson. In the North-East of Delhi, Muslims who had supported and sympathized with the Shaheen Bagh protest, were brutally attacked in an organized pogrom. Fifty-two citizens of India, both Muslims and Hindus, were killed in the murderous attack by hired mobs, permitted to loot homes and shops and use lethal weapons including firearms by those present in uniform, hundreds were injured.

The majority of those killed were Muslim. Hundreds of Muslims along with a few from other communities lost their homes, their properties and their entire source of livelihood. As five young people belonging to the Muslim community attacked in the pogrom, lay seriously injured on the road, and one of the five was dying; the attackers



and the police present taunted them saying :” *Now sing the National Anthem that you Muslims were singing at Shaheen Bagh;*” a few moments later one of the victims was dead. A video of the recording spread throughout the country, leaving no one in doubt that fascist barbarism had taken over.

In the northern State of Uttar Pradesh, where Yogi Adityanath is the Chief Minister, those who had organized peaceful protests in the provincial capital Lucknow, and in other places inspired by Shaheen Bagh, were arrested and imprisoned. They received notices for attachment of property, for payment of fines totaling exorbitant sums of several lakhs of rupees, for protesting and allegedly causing violence and damage to property, which had never taken place, as the protests were absolutely peaceful and non-violent.

On March 24,2000, using the so called Covid 19 ‘plandemic’ as a pretext, the government directed that ‘Shaheen Bagh ‘ had to be vacated. In the weeks that followed, young students, women and men who had participated in protests, including the women students of Jamia Milia Islamia University, were summoned for interrogation and arrested during the ‘plandemic,’ declared a serious health emergency. Among those arrested and imprisoned was a young married woman student, who was pregnant. Many who participated in the peaceful protests have been detained, interrogated and imprisoned in Delhi and in Uttar Pradesh, some under the Unlawful Activities (Prevention) Act, 1967, a statute in which there is no provision for bail.

While the government and corporate media are still busy mandating masks and social distancing, there is no social distancing in India’s prisons, where jails accommodate more than three times the number of prisoners in the same limited space. Whatever happened to Covid-19 quarantine measures of WHO, advised by the Bill and Melinda Gates Foundation, projected as a deadly and life threatening pandemic, requiring a complete lockdown of society and social distancing. Do these regulations apply to the entire people of India, including those unjustly imprisoned, or is the lockdown selective, with an objective different from public health and safety, as senior citizens who are academics, lawyers, social scientists, including a poet critically ill and a Christian priest suffering from Parkinson, both over 81, among three others over sixty including one of India’s foremost intellectuals belonging to the Dalit community, who has held senior management positions in prestigious public sector and private sector enterprises, and a lawyer

and visiting Professor at the Delhi Law School who is diabetic, and others younger, have been arrested under the Unlawful Activities(Prevention) Act, essentially for being human rights defenders and researchers of the conditions of the most deprived of Indian society, and having assisted them in securing justice from the Courts. Those arrested include young women, members of cultural troupes of the Dalit community, the Kabir Kala Manch, all arrested in what is now known as the infamous ‘Elgar Parishad’ and Bhima Koregaon ‘Case, all denied bail including the senior citizens arrested, who have serious illnesses. According to the BJP-RSS led Central Government working for the deprived and researching their conditions are all ‘ Unlawful Activities’; whereas the provincial government emphasized that all those arrested are innocent of any wrong doing and have been framed under instructions.

Shaheen Bagh is not the end, it is the beginning of a new awakening in India. Unlike any other movement in recent years, it was sustained, united, and spread throughout the country, led by simple fearless women experiencing for over three months, as they braved the winter cold, holding their children close to their chests to shield them from bitter winter winds, the real meaning of what it takes to be a concerned human being and citizen, to face unflinchingly and upfront the challenges and the struggle to rebuild a new and more just society, which in India is also the challenge of reviving a civilization.

On March 24,2020 the women of Shaheen Bagh were dispersed. Two months later, hundreds of thousands of internal migrant workers broke out from their enforced lockdown and hunger imposed by the ‘plandemic’ and walked home, from cities to rural hamlets and small towns, covering hundreds of miles in the scorching summer heat, in similar acts of peaceful non-violent civil disobedience; hundreds were to die in accidents and of exhaustion in different circumstances on the roads or in the so called ‘migrant trains’. These are examples of mass political education and grass roots organization taking place, even though citizens have been deserted by mainstream political parties, who now only occupy only the electoral space, whereas articulation of the political direction has now been taken over by masses of affected citizens. And there is more to come as farmers movements have begun against the corporatization of agriculture.

The political document that inspired the women of Shaheen Bagh is the manifesto of our anti-Imperialist ‘free-



dom struggle', the Constitution of India, now being widely disseminated among the masses of the Indian people, 70 years after it was enacted. First by the 'Pathalgadi' movement of tribal indigenous people of India, who inscribed relevant constitutional provisions protecting their tribal rights, on stone structures in Central India at the entrance of their villages; thereafter popularized by the women of Shaheen Bagh. In the public protest at Shaheen Bagh and in mass meetings that followed of hundreds of thousands in the country, it was the Preamble of this Constitution which was widely read :

WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and opportunity; and to promote among them all

Fraternity assuring the dignity of the individual and the unity and integrity of the Nation;

In our Constituent Assembly this twenty-sixth day of November 1949 do

HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION

Niloufer Bhagwat is Vice President of the Indian Association of Lawyers and the Confederation of Lawyers of the Asia-Pacific region , a former Professor of Comparative Constitutional Law, Administrative Law and International Law at the University of Bombay and an Advocate of fifty years standing appearing at the High Court , Supreme Court , other Courts and Tribunals and Commissions of Enquiry, and civil society constituted International Tribunals on crimes of aggression, genocide , war crimes , crimes against humanity in Afghanistan, Iraq , Syria, Lebanon and Yemen .

She was awarded the Philip Jessup Award of the American Society of International Law and the Monique Weyl Award of the International Association of Democratic Lawyers .



On Red Feminism: class, gender and historical materialism

ALFREDO CAMPOS

ABSTRACT:

This paper aims at providing new, and recovering forgotten, insights into Marxism, as a theoretical and analytical tool for understanding gender inequalities, themselves understood as a limitation on Human Rights.

Marxism was preponderant for its capacity and ambition to provide a theory for the “social totality”. During the twentieth century, however, and particularly after the downfall of the Soviet Union, Marxism has lost much of its public and academic relevance, mainly for its supposed economicism, class centrality and determinism, accused of deconsideration for the role of other social phenomena, namely patriarchy, race, culture, ideology and language.

Other theories on gender inequalities arose, namely post-modern, post-structural and material feminism(s). Although weakened in academia and political action, Marxist feminists have continuously studied other theories weaknesses, while both recovering the classics and formulating new insights into Marxist theory and proposing new approaches on its centrality for the study of gender inequalities.

It is therefore this paper's goal to analyse gender inequalities, showing Marxism's potential and uniqueness, both as a theoretical tool and a basis for political action towards women emancipation.

Key-Words: Gender, class, historical materialism, human rights.

“...if nature had not wanted women and slaves, it would have given looms the ability to spin by themselves.”
(Plato)¹

Introduction

In this paper we intend to explore, the inefficiencies it might *yet* have, a theory on gender inequalities, based on Marxism. It is considered that Marxism, as a theoretical approach to gender, provides the connections here deemed necessary to analyse such inequalities, inserting them both in the *material²*, historical and ideological backgrounds.³

Gender inequalities are not a new subject of study, therefore this paper seeks is to contribute to a theorization that, firstly, provides explanations for these inequalities, and secondly, doesn't follow the erroneous simplicity of disconnecting these from the social system. This means a theory that is well anchored in history and materialism, and that tries to overcome classical omissions in order to analyse inequalities in present times, but does not forfeit the basis that make it a truly emancipatory theory.

To attain these goals, this paper revisits classical writings of Marxist theorists, in order to pinpoint their actual theorizations on gender inequalities. It will be pointed out, that the aspects of these theories that have been deconsidered, misinterpreted or simply overrun, on recent feminist theorization (Brown, 2014; Gimenez, 1998, 2000), be it by ingenuity, ignorance or, quite straightforwardly on purpose (Ebert, 1995a, 1995b, 2014). It shall be noted that what has been misunderstood as class and economical determinism, whereas these authors integration of gender issues is in their theory of the total social question.

Delving beyond the classical authors on gender inequalities, there is also no doubt that these were not their main concern, which will be quite explicit in the debates in Leninist thought. As such, an approach to classical feminist Marxist authors is essential – namely, Clara Zetkin and Alexandra Kollontai, precisely for their focus on gender, family, marriage and sex.

Even though this rereading of classical Marxist authors may seem cumbersome, it is considered necessary for three reasons, particularly regarding Marxist feminists: first, it

¹ Author's translation of the citation on “O Problema Feminino e a Questão Social” (1973: 9).

² As shall be seen, the concept of “material”, “materiality” and “matter” has evolved, between Marxist, materialist and post-modern feminists. In this paper, the use of italics shall regard the Marxist conception, considering material solely that is objective and related to the physical domain.

³ We do not here intend to produce a full approach to *all* forms of gender inequalities, but to theorize a contemporary Marxist approach. Thus, several aspects will necessarily not be regarded.



shall disperse common notions of determinism and reductionism; second, there are no works which concisely organize and present Marxist theorization on these issues, scattered among many works, here we have tried to present them as a whole: third and finally, it is necessary in order to open the paths and clearly establish the basis on which the theorization of *Red Feminism* shall ensue.

The paper continues with a (necessarily) brief overview of the “first waves” of feminist theorization (Gimenez, 1998, 2000; Stanford, 2004), continuing with post-materialist or post-modernist theories (Ebert, 1995a, 1995b; Gimenez, 1998, 2000). More recently, materialist⁴ theories have brought new discussions. It will be seen how these either drive towards a notion of materialism with no trace of it deprived of historical and social contextualization, or on the contrary are not actually different from recent Marxist theories (Ebert, 1995a, 1995b, 2014; Gimenez, 1998, 2000). The paper will examine how analyses can contribute to Marxist feminism. These theories are in many cases based on misconceptions of Marxist theory (Brown, 2014; Gimenez, 1998, 2000). Furthermore, they fall in contradictions that ensnare their emancipatory potential (Ebert, 1995a, 1995b; Gimenez, 1998, 2000)

Finally, the paper shall try to tie the knots, **towards a red feminism** (Ebert, 1995a, 2014). Basically meaning Marxist feminism, but definitely one which shows its political and emancipatory aspirations and engagement, without losing, even strengthening, its theoretical consistency, through the combination of historical materialism, class and ideology. On which regards Human Rights, then, there is a double linkage when gender inequalities are considered from a Marxist feminist perspective on one hand, regarding gender inequalities as such, on the other regarding work inequalities and gendered work. Revisiting the classics: Marx, Engels and Lenin on gender inequalities and the contributions of Zetkin and Kollontai

As said by Neves (1973), women are doubly stricken by oppression and inequality, since they suffer the oppression and inequality of the majority of the population – working classes, excluded from the property of the means of production and living through the sale of their work effort, as

well the segregation within that same population. And in fact, in his *Economical and Philosophical Manuscripts* of 1848, *beyond that*⁶ (1994 [1848]: 17), here already resides a first insight into how some theories erroneously analyse Marx, concluding with his class determinism and Marx shows us a woman is “doubly proletarian”, and “doubly slave”⁵ (17), whose emancipation requires the emancipation of the proletariat as a whole, *but may persist*⁶ as deconsideration of gender and patriarchy⁷ (Brown, 2014). This means that, although Marxism inserts the gender issue on the global social system, considering that women’s emancipation requires workers’ emancipation as a whole, not in any way does this mean that gender inequalities end with the proletariat exploitation, but may go further.

Furthermore, Marx and Engels were quite explicit in their consideration of women, regarding them as historical subjects by themselves, both in their individuality, difference and capacity for change (1974a [1846]; 1974b [1848]). On his theory of value, Marx also made a precise distinction between the production/reproduction of value as surplus and value of use, considering that if in capitalism both men and women participated in the economy and generated surplus value, in the family it was mainly the women who carried the work of producing values of use. As such, they are, doubly proletarian, both in the field of social production and domestic economy (1997 [1867]). Furthermore, it is precisely this production of values of use that defines the domestic economy in an invisible work which contrasts with the visible social work, but complements it: on one hand, the domestic work of women allows further time for social work and creation of surplus value by men, on the other women themselves also participate in social work, but even more discriminated against, with lower wages (Larguia & Dumoulin, 1975).

Bebel, a contemporary of Marx, also believed men and women workers had in common exploitation by capitalism, changeable in time and space, but ever-present. But he also added that, through time, enforced through education, culture and law, a social representation of inferiority was imposed, going forth for generations until it became internalized by both men and women. And considering that all forms of inequality derive from some kind of dependence

4 See footnote number 2

5 Translation by the author.

6 Italics by the author.

7 It is important to note that neither Marx, Engels, Lenin, Zetkin nor Kollontai, ever used the notion of patriarchy, simply referring to male domination. Patriarchy is a notion which will be developed in the dual-systems theory – as analysed in the next section – although here considered improper, masculine authoritarianism being considered a better concept.



by the oppressed in relation to the oppressor, Bebel stated that the main difference between men and women workers was that “the woman is the first human being stricken by slavery. She was a slave before slavery”⁸ (1973 [1895]: 35-36). Although lacking the *materialism* and historicism that characterizes Marxism, here too the role of gender inequality and patriarchy and its continuance was regarded.

Another contemporary author, Jules Guesdes, is also very explicit on his understanding of male domination. As he states, women are men’s proletariat, domestically exploited based on gender, just as the whole proletariat is exploited by the bourgeoisie under capitalism. Social relations at the household are, then, no more than an extension of the social relations of production, such as “that *the woman shall be to the man in the same dependence that the male worker is, regarding the capitalist?*”⁹ (1973 [1898]: 38).

Lafargue (1973 [1904]) stated that with technological development and increasing industrialization, women were further integrated both in factories and liberal professions, guaranteeing capitalism a low-wage labour. Lafargue concludes that capitalism and the bourgeoisie kept the woman at home when it benefited them, and brought her to the public space when it benefited them as well, not for her emancipation but “*to exploit her even more than male workers*”¹⁰ Furthermore, and acknowledging domination and ideology’s roles, he stated that “the woman exploited by capital both carries the miseries of the proletariat *and also the burden of the chains of the past*”.¹¹

The above authors already show quite well how Marxism did not reconsider women’s role, gender inequalities and male dominance. But it is Engels that has written one of the most preeminent works on these issues, in his book “The Origin of the Family, Private Property and the State” (2002 [1884]). In his analysis of the historical development of the family Engels places men’s domination in the consolidation of the monogamist family, purpose being to give birth to children whose paternity cannot be contested, in order to guarantee heirs to the family property: as such, the transition from grouped families, to sindiasmic (allowing polygamy for the man) families and to monogamy is

strongly linked to the beginning of accumulation of surplus production and private property. Engels argues that the previous forms of family, based on common property, gave place to monogamy with the rise of private property. Therefore, as he states,

The first division of labour is between man and woman for (pro)creation of their children. Today I may add: *the first class antagonism in history coincides with the development of the antagonism between man and woman in monogamy; and the first class oppression, with the oppression of the female sex by the male*¹² (2002 [1884]: 83).

How, then, can post-structuralist and post-modernist feminism argue to disregard of Marxism’s gender inequalities and patriarchy? Furthermore, Engels states that, together with slavery and private property, monogamy started the era which has lasted until now¹³, where the well-being and development of some is attained at the expense of others suffering and exploitation. As such, when the monogamist family faithfully reflects its historical origin and clearly manifests the conflict between man and woman, originating the exclusive domination role of the first, *we have a miniature portrait of the contradictions and antagonisms throughout which society moves*¹⁴, split in classes¹⁵ (idem, 74).

It is worthwhile noting that it is precisely this kind of consideration that has led other feminist theories and movements, to the accusation of class-determinism. Still, even when the connection of family to society is centred on class as the main historical subject of transformation, there is no doubt about these author’s insights into gender inequalities, in truth conceiving their perpetuation through male domination and culture, apart from class inequalities.

Concerning this matter, Engels comments on the economical basis of monogamy, and the connections of monogamy, patriarchy and (social and biological) reproduction, noting how in the proletarian family this economical basis gradually vanishes, therefore ending the *material* mean of men’s domination, of propriety over his wife and oppression relations, since depriving of their [economic] basis the

8 Idem.

9 Translation and Italics by the author

10 Idem.

11 Idem.

12 Translation and italics by the author.

13 By “now”, it is obviously relating to Engels time.

14 Italics by the author.

15 Translation by the author.



remaining of men's supremacy on the household (idem, 91).

Engels also notes on the possible continuation of "*brutality against women, very dominant since the establishment of monogamy*"¹⁶ (idem, ibidem). Yet, the author considers that the economic basis of monogamy shall gradually fall in capitalism, at least for the working class, as its exclusion from property no longer requires the production of heirs of exclusive paternity. Thus, the domestic economy can, through the socialization of the means of production in the socialist revolution, convert to social industry, socializing women's economical functions in the family, as child-bearing, caring, feeding, the production of values of use, etc. (idem, 94-97).

It is what Shishkin (1973 [wd]) considers to have been built in the Soviet Union, with total integration of women in social production, and the progressive socialization of domestic economies, with the construction of schools, hospitals, caring centres, kindergartens, etc. Still, he also noted, as Lenin had, that

there is a need for educational work around matters concerning the integration of women's productive strength, not only among the feminine masses, *but also among men, on whose conscience (with frequency even in communists) remain not few bourgeois concepts of women as domestic slaves* (idem, 117).¹⁷

Shishkin thus considers fundamental the educational role of society, as the change in the mode of production does not, *immediately or by itself*, change the role of ideology on gender exploitation and oppression, which may persist beyond the end of domestic economies and the *material* basis of male dominance. Furthermore, Largaia and Domoulin also demonstrate that, for decades, the Soviet women, just as the women in capitalism, worked for two periods of time, the visible social work and the invisible domestic work, subjected to masculine domination (1975).

Lenin presents his analysis on the development of socialism in the Soviet Union, in a series of writings (1973a [wd], 1973b [1919a], 1973c [1919b], 1973d [1920] which show, on one hand, how the socialization of domestic econo-

mies and of the production of values of use freed women from economic exploitation in the family, but on the other hand that male dominance and gender oppression still continued. As such, he considered that women are still *home slaves*, albeit freeing laws, as she keeps oppressed, humiliated by *petty domestic activity*, which convert her into cook and housemaid, which waste her activity in an absurdly *unproductive*¹⁸ work, nerve racking and tiring. True *women's emancipation* and real communism cannot begin while mass struggle against this domestic economy, while its *mass transformation* to a large social economy has not begun (160)¹⁹.

For Lenin, this was the *material* basis of women oppression, which shall be solved, then, through class struggle against capitalism, and with socialization of domestic needs in socialism. Yet, he recognized that in the first years of the Soviet Union,

(A)lthough with equal rights, women's oppressive situation continued, domestic activities rest on her. These are, in most cases, the most *unproductive*²⁰, most barbaric and most arduous that women practice. This is petty work, which contains nothing to can contribute to women progress. (170)²¹.

Furthermore, Lenin considered that "equality in law does not necessarily correspond to equality in life" (184)²², therefore urging the presence of women in the new soviet enterprises and State, without which equality in life could not be achieved.

It is quite evident that, for these authors, gender inequality was unavoidably connected with the social system, arising from historical processes of property and social relations of production. For them, the transformation of the whole system and its economic basis, would also lead to the downfall of domestic economies and division of labour, with their socialization. Yet, if most acknowledged the perpetuation of gender dominance and oppression even with the lack of its economic basis, therefore considering aspects as culture and ideology, they did not theorize it in depth (Brown, 2014).

16 Translation and italics by the author.

17 Idem.

18 Italics by the author. This notion of unproductive work, just as in the following quotation, discards Marx's differentiation of forms of production and kinds of value.

19 Translation by the author, italics as in the original.

20 Italics by the author. Please read footnote 18.

21 Translation by the author.

22 Idem.



This is better addressed with the contribution made by the first Marxist feminists, Clara Zetkin and Alexandra Kollontai, and their discussions with Lenin, whose perspectives changed somewhat before and after the Soviet Revolution.

In a discussion with Lenin, it is quite obvious his deconsideration of Zetkin's work was directed explicitly at gender, family and sexuality, considering that everything ought to be put under the goal of the revolution's success, and only as such considered these matters (Nye, 1988; Zetkin, 1920). Thus, he considered women's issues gradually solved with the socialization of domestic economies, despite his previous considerations on dominance and oppression. On the contrary, Zetkin replied that

The questions of sex and marriage, in a bourgeois society of private property, involves many problems, conflicts and much suffering for women of all social classes and ranks (...) Old ties are entangling and breaking, these are the tendencies towards new ideological relationships between men and women. The interest shown in these questions is an expression of the need for enlightenment and reorientation. (Zetkin, 1920: 4).

An argument which Lenin cast aside without doubt, when stating that in such a perspective "the great social question appears as an adjunct, a part, of sexual problems. The main thing becomes a subsidiary matter" (idem, 4).

On long consideration of family, gender relations and sexuality²³, Lenin notes that "women's movement must itself be a mass movement, of all the exploited and oppressed, all the victims of capitalism *or other mastery*" (8), thus on one hand making women's emancipation a dependent part of the whole, one the other recognizing its specificity. Furthermore, concerning trans-classism, he referred

(N)ot only the proletarian women (...). The poor peasant women, the petty bourgeois – they, too, are the prey (...) That we hate, yes, hate everything, and will abolish everything which tortures and oppresses the woman worker, the housewife, the peasant woman, the wife of the petty trader, yes, and in many cases the women of the ownership classes (9)

Therefore, it can be seen in Lenin an unsolved theoretical contradiction between the insertion of the women's issue in the global social question, and the regards for its specificity and, furthermore, to its possible trans-classism²⁴. Even if he regarded the socialization of domestic functions as the main form of women emancipation, he also stated that

Unfortunately it is still true to say of many of our comrades, "*scratch a communist and find a philistine*". Of course, you must scratch their sensitive spot, their mentality towards woman. (...) So few men, even among the proletariat realize how much effort and trouble they could save women, even quite do away with, if they were to lend a hand in "women's work". But not, that is contrary to the "rights and dignity of man. (...) our political work, embraces a great deal of educational work among men. *We must root out the old "master" idea to its last and smallest root*"²⁵ (11).

Still, even though he acknowledged the permanence of forms of dominance and oppression which surpassed the *material* mode of production, based on culture and ideology, he gave no solution for these, apart from the socialization of domestic economies – which he himself considered insufficient.

Alexandra Kollontai (1909) went further in the theorization of gender inequalities, but still firmly anchoring on Marxist historical materialism. Yet, even though she considered that the women issue could only be totally solved together along with the "total social question", she did consider that

(B)ut must this prevent us from working for reforms which would serve to satisfy the most urgent interests of the proletariat? On the contrary (...) each right that women win brings her nearer the defined goal of full emancipation. (idem: 1).

She did consider, on the other hand, that there was an irrevocable split between bourgeois and proletarian women, considering the feminists of her time as the feminists of the bourgeoisie, solely able to regard the gain of rights through reforms (whose importance, as noted, Kollontai also acknowledged), while ignoring the necessity of the transformation of the whole social system:

23 Please refer to Zetkin (1920: 5-7).

24 Although most works by Lenin and other Marxist authors, irrevocably end considering the class issue above gender, meaning that the problems faced by bourgeois women are smaller than those by proletarian women, whose exploitation shall face a double form, of class and gender. Such can be read in most works cited in this paper.

25 Italics by the author.



As feminists see men as their main enemy, for men have unjustly seized all rights and privileges for themselves (...) Proletarian women have a different attitude. (...) The women and her male comrades are enslaved by the same social conditions; the same hated chains of capitalism (idem: 3).

It may be considered, then, that she was one of the first to draw a line between Marxist feminism and other feminisms²⁶, considering the first as a revolutionary, therefore emancipatory regarding the whole social question, yet also capable of understanding specific matters of gender. This can be noted specially on her considerations on marriage and family, noting how

to become really free, women have to throw off the heavy chains of the current forms of family. (...) For women, the solution of the family question is no less important than the achievement of political equality and economic independence (idem: 6-7).

Furthermore, she gave the first theoretical insights unto the role of ideology and culture on Marxist analysis of gender inequalities (Nye, 1988), stating that “where the official and legal servitude of women ends, *the force we call “public opinion” begins*”²⁷ (Kollontai, 1909: 7). And regarding this aspect, albeit her considerations of non-Marxist feminism, by her named bourgeois feminism, she did consider, regarding trans- classism, that

it is only important for us to note that the modern family structure, to a lesser or greater extent, oppresses women of all classes. (...) Have we not discovered the last aspect of the women question over which women of all classes can unite? Can they not struggle jointly against the conditions oppressing them? (...) Might it not be that on the basis of common desires and aims? (idem: 7).

She did, still, consider that the utmost sacrifice and struggle shall be undergone by proletarian women, as victims of greater exploitation, both by gender and class. Regarding the notion of property in the family, one may find an ex-

cellent description of gender dominance, based on culture and ideology, as Kollontai notes if

the moral and sexual norms and the whole psychology of mankind would have to undergo a through evolution, is the contemporary person psychologically able to cope with “free love”? What about the jealousy that eats into even the best human souls? And that deeply- rooted sense of property that demand the possession not only of the body but also of the soul of another²⁸? And the inability to have the proper respect for the individuality of another? The habit of either subordinating oneself to the loved one, or of subordinating the loved one to oneself? (idem: 10)

As such, Kollontai considered that both *new men and women* were necessary for true emancipation, both in society as a whole and the family is, not solely attainable through social transformation of the economic system, but also with the transformation of ideology and the creation of new gender relations (Nye, 1988). Engels had already considered that a new society would still inherit old models of gender relations. Kollontai's theorization goes further, grounded both on historical materialism, class relations, the total social system, gender relations and ideology, all of which required transformation, for the attainment of full emancipation, both of body and soul (Ebert, 2014).

It is expected that with this reading of classic Marxist authors on gender, and particularly feminist Marxists, it is possible not only to dispel any misconceptions on their so-called economic determinism and class bias (Brown, 2014; Ebert, 1995a, 1995b, 2014; Gimenez, 1998, 2000), but also to establish the theoretical basis on which a *Red Feminism* can be built. As such, it is considered that:

Gender inequalities are *objectively* built upon *material* factors, namely the mode of production and its social relations of production; The historical development of at least western²⁹ societies, has led to male property of the domestic economy, in it being reflected, as gender relations, the same class relations of the global social system;

26 A differentiation which shall be continued by Ebert (1995, wd) and Gimenez (1998, 2000), as shall be seen in the following sections of this paper.

27 Italics by the author.

28 The “property of the soul”, besides the body, even if a concept not much theorized, is central in Kollontai's work. The “property of the body” concerned the legal, if existent property and right of dominance through marriage. Kollontai thus considered that, even if destroyed the property of the body which arose from the legal boundaries of marriage, not only could the “property of the soul” resist, but lead to the perpetuation of the “property of the body”

29 It is important to recall Marx's words, when he stated that “in my analysis of the origin of capitalist production (...) I expressly limited the “historical inevitability” of this process to the countries of Western Europe” in Marx, Karl (1970 [wd]), “First Draft of the Reply to V. I. Zasulich's Letter” in idem & Engels, Friedrich, Selected Works in Three Volumes, Vol. 3. Moscow: Progress Publishers.



Further, even if the previous condition can transform historically and through political action, a *subjective* field of oppression and domination exists, based on *ideology and culture*, which may also be transformable, with or without combinations with the previous factors; Absolute emancipation requires not only emancipation on the *material* and *objective* areas, but also in *subjective* matters;

Yet, there is no doubt that much must be considered regarding the connections of these factors. Indeed, the authors – with the exception of Zetkin and Kollontai – present a total theory for emancipation, explaining inequalities through their material basis and the social relations of production that not only emanate from them but *also acknowledge the perpetuation of gender inequalities through culture*.³⁰

This is certainly a combination of factors, even though the authors (excepting the cited) did not much explore them and their relations, but are actually scattered through their works. (Brown, 2014).

A brief overview of theoretical perspectives on gender inequalities: from feminism to feminisms – production, Materialism, patriarchy, ideology and language

After the classical Marxist and Marxist feminist analysis of gender inequalities, further theoretical development ensued, usually named socialist, liberal, radical and Marxist. Inequality was studied based on the connections between *materiality* together with the notion of patriarchy, namely with the development of the dual-systems theory (capitalism and patriarchy) (Gimenez, 2000; Stanford, 2004). Yet, even if descriptively useful, patriarchy is a concept not fit for a Marxist analysis, as it was used in such a way that situates women's oppression outside history (Gimenez, 2000). *Masculine authoritarianism*, as conceptualized by Largaia and Dumoulin (1975), seems a better notion, being historically and *materially* grounded.

More recently, post-modern and post-structuralist theories, critical of what are considered generalizations, reductionism and determinism, have arisen. (Stanford, 2004). These conceptions have been analysed, with the rereading of the classic authors, and thus can be considered, in themselves, a form of reductionist anti-reductionism (Brown, 2014; Ebert, 1995a, wd). Other contemporary authors, in differ-

ent ways, have tried or have been trying to reread Marx in renewed forms, as to make it less determinist and reductionist. These theories “can be grouped loosely with a tendency called materialist feminism that incorporates some of the methods of deconstructionism and post-structuralism” (Stanford, 2004: 8).

One of the central problems addressed by these theories is then naturally, materialism, essentially seeking forms of reconceptualising it in different ways than classical *materialist* analysis. That is, disconnecting *materialism*, *materiality*, *matter*, from its historical, economic, physical and social basis. So will then be analysed how these theories, through this disconnection, loose its emancipatory potential (Ebert, 1995a, 1995b; 2014; Gimenez, 1998, 2000). Still, contrary to Gimenez and even more Ebert – who actually names all post-modern and post-structural theorizations as “ludic feminisms” (1995: 1), it is considered that certain aspects, especially regarding ideology and power, can be an important contribution to Marxist feminism, as they address precisely what has previously been considered the main aspects not studied in depth in classical theorization.

Gimenez (1998, 2000) and Ebert (1995, wd) developed a deep analysis of materialist feminism, in opposition with Marxist feminism, considering that the first either falls into an immaterial theorization, discarding the traces of historical materialism, or ends not distinguishing itself from Marxist feminism. She considers the difficulty of defining materialist feminism, as its own theorists differ in its theorization and conceptualization, furthering the difficulty of distinguishing and separating it from Marxist feminism (which is Gimenez goal). For example, Jennifer Wicke, a materialist feminist author, defines it as

a feminism that insists on examining the material conditions under which social arrangements, including those of gender hierarchy, develop (...) materialist feminism avoids seeing this (gender hierarchy) as the effect of a singular patriarchy and instead gauges the web of social and psychic relations that make up a material historical moment; (...) materialist feminism argues that material conditions of all sorts play a vital role in the social production of gender and assays the different ways in which women collaborate and participate in the productions (...) Materialist feminism is less likely than social constructionism to be embarrassed by the occasional material importance of sex differences. (in Gimenez, 2000: 3)

³⁰ Italics by the author



As Gimenez points out, although while Wicke often refers to materialism, itself and other concepts remain abstract pronouncements. Landry and MacLean, in turn, define materialist feminism as a

critical investigation, or reading in the strong sense, of the artifacts of culture and social history, including literary and artistic texts, archival documents, and works of theory (...) a potential site of political critique, not through the constant reiteration of home-truths (idem, 4)

Yet, then, what is materialism and history in this definition? It would seem that the novelty is the acknowledgement of culture, but was not culture and language already part of classical Marxist theorization? Marx himself stated that “language is practical consciousness (...) for consciousness is always and from the very first a social product” (idem, *ibidem*). The authors go further, giving their own distinction between materialist and Marxist feminisms, considering that

Marxist feminism holds class contradictions and class analysis central, and has tried various ways of working an analysis of gender oppression around this central contradiction. In addition to class contradictions and contradictions within gender ideology (...) we are arguing that materialist feminism should recognize as material other contradictions as well” (idem, 5)

Here, then, a definition of what is to be considered as material, or materialism, is clear. Basically, everything – a transformation of Marxism such as that materiality can be granted to anything, from ideology to discourse and knowledge. One might argue yet, that if materiality is in everything, than ultimately it is nothing, devoid of explanatory potential in the sense of emancipation. As such, devoid of historical analysis, it may be said of this materialism what Marx and Engels said of Feuerbach's: as far as it is material it does not deal with history and as far as it considers history it is not materialist (Marx & Engels: 1974 [1932]). It is this process of reconceptualising materiality that Ebert claims to be the basis of all she encompasses as “ludic feminisms” (Ebert, 1995, wd).

Hennessey and Ingraham, on another hand, state that “dis-

course and knowledge have materiality in their effects” (*in* Ebert, 1995: 7), although they link these to capitalism, patriarchy and the social totality, in a sort of historical materialism with new variables, claiming of Marxist analysis categories proper of post-modernism and post-structuralism, while trying to avoid their contingency and localism. Also, inserting into Marxist feminism categories proper of post-modern and post-structural feminisms, they argue, as it is here that Marxism has been “misread, distorted, or buried under the weight of flourishing postmodern cultural politics”, considering that “unlike cultural feminists, materialist, socialist and Marxist feminists do not see culture as the whole of social life but rather as only one area of feminist struggle” (idem, 8). For these authors, then, there would not be that much difference between materialist and Marxist feminism, considering that their goal was “to re-insert into Material Feminism (...) that (untimely) Marxist feminist knowledge that the drift to cultural politics in postmodern feminism has suppressed” (idem, 9).

To Gimenez (1998, 2000), they are in fact different, on one hand on the relevance given to cultural aspects such as ideology and discourse but, more importantly, because they establish no hierarchy of causality. As such, first, by considering everything as material and, second for acknowledging no causalities between factors of oppression, such a theory cannot be emancipatory: if “all institutions or elements of the social system mutually interact and affect each other, and none is “more” causally efficacious than others” (2000: 6). then where does the struggle for emancipation start, and which paths shall it follow? Butler³¹, which many, as Ebert, considered one of the most preeminent feminist theorists, does indeed declare “the “unrealizability of emancipation” because poststructuralism has shown its foundations to be “contradictory and untenable” (Ebert, 1995: 7; wd: 2).

For Gimenez and Ebert, two main forms of theorizing material feminism can be found. One which nearly or completely discards the Marxist notion of *matter* and *materiality*, another which keeps it, but it is as such not actually different from Marxist feminism. The first is, to Gimenez not much different from the first post-modern and post-structural feminisms, with its focus on language, discourse, the body and “the resisting matter of the non-discursive”, but with new clothing which disguises it as materialist. Concerning the second, the author states that

31 For a full discussion on post-modern and post-structural materialism, and its developments, regarding many authors, and a Marxist rebuttal, please read Ebert (1995).



a theoretical transformation would have entailed a challenge to Marxism's fundamental assumptions, rather than the use of those very assumptions to theorize new phenomena (...) introducing in the analysis of the oppression of women the causal (...), is to remain faithful [to] its basic tenets, not to transform it (Gimenez, 1998: 11).

On the contrary, the first draws upon notions of materiality which deprive it from any emancipatory potential. Based, for instance, Laclau, considering that "social relations, like all "signifying systems", are "ultimately arbitrary", these reduce social, power and inequality to discourse, the discursive and the non-discursive, to *subjectivity*, with no notion of *materialism* which can provide them with a basis of struggle, since "if social relations are not exploitative (determined), they no longer require emancipation" (Ebert, 1995: 3). By centring on discourse and language, discarding their *material* basis, or considering that *anything* can become *matter* through the subject's signification, they forget what Engels had already remarked to Duhring: "the fact that we *understand* reality *through* language does not mean that reality is *made by language*³²" (idem, 5).

It is here considered that, if the *subjective* – discourse, ideology, culture – must be understood historically and in its connections with *material* totalities, it follows that these *subjective* matters may carry and affect *materiality*, but that they arise, and have effects, from and on grounded historical and *material* factors, which are not local nor contingent but on the contrary, linked to *material* conditions of production and reproduction. And it is as such that *masculine authoritarianism* – different from the ahistorical notion of patriarchy – must be conceived (Larguia & Dumoulin, 1975).

On Red Feminism: re-casting Marxist analysis of gender inequalities

It is now, then, time to map out what is to be considered *Red Feminism*, one that keeps Marxism and historical materialism as its basis, albeit not discarding the basic ideas brought up by post-modern and post-structural analysis, but recognizing historicity, structures and their *material* basis.

Ebert (1995, wd) defines *Red Marxism*, in what may be considered both a theoretical and political conceptualization, considering that

Red Feminism contests all forms of institutionalized feminism: from cultural feminism (...) to postmodern feminisms with their bourgeois reifications (...) [it] challenges the effectivity of the new localist, "transnational" feminisms and calls for a renewed internationalism (...) to fight global capitalism. It insists on the priority of production and class struggle in the emancipation of women (...) Red Feminism thus moves away from individualistic desires and the limits of identity politics toward the collective struggle of international socialism. (wd: 1)

Ebert's theorization is straightforward in its rejection of most considerations of post-modern and post-structuralist feminisms which, again, she globally names as "ludic feminisms" (1995, wd), going further to consider that they are "of course, themselves a historical effect of transnational capital and its knowledge industry" (wd: 1). Yet, it is here considered that, albeit the fact that the *material* conditions of production and reproduction are the first basis of inequality, it is acknowledged that ideology, discourse and culture are factors to be considered, both at the collective and individual levels.

That means, according to Gimenez (1998, 2000), seeking the historical conditions which socially and economically give rise to inequalities among men, women and both, more or less directly. It is here added that also the *subjective* factors that emerge from these and in their turn can also have effects on *materiality*: yet not independent, local, a-historical or contingent, but founded on *matter*. Therefore, again returning to Gimenez, using historical materialism to identify class processes and how they place both men and women in similar social and economic situations, but also experiencing different opportunities, forms of domination and oppression.

Feminism cannot, therefore, fall into idealism, discarding the essential for the formal, making the last the issue and the former the secondary (Ebert, wd). To do so, will mean forfeiting its emancipatory potential, for women in the first place, but for men as well, if this feminism is to embrace the total social question. That means dropping this "ludic" contemporary feminism, [which] under the influence of post-modernism has developed a number of theories and practices that are represented as progressive. (...) this kind of feminism cuts off the relation of a coherent theory as an explanatory critique to guide its practices (...), such feminism becomes an ally of capitalism. (5)

32 Italics by the author.



If a *Red Feminism* is meant to be able to theoretically analyse gender exploitation and oppression, while at the same time combining it with the social totality, then both gender and social relations must be connected to the *materiality* of production and reproduction, both of the *material* and of the *subjective*. This, in turn, necessarily requires a conceptualization of power as basis of inequality and domination which arises from this *materiality* of production, even if it may become both a form of *subjective* and *objective* power. Not a notion of power as Foucault considers it, not something which “must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization”: self-constituting thus aleatory, immanent thus contingent, local and diffuse thus heterogeneous, a-systematic thus unstable power (Ebert, 1995: 22). In such a conceptualization, power creates its own resistance, making the struggle for organization and emancipation as needless as unnecessary, as power is separated from its material basis and limited to the superstructure.

As Foucault puts it, “power is everywhere (...) comes from everywhere”, but as Hartsock notes, if “power is everywhere [it is] ultimately nowhere”, therefore being everything and nothing (Ebert, 1995: 29). These notions, forfeiting the basis of production and reproduction and the *material* social relations from which power, ideology and discourse arise and when conceding *materiality* to everything, do not consider, as Marx and Engels maintain, that they are only fighting against “phrases”. They forget, however, that to these phrases they themselves are only opposing other phrases, and that they are in no way combating the real existing world when they are merely combating the phrases of this world (Marx & Engels *apud* Ebert, 1995: 36).

On the contrary, power and domination must be understood through their *material* basis, the historically developed social relations established, and the *materiality* and the *subjective* which arises from them.

As such, *Red Feminism* acknowledges the historical ground on which materiality is based, regarding the social relations of production and reproduction. Other social relations of oppression and domination, such as *masculine authoritarianism*, are connected with those and from them arise, being part of the superstructure, thus *subjective*, but can produce effects on *materiality*, as such rearranging it. It is this *materiality* to *subjective* to *materiality* that *Red Feminism* must analyse, for a conceptualization of the struggle for emancipation,

both of gender and the social totality.

Concluding Remarks

Red Feminism is then based on historical materialism, sustaining that what is *material* is that which is historically related to the economic relations of production and reproduction, and from which other social relations and phenomena, such as culture, ideology and discourse arise, in turn having effect on the former. Not only, then, does individual *subjectivity* – even if turned into *materiality* – not exist independently, but it is from the mode of production and reproduction that it arises.

As such, in order to erase gender inequalities – including social and domestic work and *masculine authoritarianism* – themselves part of the total social question, this must be solved, with the transformation of the mode of production and the socialization of all means of production and reproduction. As noted, namely with the works of Kollontai and Zetkin, and notes from other authors, this does not mean that *subjectivity* – ideology, culture – is of no importance. It is a question of regarding such issues through the lenses of historical materialism, therefore observing them in their connections and hierarchical causalities, even if they can be object of separate struggles, their relations cannot be begotten. Gimenez considers that, given the theoretical confusion regarding material feminism, it is time for Marxist feminists to “separate themselves from material feminism and assert the legitimacy and political urgency of their approach” (2000: 15). For her, the fact that materialist feminism has gained so much relevance, cannot be disconnected from the fact that

there is an “elective affinity” between its dominant theoretical assumptions (...), the dominant ideologies in the advanced capitalist countries, and the life styles and world views of the middle and upper-middle class professionals and students who have eagerly embraced post-modernism and poststructuralism” (2000: 15) and that “self-identified Marxist feminists are likely to face a difficult time, politically and professionally; they would be perceived as “orthodox” or “fundamentalist” Marxists (17).

The moment for *Red Feminism* may still be yet to come.

Alfredo Campos is a Doctoral Researcher at the Center for Social Studies of the University of Coimbra (Portugal), where he de-



velops a Marxist approach to human rights and to labour rights in particular. Alfredo Campos is also the Subregional Coordinator at Statistics Portugal on the Agriculture Census.

Bibliographical References

Bebel, August (1973 [1895]), "A História da mulher é a história da sua opressão" in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Brown, Heather (2014), "Marx on Gender and the Family: a Summary", *Monthly Review* Vol. 66, N 2.

Ebert, Teresa (1995a), "(Untimely) Critiques for a Red Feminism", in idem, Zavarzadesh, Mas'ud & Morton, Donald, *Post-Ality, Marxism and Postmodernism*. Maisonneuve Press.

Ebert, Teresa (1995b), *Towards a Red Feminism*. Solidarity. Available at <http://solidarity-us.org/node/2309>

Ebert, Teresa (2014), Alexandra Kollontai and Red Love. Solidarity. Available at <http://www.solidarity-us.org/site/node/1724>

Engels, Friedrich (2002 [1884]), *A Origem da Família, da Propriedade Privada e do Estado*. Lisbon: Edições Avante.

Gimenez, Martha (1998), "Marxist/Material Feminism" in idem, *Marxist feminism / Material Feminism*. Available at <http://cddc.vt.edu/feminism/mar.htm>

Gimenez, Martha (2000), "What's Material about Materialist Feminism? A Marxist Feminist Critique", *Radical Philosophy*, 101.

Available at <http://www.colorado.edu/Sociology/gimenez/work/rphil.htm>

Guesdes, Jules (1973 [1898]), "A Mulher deve poder viver trabalhando" in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Kollontai, Alexandra (1909), *The Social Basis of the Woman Question*. Available at <http://marxists.org/archive/kollontai/1909/social.basis.htm>

Lafargue, Paul (1973 [1904]), "A Questão da Mulher" in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Larguia, Isabel & Dumoulin, John (1975), *Para uma ciência da*

libertação da mulher. Lisboa: Prelo Editora.

Lenin, Vladimir Ilyich (1973a [wd]), "A Emancipação da Mulher", in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Lenin, Vladimir Ilyich (1973b [1919a]), "O Movimento Operário Feminino", in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Lenin, Vladimir Ilyich (1973c [1919b]), "O Poder Soviético e a Situação da Mulher", in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Lenin, Vladimir Ilyich (1973d [1920]), "A Igualdade da Mulher", in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Marx, Karl (1994 [1844]), *Manuscritos Económico-Filosóficos de 1844*. Lisbon: Edições Avante.

Marx, Karl (1997 [1867]), *O Capital – Tomo III*. Lisboa: Edições Avante.

Marx, Karl e Engels, Friedrich (1974a [1846]), *A Ideologia Alemã*. Lisbon: Editorial Presença.

Marx, Karl e Engels, Friedrich (1974b [1848]), *Manifesto do Partido Comunista*. Coimbra: Edições Centelha.

Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Nye, Andrea (1988), "Uma Comunidade de Homens: O Marxismo e as Mulheres" in idem, *Teoria Feminista e as filosofias do Homem*. Durham and London: Duke University Press. Rio de Janeiro: Rosa dos Tempos.

Shishkin, Aleksandr Fedorovich (1973 [wd]), "O Amor, o Casamento e a Família" in Neves, Helena (1973), *O Problema feminino e a Questão Social*. Viseu: Tipografia Guerra.

Stanford Encyclopedia of Philosophy (2004), *Feminist perspectives on Class and Work*. Available at <http://plato.stanford.edu/entries/feminism-class>

Zetkin, Clara (1920), "Lenin on the Women's Question" in idem, *From my memorandum book*. Available at <http://www.marxists.org/archive/zetkin/1920/leni>



The Treatment of the ICTR Acquitted: The “Achilles Heel” of International Criminal Justice

BETH S. LYONS

ABSTRACT:

My paper examines the implications of the failure of international justice to act fairly in respect to those who are acquitted in international courts and tribunals. I contend that unfair treatment of the acquitted is the “Achilles heel” of international justice, and undermines its legitimacy.

My conclusions are based principally on the *Ndindiliyimana et al.* (“Military II”) case, in which Lead Counsel Chief Charles Achaleke Taku and I represented one of the co-defendants, Major Francois-Xavier Nzuwonemeye, at the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania.

When our client, Major Nzuwonemeye, was acquitted by the Appeals Chamber on 11 February 2014, he had already completed the sentence of incarceration for the crimes for which he was acquitted. Today, he remains in a “safe house” in Arusha and the ICTR has refused to compensate him for the years he spent in jail.

I contend that the absence of compensation in the ICTR or International Criminal Tribunal for the former Yugoslavia (ICTY) Statutes is not an oversight, or an act of negligence. Rather, it objectively illustrates that the presumption of guilt is alive and well in international justice. Although compensation provisions are found in the Rome Statute (Statute) of the International Criminal Court (ICC), in Article 85, the issue of compensation continues to be a challenge to the political will which drives international justice.

Introduction

In 2020¹ – Major Francois-Xavier Nzuwonemeye², the former Commander of the RECCE (Reconnaissance) Battalion in Rwanda in April 1994, will have completed his full sentence of twenty years, rendered by the Trial Chamber II of the ICTR, for crimes for which he was acquitted on appeal. Today – at the time of this Conference – Major

Nzuwonemeye, has lived as an acquitted person in a “safe-house” in Arusha, Tanzania for more than five years.

He is not alone. Eleven persons,³ including six who have been acquitted and five who have completed their sentences, live in the Arusha “safe-house.” They are stateless, with no travel papers, and totally dependent on the U.N. for their room and board, medical services, etc. The longest serving “safe-house” resident is Dr. André Ntagerura, who

1 Beth S. Lyons is currently a defence counsel in the *Ongwen* case at the ICC and has represented clients at the ICTR since 2004. I am also an Alternate Delegate to the United Nations in New York for the International Association of Democratic Lawyers (IADL), an ECOSOC NGO. I can be contacted at bethlyons@aol.com. Special thanks to Major F.X. Nzuwonemeye, Chief Charles Achaleke Taku, Morganne Ashley, Tibor Bajnovič, Linda Carter and Sara Pedroso for their assistance.

This paper was originally prepared for the IntLawGrrls 10th Birthday Conference, held in March 2017 at the University of Georgia (US) Law School. IntLawGrrls, a website founded in 2007, provides a voice to women scholars, lawyers, policymakers, leaders, and activists on issues related to international law, policy and practice. The paper is based on two of my previous ILG posts: *Acquitted But Still Not Free* at <https://ilg2.org/2014/05/19/acquitted-but-still-not-free/> (2014) and *Litigating for Compensation for the Acquitted* at <https://ilg2.org/2015/11/21/litigating-compensation-for-the-acquitted/> (November 2015).

In June 2017, I presented the paper at a Conference on International Public Law and International Humanitarian Law, in Havana, Cuba. The seminar-workshop was sponsored by the Cuban Society of International Law of the National Union of Cuban Jurists (<https://www.unjc.co.cu/>) and the Faculty of Law of the University of Havana.

In June 2019, I presented the paper at the African Bar Association (<https://www.afribar.org/>) Annual Conference, October 2019 in Monrovia, Liberia. I updated it with Annex 3, which discusses recent acquittals at the International Criminal Court (ICC).

2 Nzuwonemeye was arrested in France on 2 February 2000. The ICTR Trial Chamber II sentenced Nzuwonemeye to twenty years in 2009; in February 2014, he had completed two-thirds of his sentence. In many legal systems, a person is released after completing two-thirds of the sentence, assuming there are no disciplinary infractions.

3 As of June 2017. As of June 2019, there are nine persons in the safe-house.



was acquitted at trial in 2004 (acquittal affirmed by the Appeals Chamber in 2006). For the last fifteen years, he has been a “free man” on paper, but forced to live a life without freedom of movement, and other political and human rights guaranteed under international law.⁴

This situation, of being acquitted but not free, demonstrates that both the ICTR and the United Nations International Residual Mechanism for Criminal Tribunals (MICT)⁵ are shouting at the acquitted: “It is not my problem; it is somebody else’s problem.” Objectively, the treatment of the acquitted solidifies a judicial legacy of unfairness, in a tribunal characterized by “victor’s justice” and a track record of selective investigation and prosecution, in violation of Security Council Resolution 955 (1994).⁶

In the circles of international justice, this stain on fairness of the system created in Arusha is easily forgotten. There are efforts to “explain away” why this situation exists, but there is notably little interest and political will to remedy the situation. The exception, of course, is the vital concern of those who are stuck in this “legal limbo” – they remain acquitted, or as persons who have already completed their

sentences, but they are not free.

This in my view, is a crisis in international justice.

In this paper, I will identify some of the more salient issues at stake in this crisis, and suggest possible ways to address this problem.

Approach

When I first thought about this paper, I wanted to move beyond “my case” and consider the situation of acquitted at other international tribunals. My goal was to develop more general conclusions about the implications of treatment of the acquitted for international criminal justice, and some lessons (or, in U.N. parlance, “best practices”).

But, when I sat down to actually write, I realized that this would not be possible – because the ICTR acquitted face particular difficulties that are determined by the political situation and the policies of the Rwandan government. The long-standing and continuing violations of human, civil and political rights within Rwanda and their extension by the Rwandan government into the diaspora are well documented.⁷

4 See, in *Re. Andre Ntagerura*, Case No. ICTR-99-46-A28, 18 November 2008, Decision on Motion to Appeal the President’s Decision of 31 March 2008 and the Decision of Trial Chamber III of 15 May 2008, which recounts his unsuccessful litigation for the ICTR to assist in re-location and asylum in Canada. He argued that Canada, where he chose asylum, did not respond to his request. The Trial Chamber decision rejected Ntagerura’s argument that the Trial Chamber find that Canada failed to comply, pursuant to ICTR Statute, Article 28 (States’ co-operation and judicial assistance with the ICTR), and order it to do so. It held that Canada, which was not the state of origin or country of residence at the time of arrest, had no obligation to “grant resident status or extend preferential treatment in the processing of such a request.” Decision, 15 May 2008, para. 4. In his motion for leave to appeal, Appellant argued that the Trial Chamber failed to address fair trial rights, which included a right to a complete and effective acquittal. The Appeals Chamber dismissed the motion, finding that Appellant’s due process rights and right to liberty and freedom of movement had not been violated, and requested the Registrar to address Appellant’s concerns to UNHCR. In 2012, Ntagerura filed a notice of intent to claim damages. All pleadings should be available at <http://jrad.unmict.org/>

There is one very important paragraph in the Appeals Chamber decision which does re-affirm the Tribunal’s obligation to ensure the welfare of the acquitted person, and to not return him to a country where his life and security are in danger. Para. 19 states:

“...While the Tribunal does not have the ability to direct any State to accept the Appellant on its territory or to fully investigate whether the Appellant’s life or liberty would be at risk should he be returned to Rwanda or to another African country, it has nonetheless a duty to ensure the welfare of the acquitted person, and to that extent, to enquire whether the Appellant’s life or liberty would be at risk upon relocation to a given country.”

5 The MICT is also known as the Mechanism for International Criminal Tribunals.

6 U.N. Security Council Resolution 955 (1994) established the ICTR, with the competence for the prosecution of persons responsible for serious violations of international humanitarian law in Rwanda, between 1 January 1994 and 31 December 1994 (Article 1). However, this mandate has been selectively implemented: only Hutus have been prosecuted by the ICTR. No Tutsis/Rwandan Patriotic Front (RPF) persons have been prosecuted, despite evidence of the systematic crimes of the RPF against Hutus, documented by the U.N. Commission of Experts (1994), Human Rights Watch, the Gersony Report (which was suppressed by the U.N.) and indictments in Spain and France. Former ICTR/ICTY Prosecutor Carla del Ponte initiated “Special Investigations” of the RPF crimes in 2002-2003; due to pressure from Rwanda, her position as ICTR Prosecutor was not renewed in 2003. See, “Del Ponte Says UN Caved to Rwandan Pressure,” by Steven Edwards, September 17, 2003 at <https://www.globalpolicy.org/component/content/article/163/29047.html>

7 See my posting at <https://ilg2.org/2014/05/19/acquitted-but-still-not-free/>.

See also, U.S. Department of State Country Reports on Human Rights Practices (in Rwanda) for 2015 which identifies the continuing violations of human rights, political and civil rights, due process, etc. In its Executive Summary, it concludes:

The most important human rights problems in the country were government harassment, arrest, and abuse of political opponents, human rights advocates, and individuals perceived to pose a threat to government control and social order; security forces’ disregard for the rule of law; and restrictions on civil liberties. Due to restrictions on the registration and operation of opposition parties, citizens did not have the ability to change their government through free and fair elections.



But, while these factors may not be typical of other courts and tribunals,⁸ they clearly illustrate the problems which result when international criminal justice institutions do not act independently of politics.

The ICTR, in satisfaction of the U.N. Security Council's "Completion Strategy," closed its doors in December 2015, and the MICT has been established as the superseding entity – to deal with the remaining ICTR issues. Today, the acquitted, as well as those who have completed their sentences, remain an "outstanding issue."

Nuts and Bolts⁹

The ICTR indicted 93 individuals, of whom 62 were convicted and sentenced, 14 were acquitted, 10 were referred to national jurisdictions, three fugitives were referred to MICT, two died prior to judgment and two indictments were withdrawn.¹⁰ According to the Report in November 2016, presented to the U.N. Security Council by MICT President Theodor Meron, 13 acquitted and released per-

sons¹¹ were still awaiting relocation in Arusha.¹² As of February 2017, there were still 11 persons in the "safe house" and 10 persons remained incarcerated in the United Nations Detention Facility (UNDF) in Arusha.¹³ As of June 2018, 11 persons remained in the "safe house."¹⁴ In May 2019, there were nine persons in the "safe house."¹⁵

Why are the acquitted¹⁶ in this situation?

The possibility of acquittals was never envisioned by the Tribunal

It has been a consistent position of the ICTR, since its establishment (and articulated publicly at least since 2009) that acquittals were not considered, i.e. budgeted for, when the Tribunal was established.

In 2009, a spokesman for the ICTR, its Deputy Registrar, Mr Everard O'Donnell explained:

"The simple fact is—and there is some truth in this partic-

Other major human rights problems reported included arbitrary or unlawful killings; torture and harsh conditions in prisons and detention centers; arbitrary arrest; prolonged pretrial detention; government infringement on citizens' privacy rights and on freedoms of speech, press, assembly, and association; the alleged recruitment of Burundian-origin refugees, including possibly some children, to serve in armed groups in Burundi; government restrictions on and harassment of some local and international nongovernmental organizations (NGOs), particularly organizations that monitored and reported on human rights; and a small number of reports of trafficking in persons, government restrictions on labor rights, and child labor.

The most recent Human Rights Report (2018) is available at <https://www.state.gov/wp-content/uploads/2019/03/Rwanda-2018.pdf>. Its Executive Summary concludes:

Human rights issues included reports of unlawful or arbitrary killings by state security forces; forced disappearance by state security forces; torture by state security forces including asphyxiation, electric shocks, mock executions; arbitrary detention by state security forces; political prisoners; arbitrary or unlawful interference with privacy; threats to and violence against journalists, censorship, website blocking, and criminal libel; substantial interference with the rights of peaceful assembly and freedom of association, such as overly restrictive nongovernmental organization (NGO) laws; and restrictions on political participation.

The government occasionally took steps to prosecute or punish officials who committed abuses, including within the security services, but impunity involving civilian officials and some members of the SSF (State Security Forces) was a problem.

In addition, see Human Rights Watch Report on Rwanda 2019 at <https://www.hrw.org/world-report/2019/country-chapters/rwanda> and European Union Annual Report on Human Rights and Democracy the World 2018 - Rwanda at https://eeas.europa.eu/delegations/rwanda/62839/eu-annual-report-human-rights-and-democracy-world-2018-rwanda_id.

8 See, *When Justice is Done – Acquitted* at <http://whenjusticeisdone.org/index.php/acquitted/53-reasons-for-acquittal> which states: "Most ICTY acquitted face relatively few problems. Bosnians, Croats, Kosovars or Serbs can typically return to any of the newly republics. ICTR acquitted, on the other hand, face much more difficulties after an acquittal. Fearing persecution, further prosecution or discrimination upon their return to Rwanda, they do not want to go back to their country of origin." Whether this conclusion about ICTY acquitted is accurate requires more research.

9 See listing in Annex 1 of persons who have been acquitted and released upon completion of sentence living in the "safe-house" in Arusha.

10 <http://unictr.unmict.org/en/tribunal>

11 Released upon completion of sentence.

12 S/2016/975; in December, 2016, two persons were re-located to Ghana.

13 See Annex 2.

14 S/PV.8278, 6 June 2018, p. 14.

15 S/2019/417, Letter dated 20 May 2019 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, p. 20.

16 Both the acquitted and those who have completed their sentence face similar ideological obstacles, although the specific difficulties in re-location may be different.



ular fact—that no proper provision was made for acquittal at the beginning of the setting up of the Tribunal. That much is a fact, and it's one that we have been struggling with in the registry ever since. There was no budget for dealing with acquitted persons.”¹⁷

Nothing happens within the super-bureaucracy of the U.N. structure without a budget line. If acquittal had been envisioned, it would have been budgeted.

In December 2014, the then current Registrar of the ICTR, Mr. Bongani Majola, described the “legal limbo”¹⁸ of those who were acquitted or were released after serving their sentences:

“They are in limbo, they are as good as non-existing,” Majola said, bemoaning what has emerged as a major challenge for international justice.

“In the planning, in the establishment of the tribunal, there was thought given to those convicted, but no thought to what would happen to those who were acquitted,” he said.

“It was simply assumed that they would go back to their original places. In a national system, when you are tried and found not guilty, society takes you back, society gives you all your rights and privileges. The international criminal justice system, which is supposed to be better, actually fails because the acquitted cannot live freely.”¹⁹

This position was echoed the following year – in 2015 – in an article in *The East African*, in which Mr. Danford Mpu-liwa, the ICTR associate information officer, again explained that the U.N. Security Council did not foresee the problem of acquittals when it created the Tribunal. He also noted that the ICTR Statute and U.N. Security Council resolutions about the ICTR do not contain any express obligations of State Parties to relocate acquitted persons and released convicts. He stated:

“Nobody thought that any of the accused would be freed and we are now forced to house them and feed them. We have been talking with various members states of the U.N.

but most countries remain hesitant. This issue has now become extremely urgent, with the closure of the Tribunal at the end of 2015.”²⁰

Hardly anyone thought that there should be acquittals at the ICTR

(a) The Presumption of Guilt

Acquittals were never envisioned because there is a presumption of guilt operating in the international judicial and other arenas.

Internationally recognized principles of fair trial and the presumption of innocence are not “given assumptions” in any courtroom – whether in a national or international venue.²¹ Most often, they must be litigated from the very beginning of a case, and are the “clarion call” of the Defense. But, the reality is that especially in international courts and tribunals, these principles underlie a determination of whether the judgments are legitimate.

At the ICTR, anyone who is charged with a crime is presumed guilty, and the presumption of guilt is glued to the defendant, even after he has been acquitted.

The title of *The East African* newspaper article cited above²², “ICTR genocide suspects stranded in Arusha,” illustrates the problem. Even in 2015, when the ICTR was about to finish its work, and 14 persons had been acquitted and six had completed their sentences, some media still referred to everyone as “genocide suspects.”

For those of us who work in the criminal justice arena, it is a given that acquittals in any criminal case are a contentious matter, based on the events which occurred and the nature of the proceedings. This is a “truism” in domestic and international jurisdictions. But acquittals in international venues, and in particular, at the ICTR, go far beyond contentions. A few examples:

In response to the “Military II” acquittals of Nzuwonemeye and Ndindiliyimana, one of the co-Accused in the case,

17 International Symposium, Geneva, ‘International Criminal Tribunal for Rwanda: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders’, Session 4, Geneva, 10 July 2009, p. 12. Available at <https://genevaconference-tpir.univ-paris1.fr/-session-4-?lang=#ENV{lang}>

18 See, Kendall and Nouwen, “Speaking of Legacy: Toward an Ethos of Modesty at the ICTR,” *American Journal of International Law*, Vol. 110 No. 2 (April 2016), pp. 212-232), p. 221.

19 Associated Free Press “Acquitted of Rwanda genocide, now left in legal limbo,” 18 December 2014, and quoted in “Freed yet without liberty: The possibility of refugee status for former indictees at the International Criminal Tribunal for Rwanda who were either acquitted or sentenced and completed prison terms,” by Florence M. Denga, unpublished paper, 20 February 2015 available from author at floden95@gmail.com.

20 “Acquitted genocide suspects stranded,” by Fred Oluoch, TEA Special Correspondent, 23 May 2015.

21 As a career Legal Aid attorney, I can attest to this in both state and international jurisdictions.

22 At endnote 20 *supra*.



and the reduction in sentence for Sagahutu, another co-Accused in the case, the Presiding Appeals Judge, Theodor Meron, was declared to be senile by the Rwandan press.²³

Shortly after, in early 2014, Rwandan civil society organizations circulated an on-line petition addressed to the President of the U.N. Security Council requesting that Judge Meron be investigated for professional misconduct, based on the Appeal Chamber's acquittals in four ICTR cases, including the "Military II" case. The petition was publicized as a call for his resignation.

The heart of the petition was that the acquittals for conspiracy to commit genocide eviscerated the lynchpin of Rwanda's narrative about what happened in 1994.²⁴ At the time the petition was filed in mid-March 2014, no Trial Chamber convictions for conspiracy to commit genocide had been upheld by the Appeals Chamber.²⁵

In 2016, on the occasion of the release of two ICTR prisoners in Mali, the newspaper attacks were renewed.²⁶

(b) The Pro-Conviction Bias

The presumption of guilt is alive and thrives because the

"pro-conviction bias" for international crimes is a strong tenet within the "international community." Professor Nancy Combs, in her excellent book,²⁷ discusses this bias among international tribunal judges (at ICTR, SCSL²⁸ and Special Panels–East Timor²⁹). She found that the tribunals "operate in a fact-finding fog of inconsistent, vague and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom."³⁰ In addition, in the ICTR judgments she reviewed (through 2005), about fifty per cent involved Prosecution witnesses whose statements contained serious discrepancies.³¹

Combs links this pro-conviction bias to a lack of serious consideration of the fact-finding deficiencies which permeated the Prosecution evidence at the tribunals she analyzed. She concludes: "Suffice it to say at this point that the Trial Chambers' lackadaisical attitude toward testimonial deficiencies appears to reflect a pro-conviction bias that ultimately results in the Tribunals' exceptionally high conviction rates."³² The corollary to this premise is that where there was more judicial scrutiny of fact-finding impediments, the proportion of acquittals was greater.³³

23 *New Times*, 11 February 2014: "Major François-Xavier Nzuwonemeye and Captain Innocent Sagahutu acquittal and the reduction in prison sentence is more than odd, it would seem that the International Criminal Tribunal for Rwanda appeals bench has lost all touch with reality. Or to put it another way Judge Theodor Meron has. I would have to say that having a clearly senile Judge in charge of the tribunal has resulted in justice being denied to the victims of the atrocities of 1994." Reported at <http://hamishinauckland.blogspot.com/2014/02/rwanda-heralds-of-holocaust-uzis-on.html>

24 The petition stated: "Based on the above [acquittal decisions], it is disquieting to note that in all cases it has handled, all those known and accused of planning the genocide against Tutsi, no one has been convicted of this act or planning. Can genocide happen unplanned?" It received very few signatures. It had been available on the internet, maybe on website of www.resprwanda.org but I have not been able to find it again; see "Rwanda: Civil Society Sign Petition Against ICTR Judge Meron," by Ivan R. Mugisha, *The New Times*, 14 March 2014; Hironelle News Agency, "Rwanda: 20 Years after Genocide, ICTR Appeals Chamber Accused or Rubbing Salt into the Wounds," 8 April 2014.

25 In only one case, the *Gatete* case, the Appeals Chamber, in a 3-2 decision, entered a conviction for conspiracy to commit genocide (2012) at the Prosecution's request.

As of mid-March 2014, the Appeals Chamber had affirmed 3 Trial Chamber convictions and reversed 5 Trial Chamber convictions. In the duration of the ICTR, 51 defendants were indicted for conspiracy to commit genocide (out of a total of 93 indictees). Of these 51, the Trial Chamber acquitted 28 and convicted 11. [note: the remaining 12 cases include fugitives, referrals to Rwanda, withdrawals by the Prosecution and defendants who died before trial was completed].

26 See "Kagame weighs in on UN's release of genocide convicts," *New Times*, 17 December 2016 (early release of Ferdinand Nahimana and Emmanuel Rukundo by Appeals Chamber "dubious" and violates due process).

27 Combs, Professor Nancy Amoury, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press: 2010, Chapters 7 and 8; see also, Lyons, Beth S., "Enough is Enough: The Illegitimacy of International Criminal Convictions: A Review Essay of *Fact Finding Without Facts*," *Journal of Genocide Research*, 13(3), September 2011.

28 Special Court for Sierra Leone (SCSL).

29 Special Panels in the Dili District Court in East Timor.

30 *Ibid.*, p. 174.

31 *Ibid.*, p. 120.

32 Combs, p. 222.

33 See Combs, p. 229. In early 2015, the acquittal rate at the ICTR was about 14%, based on both trial and appeal judgments through 2013; 74 persons were tried/10 persons were acquitted. For statistical analysis of other factors in the international courts and tribunals, see, Smeulers, Holsa and van den Berg, "Sixty-Five Years of International Criminal Justice: The Facts and Figures," *International Criminal Law Review* 13 (2013) 7-41.

Combs also discusses the "cost" of acquittals to the ICTR in respect to the reactions of Rwanda and of victims. She cites the example of the acquittal of Bagambiki, who was tried and convicted *in absentia* in Rwanda for rape, a crime for which he was not indicted and not prosecuted at the ICTR (Combs, p. 232).

Heller points out that although ICTR Statute, Article 9 (*non bis idem* or *ne bis in idem*), prohibits prosecutions in a national proceedings, based on acts which constitute serious violations of international humanitarian law, this does not extend to modes of liability. His article explains what happened in the *Bagambiki*



The implications of these findings should be enough, in my view, to overcome the pro-conviction bias within the legal community, because the quality of the evidence in the Prosecution's case is the cornerstone on which the legitimacy (or illegitimacy) of the whole proceeding rests. It appears to me, that these findings have hardly been heeded. It continues to be a Sisyphean task undertaken mainly by the Defense, but it is one in which a principled Prosecution, committed to equal justice and application of the rule of law to all, has a key role to play.³⁴

No compensation for the Acquitted

The absence of compensation provisions for the acquitted is another of the indicia that the presumption of guilt is alive and well.

There is no legal right to compensation for an acquitted person in the ICTR (or ICTY) Statute, and hence, no remedy under the Tribunals' jurisprudence. An acquitted person cannot be compensated for malicious prosecution,

false or wrongful imprisonment or similar causes of action. Many have tried unsuccessfully to litigate this issue³⁵ and a number have filed claims for damages.³⁶ But only one acquitted person, André Rwamakuba, has received compensation: he was awarded \$2000 for a breach of his right to counsel.³⁷ This was a pittance which effectively ridiculed the violation of his right.

In his excellent article,³⁸ Johan David Michels points out a paradox: while a convicted person at the Tribunal is compensated for time spent in custody, which results in the actuality of a reduced sentence, the acquitted person is not compensated for anything. He argues that for policy reasons, including to "enhance the credibility and legitimacy of international criminal courts," a compensation regimen for the acquitted makes sense. Since lengthy detentions of the Accused are necessary, he advocates that compensation should be based on strict liability.

In the case of our client, there was extensive litigation for

case, and is generally an excellent discussion of the situation of the acquitted and of the future ICC acquitted. See "What Happens to the Acquitted?" by Kevin Jon Heller, *Leiden Journal of International Law*, 21 (2008), pp. 663-680.

³⁴ What constitutes a "principled" Prosecution – one which is professional and driven by law as opposed to politics – is the subject for another paper. Theoretically, the separation of law and politics makes sense; the reality is different. So, the question is: what should be the relation between political and legal factors, for example, in the Prosecution's selection of cases, and in its various other policies and practices. In the formation of the ICC, the principle of the "independence" of the Prosecution – generally from the politics, especially of the Security Council – was an important goal, especially among many NGOs. I supported it then, and still support it. But, based on my work at the ICC, and the Prosecution's selectivity of cases to investigate and prosecute, it remains a wide open question whether the Prosecution is – in fact – independent, and – more importantly – independent of what? Whose/which politics?

It is my view that the ICC Prosecution continues to implement a policy of selective investigation and prosecution of African "situations." Based on its website (viewed on 7 June 2017), the ten "preliminary examinations" [the 1st level] listed involve four African countries – Burundi, Gabon, Guinea and Nigeria. But, Prosecutorial decisions taken [at 2nd and 3rd levels] reveal that nine of the ten "situations under investigation" are on the African continent; and the listing of 24 cases which are being, or have been pursued by the Prosecution involve forty defendants, all of whom are from African countries.

³⁵ The acquitted who have unsuccessfully litigated for compensation and damages include Bagilishema, Kabiligi, Zigiranyirazo, Nzuwonemeye and others. Some of the pleadings are available at www.unmict.org.

³⁶ Including Bagilishema, Nzuwonemeye, Zigiranyirazo, Ntagerura, Kabiligi, and others. Pleadings available at www.unmict.org and information available through google.

³⁷ *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007, available at: <https://www.legal-tools.org/doc/7a84f3/pdf/>.

³⁸ "Compensating Acquitted Defendants for Detention before International Criminal Courts," by Johan David Michels, *Journal of International Criminal Justice* 8 (2010), 407-424, available at <https://academic.oup.com/jicj/article/8/2/407/848174> and also HeinOnline. He points out that in many domestic criminal jurisdictions – Norway, Sweden, Denmark, Austria, Germany, the Netherlands, Iceland, Italy and Latvia – the acquitted accused may be compensated for the deprivation of liberty and economic loss suffered as a direct result of the proceedings against them. In some countries, however, there is a consideration of whether the defendant contributed to his detention, for example, based on suspicious behavior or giving a false statement to authorities during the investigation.

See also, http://www.ecba.org/extdocserv/conferences/copenhagen2014/vindingkruse_compensation.pdf.

This comment by Sysette Vinding Kruse, 25.9.2014 Copenhagen may be part of a report from the Danish Bar Association, I am not sure. In Denmark, an acquitted person can claim compensation for unjust arrest or deprivation of liberty pursuant to the trial, and is entitled to monetary compensation for both actual losses the injury of deprivation of liberty. The compensation [in 2014] per day for the injury amounts to 100-130 Euros depending on the prison conditions.

It is particularly interesting that Kruse writes: "compensation cannot be refused on the grounds that suspicion still adheres to the accused" but there is a provision to reduce or refuse compensation if an accused has brought the sufferings on himself, by "changing explanations during the imprisonment or making false statements."



compensation.³⁹ In February 2015, the Defence⁴⁰ filed a Motion for Compensation and Damages for Violations of the Fundamental Rights of F.X. Nzuwonemeye, pursuant to U.N. Security Council Resolution 1966 (2010).⁴¹ We framed our arguments as violations of international law, including the right to notice and right to be tried without undue delay.⁴² Based on ICTR jurisprudence, we argued that the Appeals Chamber had upheld the right to financial compensation for violations under the ICCPR. The bottom line was: in the interest of fairness, the MICT possessed the legal will to fashion a remedy for the violations of Nzuwonemeye's fundamental rights. In his Decision, the Single Judge dismissed the motion for lack of jurisdiction.⁴³ It boiled down to the finding that because the Appeals Chamber made no reference in its Judgment to a right to compensation for acquittal, there was no basis on which the ICTR could grant this. Anticipating this problem, we had requested that the Single Judge, if not authorized to decide the matter, refer it to the Appeals Chamber. This was not done.

The lack of a legal right to compensation and the failure to "plan for" acquittals shows that the presumption of guilt is thriving at the ICTR.

Re-location Issue

The ICTR acquitted have engaged both in individual litigation⁴⁴ as well as negotiations with the ICTR/MICT to remedy their situation. They have repeatedly met with the

ICTR Registrar and other representatives over the years, have responded to the U.N.'s queries and have directed their requests to the U.N. Secretary-General. A letter, dated 21 April 2016, from the acquitted and those who have completed their sentences, detailing the obstacles to relocation is available at this link. It focuses on the obligation of the MICT to care for the acquitted person until he joins his family, based on the holding of the Appeals Chamber decision in the *Ntagerura* case⁴⁵ that the Tribunal has a duty to ensure the welfare of the acquitted person. It also details efforts for UNHCR protection, and urges the MICT to pressure the UNHCR to find a sustainable solution. The letter appends the conclusions of the "Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law," held in Arusha in 2011.⁴⁶

In addition to the voices of the acquitted themselves, there have been the biennial pleas to the U.N. Security Council from all the Presidents of the Tribunal and the countless resolutions⁴⁷ passed by the U.N. Security Council for State Parties to assist in the relocation and resettlement of the acquitted and those who have completed their sentence. With a few exceptions it continues to be an uphill battle. After extensive negotiations, a miniscule number of States Parties have accepted an acquitted person,⁴⁸ but Rwanda remains the only State Party which consistently expresses affirmative interest as a site for re-location. And Rwanda is the one country to which none of these persons can safely

39 Nzuwonemeye Compensation Documents available at <http://ictrcaselaw.org/Browse.aspx> or at <http://jrad.irmct.org/>.

Request for Leave to Exceed the Word Limits for Motion for Compensation and Damages for Violations of the Fundamental Rights of F.X. Nzuwonemeye, Pursuant to Security Council Resolution 1966 (2010) ["Motion"], 18 February 2015; Prosecutor's Consolidated Response to Motion, 4 March 2015; Reply to Prosecutor's Consolidated Response, 9 March 2015; Decision on Request for Leave to Exceed the Word Limits for Motion and Invitation to Make Further Submissions, 19 May 2015; Submission re Claim for Compensation and Damages, as requested in the Decision, 19 May 2015, Paragraph 23, 18 June 2015; Prosecutor's Further Submission on Motion, 19 June 2015; Decision on Motion for Compensation and Damages For Violations of the Fundamental Rights of F.X. Nzuwonemeye, MICT-13-43, 3 August 2015.

40 Counsels Chief Charles A. Taku and Beth S. Lyons and Legal Assistant Tharcisse Gatarama.

41 Available at http://www.irmct.org/sites/default/files/casedocuments/mict-13-43/defence-motions/en/150218_0.pdf.

42 The Defense based its argument on the Appeals Chamber's reversal of Nzuwonemeye's conviction for 6(3) for the murder of the Belgian "peacekeepers," and for 6(1) for the aiding and abetting of the murder for the Prime Minister, based on violations of notice requirements. It argued that the undue delay was based on the length of time from arrest to judgment and sentence of approximately 11.25 years. The onus for the twenty-three month delay during the drafting stage of the Judgment was based on conduct of the Tribunal – its allocations of resources, including the workloads of the judges.

43 Decision on Motion for Compensation and Damages for Violations of the Fundamental Rights of F.X. Nzuwonemeye, MICT-13-43, 3 August 2015.

44 See, for example, Dr. Ntagerura's efforts to be re-located to Canada (discussed at endnote 4 *supra*), and efforts of Zigiranyirazo and others, available at www.unmict.org or at <http://jrad.unmict.org/>.

45 *In re Andre Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion to appeal the President's decision of 31 March 2008 and the decision of Trial Chamber III of 15 May 2008, 18 November 2008, para. 19 ("...While the Tribunal does not have the ability to direct any State to accept the Appellant on its territory or to fully investigate whether the Appellant's life or liberty would be at risk should he be returned to Rwanda or to another African country, it has nonetheless a duty to ensure the welfare of the acquitted person, and to that extent, to enquire whether the Appellant's life or liberty would be at risk upon relocation to a given country.")

46 See Annex 2.

47 One example is U.N. Security Council Resolution 2054 (2012), which was unanimously adopted on 29 June 2012. The U.N. Security Council called upon States Parties to cooperate and render all necessary assistance to the Tribunal in its efforts toward relocation of acquitted persons.

48 See list in Annex 1.



return.

The acquitted and released persons repeatedly have explained their well-founded fear of persecution if re-located to Rwanda, including in their letter dated 30 April 2014 in response to the ICTR's suggestion (during a 17 April 2014 meeting) that the acquitted and released persons return to Rwanda as part of a "come and see" program. The eleven persons detailed the dangers for them in returning to Rwanda; the new threats from Kigali to their security while in Arusha (for example, false allegations that the acquitted persons were in contact and meeting with FDLR⁴⁹); the fact that Rwanda was requiring that they personally request their passports in Kigali, although Rwandan government representatives had taken 4000 passports to Lusaka for Rwandans in exile there; and the continuing and worsening human rights violations within the country. Their recommendations included: that the ICTR should mobilize the U.N. Secretary General to be involved in relocation and especially focus on France, Canada, UK and Belgium – where their families were located; that the ICTR Registrar request a letter from the Government of Rwanda to these countries, ensuring that their bi-lateral relations with Rwanda would not be damaged by granting asylum, and that the ICTR should pressure the Rwandan government to end its serious violations of citizens' rights, which could encourage them to return home if the situation changed.

There have also been requests regarding Tanzania, the "host country." In October 2015, there was a request that the ICTR intervene with the Tanzanian government to provide appropriate identity papers, resident permits and travel documents to facilitate their stay in Tanzania and their travel to and from Tanzania if re-located. Such temporary measures are within the legal framework of Article 39 of the Agreement between Tanzania and the MICT which provides that the host country shall "facilitate the temporary stay of the released person on its territory" until

the person is transferred (re-located to a third country).⁵⁰

Most recently, in respect to Nzuwonemeye, the Defence⁵¹ has made efforts to re-locate him to join his family in France. In December 2018, the Defence made a motion for an order from the MICT for France, under Article 28 of the MICT Statute, for co-operation. The Defence argued that since France was the country where Nzuwonemeye was arrested, it should now take him back after his acquittal. His family (wife and four children) are all French citizens. The Single Judge from the MICT denied the motion on jurisdictional grounds, holding that Article 28 did not provide the authority to impose a request upon a State.⁵² The Defence appealed,⁵³ and the Appeals Chamber denied the Appeal. As in the earlier Decision, the Appeals Chamber "encouraged France to renew its consideration of Nzuwonemeye's request to be allowed in France, under the same conditions in which he was arrested, and be given the opportunity to attempt through the proper procedures, to legalize his status in that country."⁵⁴ In June 2019, the Defence gave Notice of Application for French Visa to the MICT.

In both decisions, the ICTR/MICT "washed its hands" of responsibilities for the acquitted persons, using its narrow interpretation of both the MICT's obligations and the MICT's ability to request co-operation from domestic jurisdictions. The conclusion to be drawn, in essence, is again that the acquitted are "not the problem of the ICTR/MICT."

The Immigration Issues – the "Catch 22"

. Some salient issues in the area of immigration⁵⁵ are set out below.

First, the immigration situation of a person who is acquitted, and a person who has completed his sentence is fundamentally different in the law. A convicted person, under Article 1(F)⁵⁶ of the 1951 Convention and Proto-

49 Forces démocratiques de libération du Rwanda (FDLR), a mainly Hutu armed group active in eastern Democratic Republic of the Congo.

50 Agreement between the United Nations and the United Republic of Tanzania concerning the Headquarters of the International Residual Mechanism for Criminal Tribunals.

51 Defence Counsel Peter Robinson.

52 Decision on Motion for An Order Pursuant to Article 28 of the Statute and Other Considerations, MICT-13-43, 15-10-2018 (7-1/268bis), paras 10-12, 16.

53 Appeal from Decision on Motion for Order to the Government of France, MICT-13-43, 17-12-2018 (295-280).

54 Decision on the Appeal of the Single Judge's Decision of 22 October 2018, MICT-13-43, 17-4-2019 (311-300), para 30.

55 See, excellent paper by Florence M. Denga at endnote 19 *supra*, which addresses both relevant international refugee law, as well as Tanzania's legal responsibilities.

56 Article 1(F) defines the three categories of persons to whom the Convention does not apply, and who not fit into the definition of "refugee" and the applicable standard to be applied:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed



col Relating to the Status of Refugees⁵⁷ does not meet the definition of “refugee.” Although there is no provision for prosecution of offenses labeled as war crimes in the ICTR Statute (unlike the ICTY Statute), the statute does designate “crimes against humanity.” Those convicted of crimes against humanity are excluded under Article 1(F) (a). Second, I am not clear if the “refugee” definition is not satisfied, whether the protections of Article 33⁵⁸ (“refoulement”) would be available to a person, especially when considered with the provisions of Article 33(2).

But the Guidelines on International Protection offer an opening for protection for those who are excluded under Article 1(F).⁵⁹ An excluded person can still be granted protection or assistance from UNHCR based on other instruments, for example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

While the situation of the acquitted should be more easily resolved, this is not the case. It seems that there has been no agreement as to who is responsible, and the U.N. agencies point to the necessity of State consent.⁶⁰ I am not sure it is correct to conclude that this is simply a “passing of the buck” between the U.N. agencies and the State Parties, since immigration laws are controlled by States. But the end result remains the same: the only State Party that wants to welcome the acquitted is the one State Party where

they have a well-founded fear of persecution – Rwanda.

What (else) is to be done?

The lesson from the acquittal of our client in the “Military II” case is that a legal win in the courtroom has to be fought for and won in the political arena, in order for the legal win to have any meaning on a day-to-day basis for the client.

Make no mistake: the cases at the international criminal tribunals are political cases. The struggle in the courtroom is as much about the historical narrative as it is about culpability. As a former ICTY Prosecutor has pointed out, “The struggle for the interpretation of historical events through the trial record might be as important in [the] long run as the determination of guilt or innocence of the individuals tried.”⁶¹

At the ICTR, its judgments are a historical narrative of the events of 1994. This is the reason that the government of Rwanda has so tenaciously tried (and mostly succeeded) to exercise control over the ICTR, especially the Prosecution.

This political framework is the context in which the situation of the acquitted, and those who have been released after completing their sentences, exists. But the acquittals in these cases are political landmines.

While recognizing this reality, the situation of the acquitted must be “de-politicized” as much as possible, and there needs

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

57 The UNHCR website has a wealth of material, including the *travaux préparatoires* for the Convention at <http://www.unhcr.org/en-us/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>.

58 Article 33 – prohibition of expulsion or return (“refoulement”).

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

59 UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 4 September 2003 states:

8. Although a State is precluded from granting refugee status pursuant to the 1951 Convention or the OAU Convention to an individual it has excluded, it is not otherwise obliged to take any particular course of action. The State concerned can choose to grant the excluded individual stay on other grounds, but obligations under international law may require that the person concerned be criminally prosecuted or extradited. A decision by UNHCR to exclude someone from refugee status means that that individual can no longer receive protection or assistance from the Office.

9. An excluded individual may still be protected against return to a country where he or she is at risk of ill-treatment by virtue of other international instruments. For example, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture. Other international and regional human rights instruments contain similar provisions.

60 Summary Conclusion, para. 46: The responsibility for resolving this problem does not lie with UNHCR, ICRC or OHCHR, none of which are in a position to implement a solution for the persons concerned without the consent of States.

61 Nice, Professor Sir Geoffrey, “Legal Process as a Tool to Rewrite History – Law, Politics, History,” Lecture, Gresham College, 13 February 2013.



to be a different ideological approach to its resolution. To the extent this framework can be de-fused and re-shaped, there is a chance for a fair and equitable resolution.

Some working premises to provide fairness to the acquitted and those who have been released:

It is necessary for the presumption of innocence to be imposed in the proceedings at international courts and tribunals;

The situation of the acquitted and those who have been released is an issue of rule of law and of human rights. It is necessary to change the “terms of reference” and focus on human, civil and political rights.⁶² If we simply put this situation in a “criminal justice” box, there is no way to overcome the strong bias against those who have been charged with international crimes.

It is necessary to re-frame the situation within in the “rule of law” and fairness context.⁶³ In a letter to the U.N. Security Council in 2011, the then outgoing ICTR President Judge Khalida Rashid Khan saw the resettlement of persons acquitted by the tribunal as a “fundamental expression of the Rule of Law,” guaranteeing acquitted individuals the right to live, including full enjoyment of education, employment, and family.⁶⁴

The international tribunals need to understand that lack of fairness delegitimizes their work, and that there is an urgency to resolve the situation. The corollary is that as the situation continues, the international justice system suffers

– it loses legitimacy, standing and respect.

The international courts and tribunals must aggressively ensure that the obligations on the Prosecution to fairly investigate both inculpatory and exculpatory evidence⁶⁵ are implemented in a timely manner.

Requests for re-location and claims for damages have to continue to be made – as applicable – to all parties involved in the situation: the U.N. Security Council, UNHCR, the host country, the “international community.” The claims for damages must take account of the material, moral, psychological and social damages to the acquitted person and to his family.⁶⁶

The litigation route needs to be taken – if only to exhaust all remedies underneath – in national and regional courts, as well as in human rights courts. Some of the “safe-house” residents have heavily litigated in these venues, but with no success.⁶⁷

In the interim, the U.N., in its obligation to implement the human rights provisions of its own treaties, needs to provide funding for family visits for those who are in the “safe-house.” This is not a “fix” obviously, but it makes it possible for the acquitted and others to be re-united, on a regular basis (if only for a short time) with their families.

Conclusion

J. Meron has stated that criminal justice cannot be a synonym for convictions, and acquittals are integral as well. “When you have acquittals,” he posited, “it shows the

62 These rights include but are not limited to ICCPR – Article 6 (right to life), Article 9 (right to liberty and security of person), Article 23 (right to family) and Article 26 (non-discrimination); UDHR – Article 3 (right to life, liberty and security of person), Article 14 (right to seek and enjoy asylum in countries, free from persecution), and Article 16 (right to a family). These individual rights are also found in many regional instruments and the obligations of State Parties to implement these rights are enumerated in the ICESCR.

63 A few random examples: ICTR President Judge Khalida Rashid Khan’s Report on the completion strategy of the International Criminal Tribunal for Rwanda (as at 4 November 2011), para. 67: “The Tribunal considers the resettlement of persons acquitted by an international criminal tribunal to be a fundamental expression of the rule of law and is concerned about the consequences of failing to fulfill this obligation. In the light of the imminent closure of the Tribunal, the insufficient level of voluntary Member State cooperation and the human rights implications of the delayed relocation of acquitted persons, and in spite of the assistance of the Office of the United Nations High Commissioner for Refugees, the Tribunal has had no other choice but to call upon the assistance of the U.N. Security Council to find a sustainable solution to this issue.”

See also, Letters from ICTR and ICTY Presidents to Secretary-General K. Annan, in support of compensation for the acquitted: Letter dated 26 September 2000 from the President of the ICTR, S/2000/925 and letter dated 19 September 2000 from the President of the ICTY, S/2000/904.

64 Watson, Benjamin, “No Refuge: the Quandary of Resettling Suspects Acquitted by the ICTR,” 14 March 2012.

65 This is clearly stated in the Rome Statute, Article 54(1) and Article 67, and evident in Rule 68 at the ICTR. Rule 68 (Disclosure of Exculpatory Evidence) states: “The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.”

66 This point is in Me. Doumbia’s paper. It underscores that the acquitted are not alone in paying a price for their situation; it extends to their family members.

67 These efforts need to be analyzed and reviewed. They are available on the internet and include, for example, Kabiligi’s efforts re France and Ntagerura’s litigation re Canada. Based on the extensive litigation for compensation in Nzuwonemeye’s case, the problem has not been “deficient” legal arguments, but the determinant influence of political considerations.



health of the system.”⁶⁸ But the international criminal justice system has abrogated its obligations to the acquitted. Mr. Bongani Majola, a former ICTR Prosecutor and Registrar, said it succinctly:

“The international criminal justice system?, which is supposed to be better, actually fails these people and perpetuates the violation of their rights in the sense they cannot live freely.”⁶⁹

This is the reason that the international justice community has to pay attention to and resolve the situation of the acquitted and the released persons who have completed their sentences. Their continued lack of liberty remains a stain on international justice, and perpetuates a well-founded criticism that international justice has failed to ensure and implement fundamental human rights.

As lawyers, we fight the legal battles in the judicial arena, and exploit any potential opportunities for post-acquittal remedies within the ICTR/MICT Statute. But the ultimate resolution of the situation of the ICTR acquitted (and those who have completed their sentences) is political, not legal. The “wall” between politics and law is porous, particularly in international courts and tribunals. This is evidenced by “victor’s justice” at both the ICTR and the ICC, and cemented by the fact that the ICTR only prosecuted Hutus and the ICC, in its two decades, has only selectively prosecuted defendants from the Continent of Africa.

In this political context, the situation of the acquitted will ultimately be resolved through an international political campaign for justice and compensation – in communities and in States, including the Assembly of States Parties. This idea is not novel, but it is worth repeating.⁷⁰

International justice has a choice to make: Will it apply the rule of law to all? And, will it be seen as being on the side of fairness and human rights, or on the side of violating those rights. The treatment of the ICTR acquitted indicates that international justice is making the wrong choices, and losing the battle that we need to win in order to end impunity.

See annexes beginning on page 54.

⁶⁸ Quoted from law review article by Van Wijk and Hola (*see bibliography supra*.)

⁶⁹ *See* endnote 19 *supra*.

⁷⁰ I remember, for example, years ago that Professor Lennox Hinds, who was one of the first – or perhaps the first – ICTR Defence counsel to go to Rwanda (he represented Juvenal Kajelijeli and later Colonel Ephrem Setako) identified the need for a political campaign for the rights of the acquitted.



ANNEX 1

Acquitted persons

Dr. André Ntagerura	Acquitted at trial (2004) & on appeal (2006)	Safe-house
Gen. Gratien Kabiligi	Acquitted at trial (12/2008) & No Prosecution Appeal	Safe-house until 2019 when he is re-located to France
Dr. Casmir Bizimungu	Acquitted on appeal (9/2011)	Re-located to Ghana – 12/2016
Protais Zigiranyirazo	Acquitted on appeal (11/2009)	Safe-house
Jerome Bicamumpaka,	Acquitted on appeal (2/2011)	Safe-house
Justin Mugenzi	Acquitted on appeal (2/2014)	Re-located to Belgium
Prosper Mugiraneza	Acquitted on appeal (2/2014)	Safe-house
Francois Xavier Nzuwonemeye	Acquitted on appeal (2/2014)	Safe-house
Hormisdas Nsengimana	Acquitted at trial (11/2009) & No Prosecution Appeal	Re-located to Italy
Augustin Ndindiliyimana	Acquitted on appeal 2/(2014)	Re-located to Belgium
Andre Rwamakuba	Acquitted at trial (9/2006) & Prosecution Appeal of Compensation Dismissed by Appeals Chamber (4/2007)	Re-located to Switzerland
Emmanuel Bagambiki	Acquitted at trial and on appeal (2006)	Re-located to Belgium
Ignace Bagilishema	Acquitted at trial (1 st ICTR acquittal)	Re-located to France
Jean Mpambara	Acquitted at trial (2006); No Appeal	Re-located to France

Persons released on completion of sentence

Anatole Nsengiyumva		Safe-house
Tharcisse Muvunyi		Safe-house
Innocent Sagahutu		Safe-house
Sylvain Nsabimana		Re-located to Ghana – 12/2016
Alphonse Nteziryayo		Safe-house
Joseph Kanyabashi		Safe-house



ANNEX 2

Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, 11-13 April 2011: Summary Conclusions⁷¹

41. An indictment by an international criminal tribunal or court is, on the other hand, generally considered to meet the “serious reasons for considering” standard required under Article 1F of the 1951 Convention. If the person concerned is subsequently acquitted on substantive (rather than procedural) grounds, following an examination of the evidence supporting the charges, the indictment can no longer be relied upon to support a finding of “serious reasons for considering” that the person has committed the crimes for which he or she was charged.

42. An acquittal by an international criminal tribunal or court does not mean, however, that the person concerned automatically qualifies for international refugee protection. It would still need to be established that he or she has a well-founded fear of being persecuted linked to a 1951 Convention ground. Moreover, exclusion may still apply, for example, in relation to crimes not covered by the original indictment.

43. Procedurally, if the asylum determination was suspended pending the outcome of the criminal proceedings, it can be resumed following the acquittal. Likewise, where the person was previously excluded on the basis of the indictment, the acquittal should be considered as a sufficient reason to reopen the asylum determination. If the indictment had been used to cancel or revoke previously granted refugee status, a reinstatement of refugee status may be called for.

44. UNHCR's current guidelines on the interpretation and application of the exclusion clauses under Article 1F of the 1951 Refugee Convention do not expressly address the situation where an individual indicted by an international criminal tribunal or court is subsequently acquitted. The forthcoming revised guidelines will provide clarification on this issue.

45. In practical terms, the question of the relocation of

acquitted persons who are unable to return to their country of origin due to threats of death, torture or other serious harm is a real one. The problem of such relocation of persons is not easy to resolve and this problem is expected to persist beyond the existence of the ICTR and to arise in the future for other international criminal institutions and, in particular, the ICC. At present, three out of eight individuals who have been acquitted by final judgment before the ICTR have been unable to find countries willing to accept them. It was agreed that durable solutions need to be found for those acquitted by an international criminal tribunal or court and who are unable to return to their country of origin. Indeed, this is a fundamental expression of the rule of law and essential feature of the international criminal justice system. Concern was accordingly expressed about the consequences of failing to find such solutions.

46. The responsibility for resolving this problem does not lie with UNHCR, ICRC or OHCHR, none of which are in a position to implement a solution for the persons concerned without the consent of states. Rather, the question has to be addressed by Member States of the United Nations as part of their cooperation with and support to international criminal institutions, possibly through the establishment of a mechanism to deal with such cases, which fully respects international refugee, humanitarian and human rights law.

47. ICTR, ICTY, UNHCR and OHCHR agreed to embark on a joint advocacy strategy with the aim of sensitizing the UN Security Council and Member States to, and finding a sustainable solution for, the plight of acquitted persons.

ANNEX 3

The situation of the Acquitted at the ICC (as of early June 2019)

To date, there have been four acquittals at the ICC.⁷² The situation of three out of four⁷³ of the acquitted persons at the ICC is the same as it is for the acquitted persons (and those who have completed their sentences) at ICTR. All three – Laurent Gbagbo, Charles Blé Goudé and Mathieu Ngudjolo Chui are acquitted but not free. Jean-Pierre Bemba Gombo was acquitted by the Appeals Chamber of

⁷¹ Complete summary conclusions available at <http://www.refworld.org/docid/4e1729d52.html>.

⁷² In comparison, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), from 1995 to 2017, indicted 161 individuals of whom 99 were sentenced, 19 acquitted and 13 referred to domestic courts. The United Nations International Criminal Tribunal for Rwanda (ICTR) indicted 96 individuals of whom 62 were sentenced, 14 acquitted and 10 referred to domestic courts.

⁷³ Upon his acquittal, Mr. Bemba was not immediately released, because he was being provisionally detained in the *Bemba et al.* “Article 70” case at the ICC. Ultimately, according to press reports, he returned to Belgium and is able to travel internationally.



charges of war crimes and crimes against humanity on 8 June 2018, and has returned home to the DRC.⁷⁴

All of these cases illustrate that a judgment of acquittal does not mean that the acquitted person can freely walk out the door, and go anywhere. The situation is exacerbated by the fact that acquitted persons have no papers – they are, in effect, “stateless.” This means that the acquitted persons are not only without freedom and liberty, but are also extremely vulnerable to the national legal processes for refugees.

One example is Mathieu Ngudjolo Chui who was the first acquittal at the ICC. He was acquitted of war crimes and crimes against humanity by the Trial Chamber II on 18 December 2012, and the Trial Chamber II also ordered his immediate release. Two days later, on 20 December 2012, the Prosecution appealed the verdict and on 27 February 2015, the Appeals Chamber upheld the verdict of acquittal.⁷⁵ When he was first released from the ICC Detention Center, he was not free: he was immediately arrested by the Dutch authorities since he had no residency permit entitling him to stay in the Netherlands. He remained in a refugee detention centre until May 2013, when an appellate court in Amsterdam ordered his release. Ngudjolo Chui was finally provided with some documentation to allow him to remain in the Netherlands during the pendency of the Prosecution’s appeal of his acquittal by the Trial Chamber II.⁷⁶ On 7 April 2015, the Appeals Chamber, rejecting the Prosecution’s appeal, affirmed Ngudjolo Chui’s acquittal. However, immediately following this, the Dutch authorities arrested him again and he was deported to the DRC.⁷⁷

Recently, Laurent Gbagbo and Charles Blé Goudé⁷⁸ were acquitted of all charges of crimes against humanity by a majority of the Trial Chamber I on 15 January 2019 and ordered to be released. The Rome Statute mandates the

immediate release of an acquitted person, unless there is a finding of exceptional circumstances.⁷⁹ The next day, the Prosecution filed an appeal.⁸⁰ The majority of the Trial Chamber I rejected the Prosecution’s appeal, finding there were no exceptional circumstances to maintain their detention and to impose conditions. Nevertheless, after acquittal, the two men were held in the UN detention centre for a period of time, and were not immediately moved to a “safe-house.”

The Prosecution again appealed. On 1 February 2019, the Appeals Chamber, agreeing with the Prosecution that the two men were a flight risk, set conditions, which included the surrender of all identity documents, particularly passports, to the ICC Registry.⁸¹ These conditions were to be imposed on both upon their release to a State willing to accept them and to be able to enforce the conditions, during the pendency of the Prosecution’s appeal. Gbagbo is in Belgium; Blé Goudé remains in The Hague.

Thus, the ICC is faring no better than the ICTR, and it is, in fact, much worse. The reason is that ICC is setting a dangerous legal precedent by creating the notion of “conditional post-acquittal release.”⁸² The notion of “conditional acquittal” dilutes the legal authority of a judgment of acquittal. Full stop. And it perpetuates and institutionalizes (through jurisprudence) the ICTR violations of the liberty of the acquitted with the imposition of conditions on acquittal.

An important related issue to the dilution of the power or authority of a verdict of acquittal is the practice, within the ICC and *ad hoc* tribunals which permits the Prosecution to appeal a verdict of acquittal at the trial or appellate level. While this notion is rejected in a common law jurisdiction such as the United States as a violation of the double jeopardy clause in the U.S. Constitution, some common-law ju-

74 See <https://www.theeastafrican.co.ke/news/africa/Bemba-return-worry-for-DR-Congo-s-Tshisekedi/4552902-5143374-11ujodwz/index.html>, *The East African*, 3 June 2019.

75 See “Acquitted But Not Free: Life After a War Crimes Trial”, by Benjamin Duerr, *Foreign Affairs*, 22 July 2015.

76 The ICC Registry appears to have been instrumental in this, after the Defence had litigated issues in reference to the initial detention of the acquitted Ngudjolo Chui. I am not clear whether the documentation was eventually provided by the Host Country (Netherlands).

77 For additional information on Ngudjolo Chui and other acquitted persons, see the excellent article “Acquittals in International Criminal Justice: Pyrrhic Victories?” by Joris Van Wijk and Barbra Hola, *Leiden Journal of International Law* (2017), 30, pp. 241-262. They conclude that acquittal by international criminal courts and tribunals is a Pyrrhic victory, given the problems and challenges of life after acquittal: these include treatment as “international pariahs,” lack of compensation, threat and realities of domestic prosecutions, and other issues.

78 See “The Appeals Chamber Invents Conditional Post-Acquittal Release,” 3 February 2019, by Jon Heller at <http://opiniojuris.org/2019/02/03/the-appeals-chamber-invents-conditional-post-acquittal-release>.

79 Rome Statute, Article 81(3)(c).

80 Based on Rome Statute, Article 81(3)(c)(ii) and Article 82(3); and Rule 156(5) of the Rules of Procedure and Evidence.

81 Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, ICC-02/11-01/15-1251-Red2, 21 February 2019, paras 59-60.

82 See “The Appeals Chamber Invents Conditional Post-Acquittal Release,” 3 February 2019, by Jon Heller available at <http://opiniojuris.org/2019/02/03/the-appeals-chamber-invents-conditional-post-acquittal-release/>



jurisdictions permit Prosecution appeals on limited grounds, and civil law jurisdictions generally permit Prosecution appeals of acquittals.⁸³

As to whether the ICC deals with compensation differently, it could be argued that the fact that compensation provisions were agreed upon in the Rome Statute is a step forward for the acquitted, because it provides a legal framework for compensation in Article 85, as opposed to the silence of the ICTR and ICTY Statutes.

But, it is necessary to look at the arguments and jurisprudence in compensation cases thus far. I am aware of four ICC cases where compensation was requested: two were acquittals – Ngudjolo Chui (hyperlink) and Bemba (hyperlink); one was no confirmation of charges – Mbarushimana (hyperlink); one was for a convicted person, Mangenda (hyperlink).

Ngudjolo filed a Request for Damages, under Article 85(1) and (3). The Trial Chamber II decision is useful for its articulation of the “grave and manifest miscarriage of justice” standard as per Article 85 (3),⁸⁴ but dismissed the Defense arguments. Bemba filed a claim for compensation and damages, under Article 85(3).⁸⁵ A hearing was held in May 2019 before Pre-Trial Chamber II.⁸⁶ No decision has yet been rendered.

In the *Mangenda* case, Jean-Jacques Mangenda Kabongo claimed he was unlawfully detained and requested compensation, pursuant to Article 85(1) for a period of about nine days (22 October to 31 October 2014). The Pre-Trial Chamber had issued a Release Order (21 October 2014) but there difficulties in finding a country to accept him and to

which he was willing to go.⁸⁷ In April 2015, Mangenda requested compensation for his unlawful detention from the President, who referred the matter to the Trial Chamber. The Trial Chamber issued a decision in February 2016, denying the motion for compensation.⁸⁸ Mangenda appealed to the Appeals Chamber.⁸⁹ Although the Appeals Chamber rejected the Prosecutor’s arguments that the appeal was inadmissible based on Article 82(1)(d) on the merits,⁹⁰ it rejected Mangenda’s claim because it failed to “demonstrate any unreasonableness in the Trial Chamber’s ultimate determination on the lawfulness of his detention.”⁹¹ It held that Mangenda “failed to meet the minimum requirements of substantiation for a consideration of the merits of this ground of appeal.”⁹²

Selected bibliography

“Situation des acquittés du TPIR,” Seydou Doumbia, Mali, Novembre 2009. Me. Doumbia is a former Defense Counsel for Bagambiki, one of the persons acquitted in 2004. He presented this paper at the ICTR Defense Conference in the Hague, and video is available at <https://vimeo.com/8694990>

“Freed yet without liberty: The possibility of refugee status for former indictees at the International Criminal Tribunal for Rwanda who were either acquitted or sentenced and completed prison terms,” by Florence M. Denga, unpublished paper, 20 February 2015 available from author at floden95@gmail.com.

“What Happens to the Acquitted?” by Kevin Jon Heller, *Leiden Journal of International Law*, 21 (2008), pp. 663-680, available at <http://ssrn.com/abstract=1005772>

83 A full discussion is beyond the scope of this paper. See, “Right to Appeal” by Magali Maystre, *International Criminal Procedure, The Interface of Civil Law and Common Law Systems*, edited by Linda Carter and Fausto Pocar, Edward Elgar Publishing, Inc. 2013.

84 Decision on the “Requête en indemnisation application des dispositions de l’article 85(1) et (3) du Statut de Rome,” ICC-02/04-02/12-301-tENG, 16 December 2015, paras 36-48.

85 Second Public Redacted Version of “Mr. Bemba’s claim for compensation and damages,” ICC-01/05-01/08-3673-Red2, 19 March 2019.

86 Second Public Redacted Version of “Mr. Bemba’s claim for compensation and damages,” ICC-01/05-01/08-3673-Red2, 19 March 2019.

Under Rule 173(1), the Presidency designates a Chamber of three judges to consider a request for compensation pursuant to Article 85. The judges “shall not have participated in any earlier judgment of the Courts regarding the person making the request.”

Here, the PTC II is composed of the same bench that rejected the Prosecution’s request to open a Preliminary Examination into the Situation in Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF

87 Judgment on Mr. Mangenda’s appeal against the “Decision on request for compensation for unlawful detention,” ICC-01/05-01/13-1964, 8 August 2016, para. 2.

88 Decision on Request for Compensation for Unlawful Detention, ICC-01/05-01/13-1663, 26 February 2016.

89 Judgment on Mr. Mangenda’s appeal against the “Decision on request for compensation for unlawful detention,” ICC-01/05-01/13-1964, 8 August 2016.

90 *Ibid.*, para. 18.

91 *Ibid.*, para. 26.

92 *Ibid.*, para. 28.



“Compensating Acquitted Defendants for Detention before International Criminal Courts,” by Johan David Michels, *Journal of International Criminal Justice* 8 (2010), 407-424, available at <https://oup.silverchair-cdn.com/oup/> and also HeinOnLine

“Acquittals in International Criminal Justice: Pyrrhic Victories?” by Joris Van Wijk and Barbora Hola, *Leiden Journal of International Law* (2017), 30, pp. 241-262.

<http://whenjusticeisdone.org/index.php/acquitted/53-reasons-for-acquittal>

<http://hrbrief.org/hearings/no-refuge-the-quandary-of-resettling-suspects-acquitted-by-the-ict/>

http://ict-r-archiv09.library.cornell.edu/ENGLISH/international_cooperation/papers_presented/challenges-in-relocation-of-acquitted-persons.pdf

<https://justiceinconflict.org/2014/03/31/acquitted-by-law-prosecuted-by-propaganda/> (article on General Kabiligi’s situation by Caroline Buisman and Kate Gibson)

<http://rappr-rppsn.org/home/>

Rwandan Political Prisoners Support Network

Beth S. Lyons is currently a defence counsel in the Ongwen case at the ICC and has represented clients at the ICTR since 2004. She is also an Alternate Delegate to the United Nations in New York for the International Association of Democratic Lawyers (IADL), an ECOSOC NGO. She can be contacted at bethlyons@aol.com. Special thanks to Major F.X. Nzuvonemeye, Chief Charles Achaleke Taku, Morganne Ashley, Tibor Bajnovič, Linda Carter and Sara Pedrosa for their assistance.



After the verdict in the Golden Dawn trial

EZGI CAKIR INTERVIEWS THANASIS KAMPAGIANNIS

“A very big victory, both for the victims and for the anti-fascist movement.”

Our colleague Ezgi Cakir, from Progressive Lawyers Association of Turkey is an asylum seeker who lives in Athens. She conducted an interview with Thanasis Kampagiannis on behalf of the IADL. Attorney Kampagiannis is also a lawyer in Athens. He represented the Egyptian fishermen in the Golden Dawn trial. The Golden Dawn trial is one of the most significant incidents of 2020 and obviously the lawyers in this trial made an incredible contribution to our common struggle.

Cakir: *Dear Thanasis, first of all thank you very much for agreeing to answer our questions. I know that you have been overworked in the last weeks. The outcome of your collective efforts made all of us very happy. Could you tell us about the background of this trial and the legal background of the prosecution?*

I am the lawyer for the Egyptian fishermen who were attacked by the Golden Dawn battalion squads in 2012. This attack, plus the murderous attack against Communist trades unionists and the murder of Pavlos Fyssas, were the three major attacks by the members of the Golden Dawn who were tried in this case. The penal prosecution against the Golden Dawn was done through the Article 187 of the Greek Penal Codes, the article for forming a criminal organisation. The Golden Dawn leadership was accused of directing a criminal organisation. So apart from the three cases, the accused were indicted for being members or directors of a criminal organisation. The prosecution started in September 2013 after the murder of Pavlos Fyssas, the result of an anti-fascist uprising and large anti-fascist demonstrations not only in Keratsini where Pavlos lived and where he was killed, but also all over Greece. Then the rightwing government of Greece, the New Democracy, which until then covered up for the criminal actions of the Golden Dawn, was obliged to act and press charges not only against its members but also against its leaders. The trial started in April 2015 and it finished in October 2020, lasting five and a half years.

Cakir: *Could you give us more details about the trial and the judiciary process?*

In this case we had not only the examination of the three cases that I already referred to for which the court needed to issue a separate court decision each for the murder of Pavlos Fyssas and the attempted murders of the Egyptian fishermen and the Communist trade unionists but the court also examined dozens of other cases where Golden Dawn

members and battalion squads attacked either migrants or ideological-political opponents of the organisation. It was revealed during the court cases that the organization had national socialist character.

Golden Dawn leaders have always said that they are Greek nationalists and that they have nothing to do with national socialism, which is very heavily attached to the German occupation in the minds of the Greek society. Found inside the files and the personal computers of the leaders and members of Golden Dawn were several national socialist insignia, swastikas and ceremonies where Golden Dawn members were making an oath to the German flag, the German Reich flag, the Wehrmacht flag and the swastika. This is not a penal crime in itself as in the Greek penal system, no ideology is penalised, but it was crucial in the terms of this court, because it provided the motivation for the criminal acts of Golden Dawn. What the indictment was and what was revealed during the court was that the Golden Dawn, under the disguise of a political party, was making murderous attacks against its opponents, refugees, migrants, ideological and political opponents, under the direction of the leaders of the organisation. Of course, it was revealed that these attacks were against the weakest in our society and never against the powerful or the state. In reality the state either turned a blind eye to or collaborated in this criminal activity.

Cakir: *As far as I could understand, the state prosecutor has received a lot of criticism from your side. What was the position of the state prosecutor?*

It was striking in the course of the trial that the state prosecutor sided with the accused defendants. This is very strange, because in the Greek penal system, especially in cases of criminal or terrorist organisation, is that the state prosecutors are really tough against the defendants. In this court the state prosecutor sided with the defendants and she proposed acquittal for all the leaders and members of the organisation accused of being either members of or directing a criminal organisation.

Cakir: *What about the public opinion? Do you think social opposition had an effect on this decision?*

It was very important that there was a public outcry after the proposal of the state prosecutor in December 2019. For the past ten months there has been a significant effort by the anti-fascist movement and by the lawyers on our side to create publicity and to raise attention on the importance of the court decision of October 2020. On the 7th of Oc-



tober there was a large anti-fascist demonstration of more than 30,000 people outside the court of appeal. This showed the enormous strength of the anti-fascist movement and showed the magnitude of the anti-fascist movement and left no room for any decision other than the one taken by the court. It was also important that on the 22nd of October the court did not suspend the penalties for a large majority of the convicted, which meant that the whole leadership of Golden Dawn was taken to jail. This was a great victory, both for the victims and for the anti-fascist movement.

Cakir: *How do you evaluate the decision in terms of law and politics for Golden Dawn case?*

The decision was very important because until now there were no decisions or convictions for the murderous attacks and murders that Golden Dawn members and cadre had perpetrated against migrants or against political opponents. A single member of the organisation was convicted and there was no investigation into the penal responsibility of the leadership of Golden Dawn. This is why the decision was so important and is the reason why the decision is so important in international terms. Because while there have been several trials of Nazi criminals and racist crimes, it is the first time in many decades that we had the conviction of the whole leadership of an organisation. It is also an important case for the Greek judicial system because there has been a state of impunity for far-right criminality for many decades. In Greece for historical reasons after the Second World War, the collaborators of the Nazis were never criminalised and never paid restitution for the crimes they committed during the years of the German occupation. The far right always had the advantage of being able to act as criminals with impunity. This is why for national and international reasons I evaluate this decision as a very important one.

Cakir: *Once again thank you Thanasis and congratulations! Do you want to add anything more?*

I just want to underline one issue. We believe that the anti-fascist movement's role was very important for the making of the decision, not just because the anti-fascist movement had always talked about the criminal activity of Golden Dawn but also because it had a role during the trial itself. The lawyers of the prosecution were people who were part of the anti-fascist movement. We are lawyers who have been active in anti-racist and anti-fascist organisations and demonstrations and we decided to work pro bono for the victims. To help them be present in a trial that would be long but we knew that they would otherwise not be able to be present in a trial like that without lawyers. Whereas, the leadership of the Nazi organisation had lawyers who were being paid as

staff of the Greek parliament because Golden Dawn was part of the Greek parliament and had the support of MPs from 2012 to 2019. In addition, the anti-fascist movement was very important by helping witnesses to find the courage to come to court. There were even attacks on the first day by members of Golden Dawn against witnesses coming to the court. The constant mobilisation of the people of the anti-fascist movement inside and outside the court was very important for people not to be afraid. Also, the social movement during the last months before the court made its decision was very important because it created a public climate letting the state authorities know that it would be very difficult to acquit the defendants.

In that sense, our experience is very similar to the activity of the Progressive Lawyers Association in Turkey. As progressive lawyers, we need to do both, be active in both worlds. On one hand, represent our clients in court, people who in most cases would find it very difficult to find justice as they are the weakest in our society, working class, poor, migrants and refugees. On the other hand, fight outside the court as part of the antifascist movement and make our clients' cause part of the wider fight of the progressive movements.

This is why we need to continue building solidarity, especially the people of Greece and Turkey, and we need to emphasize our common struggles, not just as lawyers but further as popular movements fighting against injustice, fascism, racism and the system that breeds them.

Ezgi Cakir graduated from the Marmara University in 2008 and joined the Istanbul Bar Association after her internship. She has since worked in the Umut's Law Office and People's Law Office as a lawyer. She is also an active member of the Progressive Lawyers Association and is a member of the executive board of the Istanbul branch of the association.

In 2017, she and other colleagues were unlawfully detained and arrested. She was not imprisoned, because her daughter was three and a half years old. However, after the judicial process, she was sentenced to eight years of imprisonment. She is currently living in Athens and awaiting the outcome of her asylum process. Her daughter is still in Turkey and her daughter's father, also a lawyer, is in jail due to the legal process she endured.

Thanasis Karpagiannis was born in Trikala in 1978. He studied at Thessaloniki law school and has a Masters in Political Science and History from Pantion University in Athens, where he now works as a lawyer. He is an activist in the anti-capitalist left and the antiracist and antifascist movements. He is currently a member of the Board of the Athens Bar Association and with "Alternative Intervention" an organization of the radical left. “



Between memoricide and revisionism: subsidies towards a pedagogical turn on the Universal Declaration of Human Rights

MIGUEL RÉGIO DE ALMEIDA

ABSTRACT:

After 70 years, the UDHR continues to be celebrated without proper reference to its foundational narrative, thus still reproducing academic and institutional ethnocentrism. For decades, teaching the UDHR without a truly global perspective and historical context was another way to insist on a new linear legal 'Orientalism' and a renovated *ius publicum europaeum*. Aiming towards a pedagogical shift in the philosophy of human rights, I deconstruct some of the legal mythology surrounding the origins of the UDHR, while highlighting recent studies that shed new insights on the generation of human rights, afterwards reimagined as an unprecedented *ius totius orbis* and a 'language of resistance'.

Keywords: Philosophy of Human Rights; Critical Legal Thinking; Critical Legal Education; International Law; Colonialism.

As is deducible from the rather pompous title of this text¹ – which will be promptly deconstructed –, I am primarily concerned with a couple of problems derived from the mythification that the Universal Declaration of Human Rights (UDHR) has been under since 1948, concerning its genealogy and meanings, within the meta-dogmatic subject of philosophy of human rights.² In order to help overcome such legal mythology, I will highlight some recent contributions, namely historiographic, from the counter-hegemonic strand of legal thought. They urge the revision and the rethinking of the UDHR genealogy and meanings, following the retrieval of unjustly forgotten facts or subaltern agents. The 'pedagogical turn' – something which is recognizably called for in the field³ – here suggested aims to echo what the North-American scholar Duncan Kennedy had *in illo tempore* advocated regarding the 'critical legal education'.⁴ This demands a brief introduction, in order to clarify my doctrinal framing on the

Critical Legal Thinking stream, marginalized due to its dissidence towards the orthodox jurisprudence. Moreover, on the background of this text one should notice the influence of a critical thinker in particular: the German Marxist philosopher Ernst Bloch (1885-1977) and his radical interpretation of natural law, rights of man and human rights.⁵ Thus, more than a legal utopic legacy, I am thinking of the emancipatory potential of human rights and the actuality of its promissory text.

Human Rights and Critical Legal Thought

Knowing that there are many different legal 'critiques' – including Kantian, Marxist, and jurisprudential to name a few, I should first clarify that the position here adopted builds on the notion formulated by Michel Foucault: «the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us

1 This text follows the conference given on November 30, 2018, at the Faculty of Law of the University of Lisbon. The author is sincerely grateful to the *Associação Portuguesa de Juristas Democratas*, for their invitation, as also to the IADL and the Editorial Board of the *Review*, for this publication. A special thanks is due to Lopes de Almeida, Manuela Pires, Madalena Santos, and Evelyn Dürmayer. Let us keep changing the world together.

2 This is a more sensible subject that one would think *prima facie*. It is worth recalling that the Committee responsible for the writing of the UDHR chose to ignore the 1947 global questionnaire promoted by UNESCO, under the guidance of the French philosopher Jacques Maritain, that had justly the purpose of collecting the philosophic *Zeitgeist* regarding Human Rights: v. UNESCO/PHS/3 (rev.), Paris, 25.07.1948.

Nonetheless, there are many orthodox approaches to Philosophy of Human Rights – which are *not* followed here, for reasons explained below. V. e.g. Guy Haarscher, *A Filosofia dos direitos do homem*, Lisboa: Instituto Piaget, 1993 [1987]; Patrick Hayden, *The Philosophy of Human Rights*, USA: Paragon House, 2001; David Boersema, *Philosophy of Human Rights. Theory and Practice*, USA: Westview Press, 2011; Rowan Cruft, S. Mathew Liao, Massimo Renzo (ed.), *Philosophical Foundations of Human Rights*, USA: Oxford University Press, 2015.

3 V. e.g. André Kleet, «It is time: Critical Human Rights Education in an age of counter-hegemonic distrust», *Education as Change*, 19/3 (2015), p. 46-64.

4 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic against the System (A Critical Edition)*, EUA: New York University Press, 2004 [1983].

5 Namely in his 1961 *oeuvre*, *Naturrecht und menschliche Würde (Derecho natural y dignidad humana*, Madrid: Dykinson, 2011). V. e.g. Anselmo Borges, «Ernst Bloch: A esperança ateia contra a morte», *Revista Filosófica de Coimbra*, 4/2 (1993), p. 403-426; Costas Douzinas, «Adikia: On Communism and Rights», in Costas Douzinas, Slavoj Žižek (ed.), *The Idea of Communism*, London: Verso, 2010, p. 81-100; Francisco Serra Giménez, «El pensamiento filosófico-jurídico y político de Ernst Bloch», *Anuario de Filosofía del Derecho*, 14 (1997), p. 827-844; Michel Löwy, «Romanticism, Marxism and Religion in the "Principle of Hope" of Ernst Bloch», *Crisis & Critique*, 2/1 (2015), p. 350-355; Miguel Cardina, «A filosofia da esperança de Ernst Bloch», in UNIPOP (org.), *Pensamento Crítico Contemporâneo*, Lisboa: Edições 70, 2014, p. 88-100.



and an experiment with the possibility of going beyond them.⁶ Such characterization is ultimately that echoed by the school, or movement, of Critical Legal Thought/Theory, better known by its original Anglo-Saxon terminology as Critical Legal Studies (CLS), the «*enfant terrible* of legal thinking»,⁷ with which I am intellectually affiliated.

To think about the actualization of human rights can, within a meta-dogmatic approach, prove to be a problematic exercise. This is because it prompts us to question many doctrinal pre-conceptions usually found in more orthodox strands of legal philosophy. For example, we are driven to question the dogma of the autonomy of law and its neutral relationship with politics and ideology. We find that the radical potential of natural law has been reintroduced in legal and political discourses. In addition, international law theory is gradually recognizing the contrast between itself and the colonialist *realpolitik* context. The legal ramifications of citizenship and humanity, introduced by the *bourgeois* concept of *droits de l'homme*, are finally being deconstructed. When thinking about post-sovereignty, the *topoi* about the common good has been revived. The legal discussions on the extra-judicial arena have been expanded, since one cannot deny the democratic reanimation of the *demonstrations* in the streets and other public spaces. Finally, organizations from civil society (non-governmental organizations, or NGOs) outside the traditional professional legal circle, are being accepted as new legal agents.

As a consequence, the strands of legal philosophy more akin to orthodox conceptions – attached to the binomial jus naturalism/positivism and the absolute autonomy of law, as opposed to ideological deconstruction and to analyses on law's contexts and effects – pose difficulties in thinking about the *sui generis* jurisprudence, construction and realization of human rights. Traditional legal reference is inadequate here, and sometimes such strands even simply ignore the field of human rights, since they do not fit into the traditional theoretical framework. Such denial is an enormous mistake, considering that human rights undeniably constitute one of the most significant influences on

national and international legal orders. From the legal philosophy point of view, it is through the jus naturalist that human rights are usually studied,⁸ whether to associate or dissociate them from traditional natural law. Consider the examples of Leo Strauss,⁹ Michel Villey¹⁰ or John Finnis,¹¹ from the omnipresent neo-Thomist strand. But, notwithstanding their intellectual sophistication, these interpretations do not provide answers to the problems mentioned above. Nor could they, since such traditional perspectives were not grounded in the context of contemporary human rights, nor do they deal with the revision of their ethnocentric premises. Human rights have been redefined in light of the many antiracist struggles and anticolonial wars. They have also been analysed anew following the 2008 financial crises, and the current anticapitalistic struggles and appeals to active citizenship, through the Arab Spring, the *Indignados* and the Occupy Movements.

Regardless of such recent transformations, according to the North-American legal historian Samuel Moyn,¹² the presence of human rights *qua tale* in the popular legal imaginary and social conscience only dates to the mid-Seventies. This is many years after their foundational institution in 1948, with the UDHR, and their first judicialization in 1959, in the *Cour Européenne des Droits de l'Homme*. Since the early 1940's, human rights have been a target for ideological instrumentalization, particularly by North-American diplomats against the Soviet bloc during the 'Cold War'. They have been supported by the Catholic Church, with the aim to improve its geopolitical position, leading to the contamination by the different clerical factions. On the other hand, NGO's such as Amnesty International and the Helsinki Watch Groups have recharacterized human rights in the last decades through their extrajudicial mobilization. Civil and activist movements in many countries aim to transform their societies via the appeal to human rights and the denunciation of their violations.¹³ They employ the 'language of resistance' whose 'emancipatory appeal' had already been echoed in past theorizations on natural law and rights of man. Such perspective is not popular within orthodox legal doctrine. However, although peripheral, it

6 Michel Foucault, «What Is Enlightenment?», in Paul Rabinow (ed.), *The Foucault Reader*, USA: Pantheon Books, 1984, p. 32-50: 50.

7 Alan Hunt, «The Critique of Law: What is 'Critical' about Critical Legal Theory?», in Peter Fitzpatrick, Alan Hunt (ed.), *Critical Legal Studies*, UK: Basil Blackwell, 1990, p. 5-19: 5.

8 Per definition, Legal Positivism is not properly inclined to Legal *Philosophy*, but to Theory or Methodology of Law.

9 V. e.g. *Natural Right and History*, 1953.

10 V. e.g. *Le Droit et les Droits de l'homme*, 1983.

11 V. e.g. *Natural Law and Natural Rights*, 1980, and *Aquinas: Moral, Political and Legal Theory*, 1998.

12 V. Samuel Moyn, *The Last Utopia: Human Rights in History*, USA: Belknap Press of Harvard University Press, 2010; *id.*, *Human Rights and the Uses of History*, USA: Verso, 2014; *id.*, *Christian Human Rights*, USA: University of Pennsylvania Press, 2015; *id.*, *Not Enough: Human Rights in an Unequal World*, USA: Belknap Press of Harvard University Press, 2018.

13 V. Aryeh Neier, *The International Human Rights Movement: A History*, USA: Princeton University Press, 2013.



benefits from worldwide academic approval, that is, Critical Legal Thought that specifically focuses on the issue,¹⁴ in the tradition of the Greek legal philosopher Costas Douzinas.¹⁵

Thus, the heretofore-mentioned theoretical and practical problems raised by traditional legal thinking are not at issue from the CLS point of view. For CLS *assumes* that law is theorized and operates in the context of politics and ideology. This way, law's 'symbolic power' is made evident and one can see beyond the legal '*habitus*' and the '*homo academicus*', to evoke Pierre Bourdieu.¹⁶ Although such analysis undoubtedly challenges the predetermined boundaries of academic epistemology, it has the capacity to analyse legal problems and themes while *recognizing* their ideological limitations. It investigates *how* they were erected, and suggests means to *transform* or *overcome* them through law's 'radical normative potential'. That is why one of the key *topos* of this stream of legal studies is to take law *as* resistance,¹⁷ as counter-conduct. *Brevitatis causa*, it is worth quoting the summary characterization of this movement provided by the Portuguese legal historian António Hespanha, to which I subscribe: «what the Critical School of Law suggests is more than to replace a doctrinal opinion by another: more radically, it is to substitute the rules of legal practice and discourse; to admit that other type of subjects can participate on the academic and jurisprudential dialogue of lawyers; to use other types of facts as relevant; to speak another language; and, above all, to recognize that Law is a controversial knowledge, whose choices also represent ideological and political options».¹⁸

The pedagogical turn

Having concluded the background briefing, we can now turn to the genesis of the UDHR¹⁹ and its recent ephemeris,

which has already celebrated its seventh decade. These moments should reflect a mixture of emotional recall and of critical jurisprudence. On one hand, as the Kenyan legal scholar Makau Mutua²⁰ has advocated, we must avoid the «orgy of celebrations» that have become common on such occasions, as well as the reiterated memocide of its generational context. On the other hand, we should recall its impact on and promotion by counter-hegemonic organizations in extra-institutional fora. This has begun to shape the movement *for* human rights, which *a posteriori* demanded the radical interpretation of the UDHR and guaranteed its current role in popular jurisprudence.

This is not the proper place to expose and deconstruct the orthodox 'big narrative' on human rights.²¹ There is already an excellent textual analysis on the preparatory works of the UDHR.²² But, as a rule, its foundational myth is the absolute blaming of Nazism (while ignoring its logical connections with capitalism and colonialism) and the attribution of authorship to the editing collective, usually reduced to a parental duo, focused basically on the influence of Eleanor Roosevelt and René Cassin.²³ This ignores the previous key work of John Humphrey²⁴ and the fact that the UDHR was the collective result of the extensive labour of dozens of delegates. And, even more shockingly, it purposely neglects the work *outside* the institutional stage: *beforehand*, in preparation for the lengthy process of writing the UDHR; and, *afterwards*, to earn acceptance and validity in the troubled context of post-1948 decolonisation.

In this sense, the pedagogical turn I am advocating results from identifying both a lack and a tendency to a limited syllabus on the teaching of this *topos* in different areas of legal thought. It also emanates from a common insistence on ignoring the contributions from the CLS movement on international law and human rights – and it happens that

14 V. Boaventura de Sousa Santos, César A. Rodríguez-Garavito (ed.), *Law and Globalization from Below*, UK: Cambridge University Press, 2005: Cap. 8-11; Conor Gearty, Costas Douzinas (ed.), *The Cambridge Companion to Human Rights Law*, Cambridge: Cambridge University Press, 2012; Costas Douzinas, Conor Gearty (ed.), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights*, Cambridge: Cambridge University Press, 2014.

15 V. Costas Douzinas, *The End of Human Rights. Critical legal thought at the turn of the century*, UK: Hart Publishing, 2000; *id.*, *Human Rights and Empire. The political philosophy of cosmopolitanism*, UK: Routledge-Cavendish, 2007.

16 V. Pierre Bourdieu, «La force du droit. Éléments pour une sociologie du champ juridique», *Actes de la recherche en sciences sociales*, 64 (1986), p. 3-19; *ibidem*, «Habitue, code et codification», p. 40-44; *id.*, *Homo Academicus*, Portugal: Edições Mulemba, Edições Pedagogo, 2016 [1984].

17 V. Peter Fitzpatrick, «Law as Resistance», in Ian Grigg-Spall, Paddy Ireland (ed.), *The Critical Lawyer's Handbook*, UK: Pluto Press, 1992, p. 44-48.

18 António Manuel Hespanha, *O caleidoscópio do direito. O direito e a justiça nos dias e no mundo de hoje*, Coimbra: Almedina, 2014 (2nd ed.), p. 291-292 (the translation is mine). For a Portuguese depiction of the CLS *v. e.g.* Ana Simões Gaudêncio, *Entre o Centro e a Periferia. A perspetiva ideológico-política da dogmática jurídica e da decisão judicial no critical legal studies movement*, Rio de Janeiro: Editora Lumen Juris, 2013.

19 Gen. Ass. Res. 217A (III).

20 Makau Mutua, *Human Rights. A Political & Cultural Critique*, USA: University of Pennsylvania Press, 2002: p. 15.

21 *Ibid.*

22 V. Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent*, USA: University of Pennsylvania Press, 1999.

23 *V. e.g.* Mary Ann Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights*, USA: Random House, 2002.

24 V. Clinton Timothy Curle, *Humanité. John Humphrey's Alternative Account of Human Rights*, Canada: University of Toronto Press, 2007.



human rights are precisely a field that aggregates different generations of critical legal scholars.²⁵ Transversally to the CLS, there has been a specific research strand on the genealogy of human rights that is gradually interjecting itself.²⁶ It proudly displays its historiographic revisionism (for example, highlighting the recency of such rights), following the iconic head-start made by the North-American historian Kenneth Cmiel.²⁷ It is with this revisionism that Samuel Moyn has distinguished himself, particularly by defending the thesis that human rights only turned out to be truly valid from 1977 onwards. That year was symbolized by the attribution of the Nobel Peace Prize to the NGO Amnesty International and by the election of the USA President Jimmy Carter.

In this context, the methodologies of the history of human rights are themselves being questioned. Specifically, the demystification of the UDHR is part of²⁸ this phenomenon, as well the generic tendency to denounce the erroneous emphasis on occidental legal perspectives,²⁹ nowadays a recognized and unjustified affront that calls for its urgent overruling. Therefore, it is increasingly inescapable to integrate the contributions from the subaltern legal thinking on the curricula concerned with human rights education that benefits from many academics still influenced by the CLS, and others specifically integrated in the post- and decolonial studies. I am speaking namely of strands of the New Approaches to International Law (NAIL), the Third World

Approaches to International Law (TWAAIL), and the study of human rights through the optics of decolonial theory.³⁰

For example, within NAIL, one can already see how the colonial origin and modulation of international law constitute the premise for a full understanding of its methodology, as well of the plundering and commercial interests that the *ius publicum europaeum*³¹ had always showcased.³² The Finnish scholar Martti Koskenniemi has distinguished himself as a great interlocutor of this critique of the traditional eurocentric view of international law, which extends itself to human rights.³³ Equally broad and heterodox, TWAAIL presents itself as unified under the assumption of a post-colonial perspective on the study of the international community normativity, giving significant attention to the politics *of* and *for* human rights.³⁴ In this usually interdisciplinary strand, we should highlight the works of the Indian scholar Upendra Baxi, who concentrates specifically on the future of human rights,³⁵ following the revision of the eurocentric premises and episteme. And finally, as a result of the epistemological deconstruction developed by decolonial theory in these last decades, and quite popularly by the Argentinian semiologist Walter D. Mignolo, the 'darker side' of European modernity is being undoubtedly denounced, exposing how coloniality reverberates in every sphere of knowledge and social regulation.³⁶ Facing the relativization of the meaning of the European-made national and international normativity, human rights are

25 In Portuguese Academia, within an epistemic and sociological focus, it is Boaventura de Sousa Santos that has been most recognized in this field. V. *id.*, «Por uma concepção multicultural de direitos humanos», *Revista Crítica de Ciências Sociais*, 48 (1997), p. 11-32; *id.*, *A Gramática do Tempo: para uma nova cultura política*, Porto: Edições Afrontamento, 2006; *id.*, *Se Deus Fosse um Ativista dos Direitos Humanos*, Coimbra: Almedina, 2013.

26 V. Jeffrey N. Wasserstrom, Greg Grandin, Lynn Hunt, Marilyn B. Young (ed.), *Human Rights and Revolutions*, USA: Rowman & Littlefield, 2007; Akira Iriye, Petra Goedde, William I. Hitchcock (ed.), *The Human Rights Revolution: An International History*, USA: Oxford University Press, 2012.

27 Kenneth Cmiel, «The Recent History of Human Rights», *American Historical Review*, 109/1 (2004), p. 117-135.

28 V. Susan Waltz, «Reclaiming and rebuilding the history of the Universal Declaration of Human Rights», *Third World Quarterly*, 23/3 (2002), p. 437-448.

29 V. Reza Afshari, «On Historiography of Human Rights. Reflections on Paul Gordon Lauren's *The Evolution of International Human Rights: Visions Seen*», *Human Rights Quarterly*, 29 (2007), p. 1-67; Bartolomé Clavero, *Derecho global. Por una historia verosímil de los derechos humanos*, Madrid: Editorial Trotta, 2014.

30 The option for a tripartite exposition of these academic movements, on the grounds of theoretical organization, does not invalidate the fact that they usually interconnect themselves. Therefore, they are part of a truly counter-hegemonic approach to legal thinking.

31 V. Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, USA: Telos Press, 2006 [1950].

32 V. José María Beneyto, David Kennedy (ed.), *New Approaches to International Law. The European and American Experiences*, The Hague: T.M.C. Asser Press & Springer, 2011; China Miéville, *Between Equal Rights. A Marxist Theory of International Law*, London: Pluto Press, 2006.

33 Martti Koskenniemi, «Colonization of the «indies». The origin of International Law?», in Yolanda Gamarra Chopo (coord.), *La idea de América en el pensamiento ius internacionalista del siglo XXI (Estudios a propósito de la conmemoración de los bicentenarios de las independencias de las repúblicas latinoamericanas)*, España: Institución «Fernando el Católico», 2010, p. 43-63; *id.*, *The Politics of International Law*, UK: Hart Publishing, 2011; *id.*, «Vitoria and Us. Thoughts on Critical Histories of International Law», *Rechtsgeschichte Legal History*, 22 (2014), p. 119-138; *id.*, «Rights, History, Critique», in Adam Etinson (ed.), *Human Rights: Moral or Political*, UK: Oxford University Press, 2018, p. 41-60.

34 V. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, USA: Cambridge University Press, 2004; James Thuo Gathii, «TWAAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography», *Trade, Law and Development*, 3/1 (2011), p. 26-64; Larissa Ramina, «TWAAIL – "Third World Approaches to International Law" and human rights: some considerations», *Revista de Investigações Constitucionais*, 5/1 (2018), p. 261-272.

35 Upendra Baxi, *The Future of Human Rights*, India: Oxford University Press, 2012; *id.*, *Human Rights in a Posthuman World. Critical Essays*, India: Oxford University Press, 2009.

36 Walter D. Mignolo, *The Darker Side of the Renaissance. Literacy, Territoriality, and Decolonization*, USA: The University of Michigan Press, 1995; *id.*, *The Darker Side of Western Modernity. Global Futures, Decolonial Options*, USA: Duke University Press, 2011.



also necessarily seen from a different point of view, as the Colombian scholar José-Manuel Barreto paradigmatically demonstrated, adding to the historiographical revision the appeal for different references and expressions of this new legal horizon.³⁷

Consistent with this doctrinal framing, I argue that the study of the UDHR should not restrict itself to the year 1948.³⁸ On the contrary, we must take as benchmarks at least the beginning of modern European colonialism as well as its end. *Ergo*, only by understanding the strategic interest in, and the subsequent organized ripeness of, natural and human resources from Africa, the South- and Middle-East (paradigmatically expressed on the 1884-85 Congo/Berlin Conference), are we able to connect the ongoing *realpolitik* in light of World War I and World War II. And it also allows us to identify the motives that lead to the failure of the League of Nations, when it reorganized the colonial international community in 1919. It employed the Mandate System, with the various meanings that the Atlantic Charter netted in 1941. According to the conservative interpretation of Winston Churchill, it was a defence of the integrity of Europe and the British Empire. According to Franklin D. Roosevelt, the Charter had a tendentially universalist meaning, inspiring anticolonial sentiments.

Only within this context can we analyze the divisions and suspicions between the UN founding-members and the fellow 'small' member-states, as well the polemic initiated by the timid reference to «human rights» when the 1945 UN Charter was being drafted. This is how the deafening silence from most of the international audience following the proclamation of the UDHR was justified. Most people were familiar with the different practical meaning that a humanitarian text (one echoing the Atlantic Charter) could have to the majority of the world's population – especially when the victors of World War II were renewing their neo-colonial planification. In fact, as had happened with the symptomatic promotion of the *Droits de l'Homme* in the ultramarine context, human rights were also used in the beginning as a justification to *perpetuate* the colonial legal pluralism, as the British imperialism example has illumi-

nated, only recognizing them as applicable to Europeans.³⁹ Nevertheless, however originally tainted for its connivance with this system, it turned out that the UDHR has justly affirmed itself as a symbol of the *rupture* with colonial dominion.

In this light, I think that the study of the UDHR must be complemented with (until quite recently) subalternity reference, and the reports of what happened upstream and downstream from the UN. Thus, we can make the seemingly paradoxical observation that that political document, while founding a new legal *genus*, was received with both disappointment and enthusiasm. That is to say, there was a *dystonia* between the UDHR's *immediate meaning* – in a colonial context which presumed, by definition, a legalized biopolitical hierarchy amid different phalanxes of the human species – and its *potential* – as a new political-normative horizon, based on the egalitarianism and universalism of such species, *ergo* with a necessary anticolonial and antiracist meaning. Following such logic, and, in my opinion, justifying the pedagogical turn here recommended, there are two complementary historiographies on the generation and meaning of human rights that have cemented themselves in recent years. On the one hand, there are the historiographies on local NGO or subaltern activist groups from 'civil society'; on the other, are the ones about the international organization of post-colonial states in parallel to the UN, particularly escaping from the instrumentalization imposed by both aisles of the 'Cold' War.

Regarding the first historiography, it should be emphasized that the different interpretations the signifier «human rights» – and its emancipatory potential – could have in the UN Charter, as well as its development in the UDHR, was clearly illustrated by the activism of the National Association for the Advancement of Colored People (NAACP). As the North-American historian Carol Anderson has been particularly evincing, the NAACP played an important role not only at the 1945 San Francisco Conference, regarding the inclusion of human rights in the UN Charter, and its promotion. It also had a significant effect on the publication of the UDHR among the African-American com-

37 José-Manuel Barreto (ed.), *Human Rights from a Third World Perspective: Critique, History and International Law*, UK: Cambridge Scholars Publishing, 2013; *id.*, «A Universal History of Infamy. Human Rights, Eurocentrism, and Modernity as Crisis», in Prabhakar Singh, Benoît Mayer (ed.), *Critical International Law. Postrealism, Postcolonialism, and Transnationalism*, India: Oxford University Press, 2014, p. 143-166.

38 Historical landmarks are the fruit of preconceptions and impositions of common sense. As this is not the proper place to discuss such qualifications, it will have to suffice mentioning that my understanding of the Past is based on the 'History from Below' movement. *Ratione materiae*, regarding the historical context of 1948 and the «short XX century», v. Eric Hobsbawm, *The Age of Extremes. The Short Twentieth Century, 1914-1991*, UK: Abacus, 2013 [1994]; William A. Pelz, *História do Povo da Europa Moderna*, Lisboa: Objectiva, 2016; Raquel Varela, *Breve História da Europa. Da Grande Guerra aos nossos dias*, Lisboa: Bertrand Editora, 2018.

39 V. Bonny Ibhawoh, *Imperialism and Human Rights. Colonial Discourses of Rights and Liberties in African History*, USA: State University of New York Press, 2007.



munity, especially due to the works of Walter White and W.E.B. du Bois. In the beginnings of the (more restricted) North-American *Civil Rights Movement*, civil rights were initially vindicated under the aegis of 'human rights', as Malcolm X, Martin Luther King, Jr., and the Black Panther Party then noted. Thus, as a recognized NGO, the NAACP was responsible for many developments *inside* the UN. Furthermore, in its grassroots activism, the NAACP connected the national antiracist principles to those emanating from the self-determination anticolonial movement, bringing to light the undoubtable link between both radical aspirations.⁴⁰

In addition to that historiography, there is the other one concerned with the importance of the 'small' Latin-American and Asian UN member-states, namely those countries from the different decolonial waves including Jamaica, Cuba, India and Indonesia. This line of research is increasingly being recognized among specialists on human rights genealogy. It was actually due to these subaltern agents that human rights in general, and the UDHR in particular, were rescued from their initial disappointing silence and instrumentalization on the 'Cold War' stage. In the process, they were entwined in political-legal networks and spheres leading to egalitarianism between the different member-states and amid world populations. Therefore, human rights were taken not only as a means or a channel to transform the inequalities among the functioning and representations of the UN itself, but also to transform the *modus vivendi* of most recently – or soon to be – decolonized peoples worldwide.

In this strand, it is namely the Australian Roland Burke⁴¹ and the Danish Steven Jensen⁴² who have best retraced how determinant these subaltern states were in the proliferation of human rights documents, petitions and inquiries. They aimed to remedy many different types of discrimination to which the subaltern states have been historically subjected. Furthermore, in my opinion, we can observe the zenith

of the radical link between the right to self-determination, antiracism and human rights in the 1955 Bandung Conference. In accordance with this historiography, Bandung's relevance has recently been recognized.⁴³ This underscores how human rights and the UDHR became so important to the 'Third World', and therefore earned their place on the legal plane and social conscience worldwide. At Bandung, the new legal horizon and its founding text were consistent with anticolonialism and antiracism, as the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,⁴⁴ and the 1963 Declaration on the Elimination of All Forms of Racial Discrimination⁴⁵ would later find purchase in the UN system.

Thus, the long interregnum between 1948 and 1966/76, which connects the three parts of the 'International Bill of Rights' – the UDHR and the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights –, survived due to what was developed *before* and *beyond* the UN. In sum, the original popularization of human rights was a result of the activism and radical aspirations of various local and dissident NGOs, nowadays indisputably recognized as a global movement.⁴⁶ And it was because of the internationalist coalition of non-aligned states that human rights were rescued from oblivion, from the post-1945 neo-colonial order, and from the instrumentalization by 'Cold War' bipolarized *realpolitik*.

Conclusion

In light of these considerations and their respective (albeit only indicative) bibliographical support, I would make a final observation regarding the 'intellectual responsibility' of the different political and legal agents in the public sphere, as a Chomskyan reminder.⁴⁷ Considering Critical Legal Thought, past experience and the opposition to many counter-hegemonic proposals on human rights, the cordial acceptance of this 'pedagogical turn' by the majority of the academic community is not to be expected in the foresee-

40 Carol Anderson, *Eyes Off the Prize. The United Nations and the African American Struggle for Human Rights, 1944-1955*, USA: Cambridge University Press, 2003; *id.*, *Bourgeois Radicals. The NAACP and the Struggle for Colonial Liberation, 1941-1960*, USA: Cambridge University Press, 2015.

41 Roland Burke, *Decolonization and the Evolution of International Human Rights*, USA: University of Pennsylvania Press, 2010.

42 Steven L. B. Jensen, *The Making of International Human Rights. The 1960s, Decolonization, and the Reconstruction of Global Values*, UK: Cambridge University Press, 2016.

43 V. Luis Eslava, Michael Fakhri, Vasuki Nesiah (ed.), *Bandung, Global History, and International Law. Critical Pasts and Pending Futures*, USA: Cambridge University Press, 2017.

44 Gen. Ass. Res. 1514 (XV).

45 A/RES/18/1904.

46 Although with many defects, v. Paul Gordon Lauren, *The Evolution of International Human Rights. Visions Seen*, Philadelphia: University of Pennsylvania Press, 2011 (3rd ed.), p. 195ff.

47 Noam Chomsky, «The Responsibility of Intellectuals», *The New York Review of Books*, 23.02.1967 (available at <<http://www.nybooks.com/articles/1967/02/23/a-special-supplement-the-responsibility-of-intelle/>>, accessed at 25.05.2016); *id.*, *Quem governa o Mundo?*, Lisboa: Editorial Presença, 2016: 15-33.



able future. However, the relevance of the facts and analysis detailed above must not be ignored. There is no doubt that this perspective (and complementary bibliography) offer an innovative clarifying context and reference on the paradoxes that surround the UDHR since its genesis, and still hollowly hover around human rights in general. Even better, they can help overcome some justified suspicions that haunt these rights as the most recent form of the *ius publicum europaeum* and of another legal 'Orientalism'. Such contributions indeed provide support for an expansive understanding of human rights – correcting the conservative and neoliberal one – backing the progressive doctrine that assumes them as an unprecedented *ius totius orbi*, truly global and egalitarian.

We should agree that all legal and political activities regarding human rights, or under its aegis, must be made with the maxim of knowledge and critical conscience that this dissident episteme enables. Thus, the most possibly complete disposal of theoretical, historical, philosophical, normative, *et cetera*, referents is a nuclear and inalienable part of the role played by human rights pedagogues. However, what should be done with such knowledge is the (individual and collective) responsibility of the many legal and political actors, in their various fields of action. Therefore, to quote the North-American historian Mary Ann Glendon, at the least we should call for the UDHR to not be treated «like a monument to be venerated from a distance», but as a «living document to be re-appropriated by each generation».⁴⁸ Human rights must continue to be an «authentic germ of indestructible nonconformity», to quote the Portuguese legal scholar Orlando de Carvalho.⁴⁹ This should assist us all to stand, more than *enragés*, as lawyers «engagés».⁵⁰

Miguel Régio de Almeida

PhD. candidate on Legal Philosophy (University of Coimbra, Faculty of Law)

PhD. researcher (Foundation for Science and Technology, Portugal)

miguel.regio.almeida@gmail.com

Miguel Almeida is a Lecturer in the School of Technology and Management, Polytechnic of Leiria (Portugal), and a PhD. candidate in Legal Philosophy at Coimbra Faculty of Law (Portugal).

His academic work focuses primarily on Philosophy of Human

Rights, Critical Legal Thinking and Cultural Legal Studies. The present text was developed while benefiting from a PhD. scholarship, granted by the Portuguese National Funding Agency for Science, Research and Technology. The author aims to reinforce a counter-hegemonic approach to the history and philosophy of human rights.

⁴⁸ Mary Ann Glendon, *op. cit.*: p. XVII.

⁴⁹ Orlando de Carvalho, *Os Direitos do Homem no Direito Civil Português*, Coimbra: Vértice, 1973: p. 14 (the translation is mine).

⁵⁰ Roland Weyl, *Une robe pour un combat. Souvenirs et réflexions d'un avocat engagé*, Paris: Messidor, 1989.



Neoliberalism and democracy

ANTÓNIO JOSÉ AVELÃS NUNES

ABSTRACT:

This essay seeks to frame the problem of globalisation by characterising it as a neoliberal policy and rejecting the thesis that it is an inevitable consequence of scientific and technological development.

It analyses the significance of the period from the Keynesian consensus to the so-called Washington Consensus, which “codifies” the dogmas that fueled the monetarist counter-revolution and informs neoliberal policies on a global scale.

The essay considers neoliberalism incompatible with democracy. It is rather the dictatorship of big financial capital, overlapped with productive capital that drives capitalism as a whole. It reserves to itself the enormous gains in productivity resulting from the scientific and technological development in the last decades. This was a time marked by the globalisation of the labor market, which has sharply tilted the balance of forces in favor of big financial capital.

It designates and characterises the capitalism of systemic crime, describes the new Leviathan that is being built, and explains the threat of the emergence of new forms of fascism, which are much more violent than the violent market fascism (Samuelson) which seeks to pass as friendly fascism (Bertram Gross).

As Eric Hobsbawm, stated “our world is at risk of explosion and implosion. It has to change (...), and the future cannot be a continuation of the past.”

1. – We are told that we live in a globalised world and that there is no point in challenging the dictates of globalisation, because it is an *inescapable* phenomenon of our existence, a *necessary* and *inevitable* consequence of scientific and technological development.¹

This is a dangerous ideological discourse which conceals reality because it refuses to analyze it critically.

The world has known other eras with similar conditions to those of today, wherein the mastery of scientific and technological knowledge enabled imperial powers.

The *first wave of worldwide integration and globalisation* is linked to the oceanic voyages carried out by the Portuguese and Spanish explorers, from the 15th century onward. They were made possible by the evolution of knowledge and techniques in the fields of shipbuilding, astronomy, cartography, the regimen of wind and tides, and the arts of war.

This *first wave of worldwide integration and globalisation*, which extended the boundaries of the transit of people, the commerce of goods and allowed the Iberian peoples to dominate the world (which they divided among themselves, in 1494, through the *Treaty of Tordesillas*), was marked by colonisation, the oppression of colonised peoples and the slave trade. It would be absurd to argue that the aforementioned developments were the inevitable consequence of the evo-

lution of science and technology that gave “new worlds to the world” and demonstrated that the Earth is round.

A *second wave of globalisation* occurred in the last quarter of the 19th century, as a result of the *second industrial revolution*. It was characterised by a series of scientific and technological inventions that made the world smaller. They enhanced energy sources, particularly in transportation and communications.

This *second wave of globalisation* led to the resurgence of colonialism, the *race for colonies* and the systematic exploitation of colonised territories which were subordinated to the economic and political interests of the metropolises. As *dominated economies*, they were integrated into the networks of the *unified world market*. They were subjected to the logic of *capital accumulation on a world scale*, which definitively consolidated capitalism as a world system and opened the path to the *New Imperialism*.

The *race to the colonies* was embodied in the notable *Berlin Conference* (1884/1885), which began the process of dividing the colonised territories among the great capitalist powers. That development constitutes one of the most significant events in contemporary history. First, it generated conflicts between the capitalist powers; ultimately, the two major world conflicts of the 20th century originated from inter-imperialist conflicts in the struggle for “living space.”

¹ This text served as a support to the Closing Conference of the International Conference on the 50th Anniversary of the UN Covenants on Human Rights, organised by the International Association of Democratic Lawyers and the Portuguese Association of Democratic Jurists, which took place at the Faculty of Law of the University of Lisbon, between 10 and 12 November 2016. I offer it, with friendship and consideration, to my friend José Pinheiro Lopes de Almeida.



Second, it created the situation of dependency and “underdevelopment,” which condemned the dominated territories, even though they became formally independent on the political level.

This *second wave of globalisation* confirmed the original brand of capitalism as a “civilization of inequalities”: it was this that led to the disparity between the so-called developed countries and the so-called underdeveloped countries. No informed person, however, would argue that the race for the colonies, the emergence of imperialism and the development of inter-imperialist conflicts were the automatic, inescapable consequence of scientific and technological development.

2. – The colonised peoples were the victims of these two waves of globalisation and worldwide integration. They suffered from *hindered development*, as a result of the ascendancy of the capitalist powers and their “society of abundance.” The *third wave of globalisation* (beginning in the mid-1970s) continued the exploitation of the so-called “underdeveloped countries,” reducing other countries, worldwide, to the status of colonies.

Thus, to paraphrase Amartya Sen, globalisation is a world in which “the sun never sets on the Coca-Cola empire.” But it is worth digging a little deeper to understand this phenomenon.

Globalisation is a complex phenomenon, which presents itself in multiple aspects. They include a philosophical, ideological and cultural order. But it is in the field of economics in which we find the key to understanding the strategic characteristic of this phenomenon. Its ultimate goal is to create a system of globalized trade, free from physical or legal barriers, in which all types of goods circulate freely. These include raw materials, semi-products and finished agricultural and industrial goods and services, as well as “financial products,” capital and technology. But this freedom no longer applies to workers. Indeed, the great imperial powers attempt to barricade themselves in their armed fortresses, in order to avoid a new “invasion of the barbarians.”

An essential characteristic of *neoliberal globalisation* is the *hegemony of financial capital over productive capital*. The *process of financial globalisation* assumes, in this context, fundamental importance. Generally, it results in the creation of a *single capital market* on a worldwide scale, within which the *principle of the free movement of capital* governs. It allows large transnational conglomerates to invest their capital and bor-

row money anywhere in the world, at any time of the day or night.

3. – The dominant discourse seeks to convey the idea that *globalisation* is a *spontaneous and inevitable process*, an automatic consequence of scientific and technological development, namely, the transformations in transport systems and information and communication technologies. These allow control from the “centre” - a productive structure spread over several regions of the world. Information can be obtained and actions taken in real-time, anywhere on the planet, from any point on the planet.

Neoliberal globalisation is truly a *policy of globalisation*. in the service of a *political project*. It is conceived and carried out consciously and systematically by all who wield political power. And it is supported, as never before in history, by the powerful arsenal of the devices that produce and spread the *dominant ideology*: the totalitarianism of *single thought* based on the dogmas of *neoliberalism*.

The scientific and technological revolution cannot be confused with globalisation, nor can globalisation be seen as the inevitable result of that revolution. In the early days of the industrial revolution, workers saw machines as their “enemy” and so they destroyed and sabotaged them. They soon realised, however, that their class enemy was not the machine, but rather another social class. It is clear today that the source of our ills is not the progress of science and technological innovation. In fact, the development of science and technology is *the vehicle of human liberation*.

The critique of *neoliberal globalisation* cannot, therefore, be confused with the defense of a return to a “lost paradise” that denies science and progress. The problem with contemporary globalisation is not, therefore, the scientific development that facilitates some of the instruments of “neoliberal globalising politics.” Rather, it is the *neoliberalism* that fuels it, the structure of the powers upon which it rests and the interests it serves. Those are increasingly the interests of the small elite who control the financial-speculator capital.

As neoliberal globalisation is a *political project*, its opponents, committed to avoiding a new era of barbarism, must establish an *alternative political project*. It must be based on trust in humanity and its abilities, inspired by humanistic values and committed to objectives that “the markets” neither recognise nor are able to pursue. This is a project that rejects the imposition of a deterministic and inevitable logic, with *no possible alternative*, to the *policies of neoliberal globalisation*.



4. – From 1967 forward, there has been a series of crises in capitalist economies. The first sign of the *structural crisis of capitalism* was the unilateral rupture of the Bretton Woods Agreement by the USA (1971), which ended the conversion of the dollar into gold, delivering the market to speculators and controlling the exchange rates.

The so-called *oil crises* followed (1973-1975 and 1978-1980). They ended the fallacy of *capitalism without crises* that some deemed to be a “conquest” of the *Keynesian Revolution*. With the emergence of *stagflation*, they exposed the limits of the Keynesian State and Keynesian policies, paving the way for the triumph of the *monetarist counter-revolution*. This began the kingdom of the *market-god* and capitalism assumed its undisguised nature as a *civilization of inequalities*.

In the wake of F.A. Hayek, it is proclaimed that “civilization is the result of spontaneous growth and not of a will” and that only the “spontaneous order” embodied in the market can ensure a *free society*. It identifies public policies as the *road to serfdom*, especially those that aim to correct injustices. According to Milton Friedman, “men of good intentions and goodwill who wish to reform society (...) and achieve major social transformations” are condemned as *internal enemies*. This phenomenon is based on the expansion of the state’s sphere of responsibility and the broadening of its scope.

The fight against the *internal enemy* has always been the driving force and the “legitimising” reason for totalitarianism. Neoliberal ideology doesn’t mean just a radical opposition to the underlying philosophy and concrete practice of *economic and social democracy* that has achieved the stature of constitutionality in a significant number of countries. It also includes projects of a totalitarian nature that cannot be detached from certain currents of political philosophy. They decry the “excessive burden of government,” that is, the welfare state of Keynesian economics. They accuse it of having led to the “ungovernability of democracies” and the “excess of democracy” which has provoked a “crisis of democracy.” It has fueled the war against the “oppressive monopolies of work” (Gottfried Haberler) by those who proclaim that “unions are becoming incompatible with the free economy market.”

Neoliberal ideology has elevated *freedom of choice* (one of Milton Friedman’s “glories”) to the category of *the mother of all freedoms*, a *sine qua non* of human dignity. But Friedman adds that anyone who is against *freedom of choice* is against *true democracy* (F. A. Fonseca). Recall that in defense of the *veritable truth*, the *Holy Inquisition* was created, which forced

Galileo to deny his truth. In addition, the *Inquisition bonfires* were constructed, in which Giordano Bruno was burned to death because he refused to capitulate to what Galileo eventually accepted.

5. – Regarding the monetarist counter-revolution, some speak of the *substitution of politics by the market* or even of the *death of politics*. This is a correct judgment. It would also be accurate to say that it is another way of conducting politics because, as the state, *the market is a political institution*.

In fact, far from being “a given invariant of human nature” the market is a recent “invention.” It only emerged under certain historical conditions, when *companies* replaced *families* as units of production par excellence. It appeared when the means of production ceased to operate for the *satisfaction of the needs* of people (of families), and instead led to a *monetary*, homogeneous, quantifiable and measurable *gain*, that is, *profits for the capitalist class*.

The market, like the state, is therefore a *social construct*. It is a *historical creation* of humanity, which emerged in certain economic, social, political and ideological circumstances. It coincided with the advent of capitalism as an *autonomous mode of production*. Since the early days of capitalism, the market has functioned as a *political institution* designed to regulate and maintain certain *structures of power* that guarantee the prevalence of the interests of certain social groups over the interests of other social groups, resulting in a *civilization of inequalities*.

In a seminal book on this subject, Professor Natalino Irti (FD/Univ. Rome) demonstrates that the market is “the ‘visible hand’ of the law” and “an artificial organism, built by a political decision of the state.” He argues that “*market, politics and law* are not isolable [entities].” And FD/USP Professor Eros Grau points out that *market regulation* is, since the early days of capitalism, the essential function of *bourgeois law* acting as an instrument of “domination of civil society by the market.” He concludes that the *regulation of the market by the state (by positive law)* turns the market into “a sign that connotes a *political project*, a *principle of social organization*.” That is to say, “market and state do not only coexist, but they are also interdependent, building and reforming themselves in the process of their interaction.” They are both institutions of *social power* and *political power*.

Thus, the *defense of the market*, as opposed to the active presence of the state in the economy and the subordination of economic and financial power to democratic political power, does not represent just a *technical point of view* regarding



a *technical problem*.

The defense of the market means the defense of the liberal conception of the state. It is understood as a phenomenon separate from the *economy* and *civil society*. It considers the *non-intervention* of the state in the economy to be a corollary of the alleged nature of the state as purely political.

And it also means defending a model of society in the style of Hayek, who thinks the expression *social justice* should be abolished from the language of economists. This is justified by the claim that it is not “an innocent expression of goodwill towards the less fortunate, (...) having become a dishonest suggestion that one must agree with the requirements of some specific interests that do not offer any authentic reason for them.”

This conception devalues the lesson of the physiocrats, John Locke and Adam Smith, and deliberately ignores the “understanding” of the *class nature of the state* (in Marxist terms). It reveals itself incapable of comprehending that the so-called *non-intervention* of the state in the economy is just. – There are different types of “intervention.” One of the ways the *capitalist state intervenes in the economy* is to fulfil its essential mission of guaranteeing the general conditions indispensable for the operation of the capitalist mode of production and for the maintenance of the social structures that make it viable.

In that vein, the *defense of the market* conveys a conception of the *social order that is considered desirable* and enshrines an attitude of *defense of the social order* that entrusts everything to the market. Thus the *critique of the market* and its supposed *natural character* (by Keynesians, radicals or Marxists) means the recognition of the need to *introduce changes in the established social order*. This is designed to perpetuate capitalism or even *replace* the capitalist economic-social order (in which the market is one essential pillar) with *another social order* that surpasses capitalism.

6. – One of the fundamental precepts of neoliberal ideology is the attempt to reduce the state to a kind of *minimum state*, with the aim of hiding the fundamental role of the *capitalist state* in the definition and execution of the *policies of neoliberal globalisation*.

Economic liberalism worked given the historical conditions of the 18th and 19th centuries, which are considerably different from the current conditions. The liberal “solution” of imposing on workers the burden of “paying for the crisis” (mass unemployment and low and decreasing wages, until it would pay to hire more workers) only functioned

because capitalism was then, without disguise, “a system in that those who could not work could not eat either” (Samuelson/Nordhaus). And those who had nothing to eat died, as it was “natural” and “fair,” according to the *natural laws* of the market...

But the world has changed. The scientific and technological revolution, as well as the capitalist concentration, have transformed capitalist structures and brought enormous gains in productivity. Workers reinforced their class consciousness and gained strength in unions and at the political level. Universal suffrage prevented governments from continuing to ignore with impunity the sacrifices (and the sacrificed) occasioned by the cyclical crises of the capitalist economy, regardless of their duration and intensity.

As workers gained the right to universal suffrage and most civil and political rights, the *laissez-faire* attitude of the privileged culminated in the *Great Depression* of 1929-1933. Capitalism itself was in danger of imminent collapse.

In the 1950s, Raúl Prebisch (the Argentine who was the first president of ECLAC) understood that, in the context of Latin America, liberalism (structural adjustment imposed by the IMF on countries in financial difficulty – the famous *Dr. Jacobson's pills*) could only be put into practice *manu militari*, by force of arms.

Now, when the almost exclusive protagonists are the large transnational conglomerates, it makes no sense to interpret globalisation as a return to the times of “competitive capitalism,” now projected on a world scale. And it is also evident that the neoliberalism of today cannot be confused with the return to *laissez-faire* and free markets, which are said to dispense with the “intervention” of the state in the economy. István MÉSZÁROS (*The 21st Century*, cit., 33) is correct when he argues that the national state remains “the comprehensive command structure of the established order” and “the ultimate arbiter of comprehensive socio-economic and political decision-making, as well as the real guarantor of the risks assumed by all transnational economic enterprises.”

From another perspective, the national state remains the matrix of freedom and citizenship and continues to provide the only space in which workers can, within the framework of the *democratic rule of law*, organize and struggle in defense of their rights and the transformation of the world.

One of these days the national state may announce that the news of its death has been somewhat exaggerated...



7. – It is unmistakable that the *neoliberal political project* of today is not a libertarian project, which dispenses with the state. In the class societies in which we live, capitalism presupposes the existence of the *capitalist state*. But neoliberalism, as an ideology, aims to reverse the correlation of forces between capital and labor in favor of big financial capital. It requires a *strong class state*, capable of pursuing ambitious goals.

Neoliberalism is not a foreign element to capitalism. Neoliberalism is the rediscovery of capitalism itself. It is the unmasking capitalist state.

Neoliberalism is pure, unadulterated capitalism, operating as if it will last forever. It does not think it must bear the “price” of *social commitments* (the *welfare state*). And it allows all liberties to capital, even those that kill the freedoms of the workers who live by the fruits of their labor.

Neoliberalism is the *dictatorship of the bourgeoisie*, without concessions. More specifically, it is *the dictatorship of big financial capital*.

This *dictatorship* has imposed the *violence* of *neoliberal policies* which have fallen onto workers. It aims to transfer productivity gains to capital, in an attempt to counter the *downward trend in the average rate of profit*. This violence has included: (1) the imposition of tax systems that enrich the rich (the holders of income from capital) at the expense of the poor (the holders of income from work); (2) the deregulation of industrial relations; (3) the “war” against unions; (4) the “confiscation” of workers’ economic, social and cultural rights (which many constitutions enshrine as *fundamental workers’ rights*); (5) the evisceration of *collective bargaining* (which proved to be, as the ILO has shown, an instrument of income redistribution in favor of workers, more effective than Keynesian-inspired redistribution policies); and (6) the dismantling of the *welfare state*.

8. – The *neoliberal globalisation policy* has taken a giant step with the acceleration of the so-called *financial innovation process*, namely the development of markets for *derivative financial products*. These are *virtual products* whose free creation was authorised by the legislation that deregulated the financial system, multiplying *fictitious capital* and fueling *speculation*. This facilitated the appropriation, by financial capital, of a significant part of the wealth created by the *real economy* and shaped *casino capitalism* as *capitalism of systemic crime*.

It is estimated that *futures markets* mobilize financial resources equivalent to eight times the annual world GDP, controlling the markets for commodities such as food

(corn, wheat, rice and soybeans), minerals, oil and other energy sources, manipulating the respective prices at their discretion. The power this represents is what gives meaning to the truism that such “products” are true “weapons of mass destruction” (Warren Buffet).

But these weapons did not appear spontaneously. They were invented and produced, consciously and systematically, by the financial system, with the backing of the capitalist state and with the support of all the violence it is capable of marshalling. The “revolution” in telecommunications and information technology made life easier for *big financial speculative capital* which can play 24 hours a day in a worldwide “casino.” But it is incorrect to assert that *casino capitalism* and *neoliberal globalisation* are the *inevitable consequences* of scientific and technological development.

It was a *strong state* that created the conditions which led to the refusal to honor the commitments of the times of the *Keynesian social state*, destroying the pillars of the *Keynesian Consensus* and replaced by the so-called *Washington Consensus*. It was the institutions of political power (national states and international organisations dominated by financial capital and their states) that built, brick by brick, the empire of *neoliberal capitalism*. Inspired by the dogmas “codified” in the *Washington Consensus*, they included: (1) total freedom of trade (without customs barriers or other obstacles to the free movement of goods and services); (2) *absolute freedom of movement of capital* on a global scale (the “mother” of all *freedoms of capital*); (3) *deregulation* of all markets (especially financial markets) to benefit “organised money” led by professional and institutional speculators; (4) freedom to create *derivative financial products*; (5) imposition of the dogma of *central bank independence*, which has translated into a kind of “privatisation” of national states, wholly dependent on “markets” (such as families or businesses) for their own financing (of public policies); and (6) privatisation of the public business sector, including public services (even water!) and strategic companies that support national sovereignty.

Ultimately, national states are the drivers of *neoliberal globalisation*. They are parties to the World Trade Organization’s *free-tradism*. (which has always been the ideology and policy of dominant powers and interests) and they are responsible for the *policies of neoliberal globalisation*, which paved the way for the *capitalism of systemic crime*.

9. – The emergence of a real *world labor force market* is perhaps “the main social consequence of globalization.” We are undoubtedly facing a new element in the characterisa-



tion of global capitalism, which did not exist in 1916, when Lenin published the seminal treatise on *Imperialism*. And it is an element that has acted contrary to the interests and rights of workers.

The enormous increase in the *reserve army of labor* for the benefit of large corporations in powerful countries worldwide has facilitated the implementation of the neoliberal program inscribed in the *Washington Consensus*.

“Imagine, for a moment,” writes Joseph STIGLITZ (*The Price...* 127), “how the world would be like if there was free mobility of the labor force, but no mobility of capital.” He answered, “Countries would compete to attract workers. They would promise good schools and a good environment, as well as high taxes on capital.”

But the globalised world in which we live does not present itself in this way. It is governed instead by the *principle of absolute freedom of movement of capital, in a single capital market on a universal scale*. In these conditions, “globalisation, as it has been defended, often seems to replace the old dictatorships of national elites with new dictatorships of international finance.” This is because, stresses STIGLITZ (*El Malestar...*, 308-313), the “asymmetric globalisation” resulting from neoliberal policies serves the interests of large corporations that *derive their incomes* from “the political machine,”.. They get states “to define the rules of globalisation in order to increase their bargaining power with workers.”

These are the rules in force in the so-called Western democracies, driven by big financial capital. The elections themselves are transformed into an “electoral business,” replacing the democratic principle of “one person, one vote” with the plutocratic principle of “one dollar, one vote.” As Joseph Stiglitz, maintains, it is politics that “determines the rules of the economic game” because “markets are shaped by politics” and “the rules of the political game are shaped by the top 1%.”

Societies like these cannot be considered democracies. Indeed, as Paul Krugman noted at the end of 2011, “the extreme concentration of income is incompatible with real democracy.” It is characterised by the “asymmetry between power and legitimacy. Great power and little legitimacy on the side of capital and states, small power and high legitimacy on the side of those who protest,” according to Ulrich Beck (*ob. cit.*, 20/21 and 110). There is no democracy when the holders of political power lack democratic legitimacy (“capital and states”) and when the people lack power. Democracy is nothing but *the power of the people*.

These are, as Federico Mayor Zaragoza observes, the consequences of neoliberal policies pursued by all those who, at a certain historical moment, agree to carry out a real “market coup” by agreeing “to replace democratic principles with the laws of the market.” (<http://www.other-news.info/noticias/>, Dec / 2012)

10. – Important theoretical studies confirm that neoliberal globalisation requires a *strong state*. Based on the experience of Thatcherism, Andrew Gamble concluded, in a book published in 1994, that “the New Right believes that to save the free society and the free economy it is necessary to restore the authority of the state. (...) The key doctrine of the New Right and the political project it inspired is the free economy and the strong state,” capable of “restoring authority at all levels of society” and fighting both *external enemies* and *internal enemies*.

In a more recent book, Wolfgang Streeck recalls “it has already been demonstrated several times that neoliberalism needs a *strong state* that is able to curb social and, in particular, union demands to interfere in the free play of market forces.”

The German sociologist critically analyses the ongoing process of *emptying democracy*, which he characterises as “an immunisation of the market to democratic corrections.” Streeck begins by stressing that this process can be carried out “through the abolition of democracy according to the Chilean model of the 1970s” [an option that he believes is not currently available], or “through a neoliberal re-education of citizens” [promoted by what he designates as “capitalist public relations”].

He then details the paths being taken to achieve “the elimination of the tension between capitalism and democracy, as well as the consecration of a lasting primacy of the market over politics.” They include “*reforms* of the political-economic institutions, through the transition to an economic policy based on a set of *rules*, for *independent central banks* and for a *fiscal policy immune to electoral results*; through the transfer of political-economic decisions to *regulatory authorities* and *groups of ‘experts’*, as well as *curbs on indebtedness* enshrined in the constitutions, to which states and their policies must be legally bound for decades, if not *forever*.”

The realisation of the *lasting primacy of the market over politics* has other requirements as well. The states of advanced capitalism must be restructured in such a way as to permanently instill confidence in the owners and managers of capital, ensuring, in a credible manner, through institutionally es-



tablished political programs, that they will not intervene in the “economy.” If they do intervene, they will only do so to impose and defend market justice in the form of an adequate return on investment in capitals. For this, concludes the author, it is necessary to neutralize democracy, that is, the social democracy of democratic capitalism of the post-war period, as well as to carry forward and complete the liberalisation in the sense of Hayekian liberalisation, namely an immunisation of capitalism against interventions of mass democracy.

There is only conclusion to be drawn: “Neoliberalism is not compatible with a democratic state, if we understand democracy as a regime that intervenes, on behalf of its citizens and through public authorities, in the distribution of economic goods resulting from the functioning of the market.

11. – In the European context, these reflections help us to understand what is at stake when the “dominant” voices speak of *structural reforms*, *golden rules*, *central bank independence*, *state reform*, *healthy finances*, the necessary reform of the *welfare state*, the irreplaceable role of *independent regulatory agencies*, the benefits of *social consultation*, the *flexibility* of the labor market and the need to “free” *political action from the control of the Constitutional Court*.

They reinforce the concerns of many writers who have warned that the structural treaties of the EU have set in motion a “political power that is no longer separated from economic power and, above all, from financial power” (Étienne Balibar). This is a political power that “corrodes any democratic credibility” of the European integration process (J. Habermas), transforming it into a “political and economic catastrophe” (W. Streeck).

With the “argument” that the *peoples of the South* are incapable of self-government, a new *Leviathan* is being built, to moderate those who live above their means, to govern the present and guarantee the future. This is a new *Leviathan* that reduces politics to the mere *mechanical application of equal rules for all* (ignoring that the EU is made up of countries with completely different situations and histories). These rules are, for this very reason, the *negation of politics* (and of *freedom of decision* that it presupposes, with corresponding *responsibility*), the *denial of citizenship* and the *death of democracy*. It is a new *Leviathan* that is, without pretense, the *dictatorship of big financial capital*, which has been cruelly impoverishing, humiliating and colonising the *peoples of the South*.

Ultimately, Streeck’s reflections compel the conclusion that

these “soft” solutions (although muscular, even violent) will only be continued if “the Chilean model of the 1970s” is not available to big financial capital. If conditions permit (or compel, due to the impossibility of deepening the exploitation of workers through the aforementioned “re-formist” methods of “postwar democratic capitalism”), the capitalist state can dress up and arm itself again as a *fascist state*. It will be maskless and carry far more serious dangers than those inherent in both *market fascism* (of which Paul Samuelson warned in 1980 at a conference in Mexico) and *friendly fascism* (the title of a book published in 1981 by Bertram Gross, who collaborated with the Franklin D. Roosevelt administration during the *New Deal*).

12. – Since the mid-1970s, the system closed ranks in an attempt to offset the *downward trend in the average rate of profit* and prevent and overcome increasingly frequent and more difficult crises. Even when GDP begins to grow, high unemployment rates remain and the new jobs that are created offer lower wages than those that prevailed before the crisis. The *structural factors* that trigger crises (which translate into generalised decline in the purchasing power of the great majority of the population) made the presence of a *class state* increasingly stronger and more committed to financial capital, to “organised money.”

In 1994/1995, the crisis that caused the severe devaluation of the Mexican peso nearly sank the US financial system, and with it, the *great casino* of world capitalism. Serving rulers realised that they might be living the story of the *sorcerer’s apprentice*. Panicked, they proclaimed, through the voice of French President Jacques Chirac (October/1995), that speculators are “the *AIDS* of the world economy” and protested that “the world is in the hands of *these guys*,” as Michel Camdessus, then Managing Director of the IMF, wrote unceremoniously.

Despite the alarm of the creators at the behaviour of their own creations, nothing was done to end to this libertarian vertigo, not even under the pretext of saving the world economy from the kind of “AIDS” that is undermining its resistance. And this was all done in the name of the *freedoms of capital* and in honor of the *market god*.

Even in light of the evident risk of a pandemic, the guardians of the *free market* continue to defend the *same actors* and spare no effort to safeguard their private sanctuaries. These include all kinds of *off-shores*, so-called *tax havens* or *bank havens*, which are also (and increasingly) primarily *judicial havens* (lawless spaces, without taxes, without police, without courts). They are *mafia states* or *bandit states*, whose business



is to *sell sovereignty*. This is a business that mobilizes more than 1/4 of the world's GDP, to which the cream of financial capital on a global scale and the structures of political power at its service are committed. It is a business of laundering *dirty money*, through tax evasion and fraud. It profits from trafficking in arms, drugs, people and human organs. It reaps benefits from vast organised criminality, whose profits corrupt political leaders and parties. And it relies on international financial terrorism (which, under the pretext of warfare, supports the arms and security policies that are enemies of freedom and the wars that constitute *crimes against humanity*).

In the context of the fight against global crime and global terrorism announced after the attacks on the twin towers of New York (11/09/2001), journalist Francisco Sarsfield Cabral wrote (*Público*, 06/10/2001), "It will be in the determination to end *off-shores* that we will have real proof of the political will to fight terrorism and its allies. There, more than by military actions, it will be seen whether the anti-terrorist campaign is really serious."

But the "war on terrorism" was not serious, as Cabral himself acknowledged in 2008 (*Público*, 22.9.2008): "The fight against *off-shores* was defeated by the interests of those who profit from them." And those who profit from them are *organised criminals*, especially the ones committing crimes developed and/or shielded by the international financial system. This is accomplished with the exercise of *political power* at various levels, protected by the "arsenals" that constitute the *capitalist state* apparatus, the "godfather" of the "godparents" of *systemic crime* and their "men" in finance and in politics.

13. – No cogent argument can justify *tax havens*. But they are located in Europe itself (the *City* of London, Netherlands, Luxembourg, Switzerland, Monaco, Cyprus, Malta, as well as several territories of the Netherlands and the UK) and are present in other "civilised" locations, including Singapore, Hong Kong, the US State of Delaware, etc.

An investigation of the *Wachovia* bank (the fourth largest in the US), conducted after a complaint from one of its former employees, concluded that, in just four years, Wachovia brought US \$376 billion into the United States and laundered it. The investigation revealed that a high percentage of money laundering from cocaine traffic passes through the "respectable" *City* of London.

In mid-July 2012, newspapers reported that *HSBC* (an English bank considered the third largest in the world) was accused in the US of laundering billions of dollars from Colombian and Mexican drug cartels and engaging in other

illegal practices.

Also in the USA, the Swiss bank *UBS* and the German *Deutsche Bank* were found to be illegally manipulating the *Libor* and *Euribor* rates and deliberately selling toxic products. And the oldest of Swiss banks (*Wegelin & Co*) has been accused of helping US citizens hide more than \$1.2 billion from the tax authorities.

These banks should be nationalised, without the right to any compensation. And those responsible for such practices should be prevented from returning to banking, taken to court and assessed a penalty commensurate with the seriousness of their crimes. But financial capital "laws" dictated another, more "realistic" solution. Those banks paid fines and the U.S. Department of Justice agreed not to prosecute them. The official justification was fear that prosecution could jeopardise the stability of some of the largest banks in the world and ultimately destabilise the global financial system. That is, according to the literature, the normal treatment in cases like these. This is the profile of *systemic crime capitalism*.

In 2012, two professors from the University of the Andes (Bogotá) investigated the circuits of cocaine trafficking and the participation of the big banks in this criminal business. They found that the cocaine producing countries are left with only 2.6% of the trafficking profits, with the remaining 97.4% going to large dealers and big banks in wealthy consumer countries (mainly the UK and the USA).

However, warn these researchers, the system "aims at the repression of the small distributor, never trying to reach the big dealers of drugs or the financial systems that support them" because "it is a real taboo to pursue the big banks."

14. – Many other recent accounts confirm the close link between political power and some of the most powerful banks in the world, and their commitment to practices that constitute true *systemic crime*. They have, at least since 2005, *manipulated*, for their own benefit, the financial markets, through the falsification of the *Libor* rate. That is the reference rate used to determine the interest rates of contracts for financial products that assess a value corresponding to approximately ten times the value of world GDP.

These huge banks provide false data to the regulatory authorities. They use *privileged information* regarding the variation of the reference rate to their own advantage. This true *crime cartel* fraudulently earned many millions of dollars virtually overnight by betting against the "financial products" they themselves sold to their clients.



In 2012, the European Commission went public with these allegations. One of the Commissioners spoke of “scandalous behaviour on the part of the banks” and one of the vice-presidents of the Commission did not hesitate to describe “criminal activities in the banking sector.” Despite this, the Commission merely announced the EU’s intention to adopt legislation that *unequivocally prohibits* this type of action and now considers it to be *criminal activity* subject to *criminal sanctions*. One naively wonders: why were not the “criminal activities” to which the vice-president of the European Commission referred already subject to criminal sanctions? This is a scandal on top of the scandal of those “criminal activities.”

In 2013, newspapers reported that the European Commission decided to impose fines on some of the banks guilty of manipulating and falsifying the *Libor* and *Euribor* reference rates. One of the Commissioners said he was “shocked by the collusion between banks that should be competing” and two others spoke of *banksters* in this “organised money” elite.

This is a shameless admission that contemporary capitalism is the *capitalism of systemic crime*. Big finance capital is based on criminal practices. And for those who believe in the virtues of the market, manipulation of the markets must be considered a serious crime, a *crime against the market*, a *crime against capitalism*. Those faithful to the *market-god* will certainly consider it a *crime against their own divinity*. But instead of punishing criminals who commit such crimes, the political elite make deals with them. They do not take the criminals to court, so as not to destabilise the global financial system, which thrives on *systemic crime*. And this practice will continue, to the benefit of the *capitalist state* (and of all instances of *political power* in the service of capitalism) since the fines paid are a miniscule part of the profits that flow from criminal activities.

The unsuspecting *The Economist* (15/12/2012) is right that big banks are not only *too big to fail*, they are also *too big to jail*. Prisons were not built for the elite, but rather for the miserable, for people of color, for immigrants, for those not adapted to “Western civilization.” They were not created for the lords of the world, the ‘godparents’ of *systemic crime*, the veritable “owners” of prisons. The *capitalist state*, its law and its courts exist to guarantee this phenomenon.

Roosevelt is often credited with saying that allowing financial capital (the “organised money”) to dominate politics is more dangerous than entrusting the government of the world to “organised crime.” Whoever the author of this

theory, however, it confirms the current reality. Through the sacred *freedom of movement of capital* and the *free creation of derivative financial products*, *organised money* has been committing all kinds of *crimes against humanity*, crimes that affect the lives and dignity of millions of people.

This is the portrait of *systemic criminal capitalism*. This is the unfettered *dictatorship of big financial capital*. It is an intolerable situation - the complicity between the state and “organised money” (*organised crime*).

15. – In view of the crisis beginning in 2007-2008, many believed that another *New Deal* was imminent and the time had come to bury neoliberalism, already discredited on the theoretical level, once and for all. For some time, many politicians, economists and “commentators” tired of saying that *neoliberalism was dead*, that the world could not continue in the same vein as in recent decades, that “a global refoundation of capitalism” was necessary, and that “the ideology of the dictatorship of markets” died with the crisis (Sarkozy, *O Globo*, October 16 and 24, 2008).

That state of affairs, however, was short-lived. Big financial capital quickly imposed the naïve “argument” on shift officials that *there was no alternative to capitalism* and neoliberalism. Joshcka Fisher (former leader of *The Greens* and former Minister of Foreign Affairs of a German government led by the SPD), thus summarises the position of those who have given up the fight: “no one can do politics against the markets.” (*Apud* U. BECK, *ob. cit.*, 58).

Capitalism, however, is not the end of history. Joseph STIGLITZ (*Diário Económico*, 15/6/2009) correctly noted that “this substitute for capitalism, in which losses are socialised and profits are privatised, is doomed to failure.”

The *policies that do not go against the markets*, the *neoliberal policies of regenerative and salvation austerity*, imposed *urbi et orbe* by the centres that rule the world, are policies “without democratic legitimacy” that “sin against the dignity of the people.” This was acknowledged by Jean-Claude Juncker, president of the European Commission, who publicly stated (February 2015), “We have sinned against the dignity of the people!” But these policies, whether sinful or not, constitute legalized crime, unacceptable in a democracy, because no democracy can accept policies that violate the dignity of the people. How then can we classify *crimes that threaten the dignity of the people*? Are we not facing real *crimes against humanity*?

How can we admit that there is *no alternative* to the *capitalism of systemic crime*?



16. – We live in a time of great contradictions and great despair. Life experience teaches us that humans are their own worst enemy. But the productivity advances from the scientific and technological revolution that has characterised the last 200 years give us reason to believe we can build a world of cooperation and solidarity, a world capable of satisfactorily meeting the *basic needs* of all of its inhabitants. So this is also a time of hope.

Despite the “global dictatorship” that characterises this era of *unilateral thinking*, we must take advantage of the gaps opening in the fortress of globalised capitalism. “Those who protest against globalization,” *The Economist* noted in 2000, “are right when they say that the most pressing moral, political and economic issue of our time is third-world poverty. And they are right that the tide of globalisation, powerful as the engines driving it may be, can be turned back. The fact that both these things are true is what makes the protesters – and, crucially, the strand of popular opinion that sympathises with them – so terribly dangerous.”

In a moment of clarity, one of the beacons of neoliberalism admitted what we already knew: the *engines of neoliberal globalisation* can be stopped or even reversed. The *inevitability* of neoliberal globalisation is a myth; the thesis that *there is no alternative* is false.

Furthermore, in view of the contradictions inherent in neoliberal globalisation itself, many believe that globalisation, hailed by the defenders of the system as the solution to their problems, “triggers forces that highlight not only the uncontrollability of the system by any rational process, but also, and at the same time, its own inability to fulfil the control functions that are defined as its condition of existence and legitimacy.” (I. MÉSZÁROS, *The Twenty-First Century*, 105)

As Eric HOBBSBAWM (*The Age of Extremes*) wrote, “the future cannot be a continuation of the past, and there are signs, both externally and internally, that we have reached a point of historic crisis. (...) Our world is at risk of explosion and implosion. It has to change.”

Globalised capitalism has gained strength. Capitalism’s defensive strongholds are increasingly difficult to conquer. But this economic and social system only survives by the worsening exploitation of workers. The capitalist system aims to circumvent the effects of the *downward trend in the average rate of profit* and provide big financial capital with the parasitic and criminal *incomes* on which it feeds. Its contradictions and weaknesses are subject to the effects so well exemplified by the old Portuguese maxim, *the bigger the ship,*

the bigger the storm.

The discussion about the demise of the *welfare state* – exacerbated by the current *crisis of fear* – is perhaps a sign that, like the sorcerer’s apprentice, capitalism may die immolated by the fire it is setting. Or, as Karl Marx noted, capitalism contains within itself the seeds of its own destruction. Mark Blyth observes that the welfare state is “a form of asset insurance for the wealthy.” However, he says, “those with the most assets are skipping on the insurance payments.” Indeed, perhaps they are playing with fire.

This *capitalism of systemic crime* is unsustainable. The tasks of those who seek to meet the challenge of *transforming the world* are urgent. As citizens, we are all responsible. We must engage in both theoretical work (which helps us understand reality in order to more effectively interact with it), and *ideological struggle* (which helps us to fight established interests and ready-made ideas and is, today more than ever, an essential factor of both political and social struggles). Jurists and academics thus have a great responsibility.

The scientific and technological development propelled by the bourgeois revolutions provided a meteoric increase in the productive capacity and productivity of human labor, creating more favourable conditions for social progress. This development of the productive forces (with the individual as creator, depositary and user of knowledge) must lead to new social relations of production, a new way of organising collective life, so that we can achieve happiness for everyone.

But necessary changes do not happen simply by believing a better world is possible; voluntarism and good intentions have never been the “engine of history.” Real change will take place as a result of the laws of development of human societies. Social movements can, however, accelerate the trajectory of history, even making their own history, if they are committed to the struggle for real social change. They must dream that it is possible. And if *the dream rules life* (as the poem by António Gedeão sung by Manuel Freire says), *utopia helps to pave the way* (as Eduardo Galeano teaches). *Dreaming is necessary*. Even in difficult times, especially in difficult times, as the Brazilian poet, composer and singer Chico Buarque told us. Even living under dictatorship, he dreamed and sang his “impossible dream” because he believed in it: “To fight, when it is easy to give in / (...) Deny, when the rule is to sell / (...) And the world will see a flower / sprout from the impossible ground.”

António José Avelãs Nunes: *Jubilated Full Professor at the*



University of Coimbra Faculty of Law (FDUC), Portugal (Director, 1996-2000); Director of the *Boletim de Ciências Económicas* (Economic Sciences Bulletin) (1995-2012). Vice-Rector of the University of Coimbra (2003-2009). Doctor Honoris Causa from the Federal Universities of Paraná, Alagoas and Paraíba, Brazil. Sigillo D' Oro from Università Degli Studi di Foggia, Italy. Doctor Honoris Causa from the Universidad de Valladolid, Spain. Correspondent Member of Academia Brasileira de Letras Jurídicas (Brazilian Academy of Legal Writings). Vice-President of the Instituto de Direito Comparado Luso-Brasileiro (Portuguese-Brazilian Institute of Comparative Law), Rio de Janeiro, Brazil. Member of the first five governments subsequent to the Carnation Revolution in 1974. Author of several books, published both in Portugal and abroad (Mexico, Brazil and Spain). Member of the Scientific Council of several Brazilian and Portuguese magazines. Vast collaboration and contributions in several magazines in Portugal, Angola, Brazil and Spain.

BIBLIOGRAPHY

AVELÂS NUNES, António José - *A Crise do Capitalismo - Capitalismo, Neoliberalismo, Globalização* (The Crisis of Capitalism - Capitalism, Neoliberalism, Globalisation) Lisbon, Editora Página a Página, 6th edition, 2013;

– *O estado capitalista e as suas máscaras* (The capitalist state and its masks), Lisbon, Edições Avante, 3rd edition, 2013;

– *Os trabalhadores e a crise do capitalismo* (Workers and the crisis of capitalism), Lisbon, Página a Página, 2015;

– *QUO VADIS, EUROPA?*, São Paulo, Editora Contracorrente, 2016;

– *O keynesianismo e a contra-revolução monetarista* (Keynesianism and the monetarist counter-revolution), reprinting of the 1st edition (1991), Lisbon, Página a Página, 2016 (with Author's Preface).

– *O neoliberalismo não é compatível com a democracia*, (Neoliberalism is not compatible with democracy), Rio de Janeiro, Editora Lumen Juris and Faculdade Guanambi Editora, 2016.

BALIBAR, Étienne – “Um novo impulso, mas para que Europa?” (“A new impulse - but for which Europe?”), in *Le Monde Diplomatique* (PT edition), March 2014.

BECK, Ulrich – *A Europa Alemã – De Maquiavel a “Merkievel”: Estratégias de Poder na Crise do Euro* (From Machiavelli to “Merkievel”: Power Strategies in the Euro Crisis), pt translation, Lisbon, Edições 70, 2013.

BLYTH, Mark, *Austeridade – A História de uma Ideia Perigosa* (Austerity – The History of a Dangerous Idea), pt translation, Lisbon, Quetzal, 2013.

FONSECA, Fernando Adão da – “Estado Garantia: o Estado Social

do Século XXI” (“Guarantee State: the Welfare State of the 21st Century”), in *Nova Cidadania*, No 31, Jan-March 2007, 24-29.

FRIEDMAN, Milton and Rose – *Free to choose*, pt translation (*Liberdade para Escolher*), Europa-America, Lisbon, (1st American ed., 1979).

GAMBLE, Andrew, *The Free Economy and The Strong State – The Politics of Thatcherism* (2nd edition), London, Macmillan, 1994.

HABERLER, Gottfried – “Inflación y Desarrollo Económico” (“Inflation and Economic Development”), in *Revista de Economía y Estadística*, 1958, No. 3, 81-83;

– “Política de salarios, empleo y estabilidad monetaria” (“Policy on salaries, unemployment and monetary stability”), in *Información Comercial Española*, August-September 1969, 165-173.

HABERMAS, Jürgen – *Um Ensaio sobre a Constituição da Europa* (On Europe's Constitution - An Essay), Lisbon, Edições 70, 2012.

HAYEK, Friedrich A. – *Studies in Philosophy, Politics and Economics* (1st ed., 1967), Routledge and Kegan Paul, London, 1978.

HOBSBAWM, Eric – *A Era dos Extremos. Breve História do Século XX: 1914-1991* (The Age of Extremes - Brief History of the 20th Century: 1914-1991), Lisbon, Editorial Presença, 1998.

IRTI, Natalino – *L'Ordine Giuridico del Mercato*, Bari, Laterza, 1998.

KRUGMAN, Paul – “When austerity fails”, The New York Times, 25.5.2011 (published in Portugal by Jornal i); – *Acabem com esta Crise já!*, Lisbon, Editorial Presença, 2012.

MÉSZÁROS, István – *O Século XXI – Civilização ou Barbárie? (Socialism Or Barbarism: Alternative To Capital's Social Order: From The American Century To The Crossroads)*, Brazilian Portuguese translation, Boitempo Editorial, São Paulo, 2006.

SAMUELSON, Paul and NORDHAUS, William – *Economia*, 12th and 14th editions, McGraw - Hill, Lisbon, 1988 and 1993.

SEN, Amartya – *Desenvolvimento como liberdade* (Development as freedom), Brazilian Portuguese translation, Companhia das Letras, São Paulo, 2000.

STIGLITZ, Joseph E. – *Globalization and its Discontents* (2002), Spanish translation, *El Malestar en la Globalización*, Madrid, Santillana Ediciones Generales, 2002;

– *O Preço da Desigualdade* (The Price of Inequality), Portuguese translation, Lisbon, Bertrand, 2013.

STREECK, Wolfgang – *Tempo Comprado – A Crise Adiada do Capitalismo Democrático* (Buying Time: The Delayed Crisis of Democratic Capitalism), Portuguese translation, Lisbon, Conjuntura Actual Editora, 2013.



La Kanaky, le droit à l'indépendance bafoué

MIREILLE FANON-MENDES-FRANCE

Les intérêts de l'Etat colonial plus importants que le droit à l'indépendance et à l'autodétermination du peuple kanak. Comment la France, pour sauver ses intérêts, manie l'ambiguïté et le paradoxe et comment l'ONU lui emboîte le pas ?

Lors de l'ouverture de la session 2020¹ du Comité spécial de la décolonisation qui marque aussi la dernière année de la troisième décennie internationale pour l'élimination du colonialisme, le Secrétaire général de l'ONU a souligné qu'il y avait encore 17 territoires inscrits sur la liste² du Comité et « attendant toujours que la promesse de l'autonomie se concrétise, conformément au Chapitre XI de la Charte, à la Déclaration de 1960 sur l'octroi de l'indépendance aux pays et aux peuples coloniaux et aux résolutions pertinentes de l'ONU ». Il a ajouté que « le Comité continue de renforcer ses relations, voire d'en établir de nouvelles, avec les territoires et les puissances administrantes (...) ».

Parmi les 17 territoires en quête d'indépendance et de souveraineté, il y a la Kanaky, dont le FNLKS, opposé à une normalisation coloniale avec la France, avait, à la suite des accords de Matignon, de ceux de Nouméa et après la mise en place du Comité des signataires³, décidé de saisir le comité spécial de la décolonisation de l'ONU pour assurer à la fois un processus de suivi et d'évaluation de la décolonisation.

L'ensemble des protagonistes en avait accepté le principe en novembre 2017. L'organisation Survie⁴ a suivi attentivement l'évolution de cette demande qui aurait dû être portée par la France et relève que l'Etat l'a boycottée en demandant à Josiane Ambiehl⁵ -cheffe du groupe du Département des affaires politiques de l'ONU chargé d'un « appui fonctionnel » au Comité de la décolonisation⁶-, si d'après elle, l'ONU était habilitée à réaliser cet audit. Elle a répondu par la négative, au prétexte que cette demande ne relevait pas de la compétence des Nations Unies.

En fait, elle a protégé les appétits français ; en mars 2018 « le Premier ministre a indiqué aux indépendantistes le refus

formel, cette fois du Secrétaire général de l'ONU, arguant qu'il n'était pas mandaté pour cet audit » et cela malgré les textes fondant l'action du Comité de la décolonisation dont la Résolution 1514⁷ de 1960 insistant sur « le désir passionné de liberté de tous les peuples dépendants et le rôle décisif de ces peuples dans leur accession à l'indépendance » et précisant que « ... la sujétion des peuples à une subjugation, à une domination et à une exploitation étrangères constitue un déni des droits fondamentaux de l'homme, est contraire à la charte des Nations Unies et compromet la cause de la paix et de la coopération internationales... » sans oublier que « ... le processus de libération est irrésistible et irréversible et que, pour éviter des graves crises, il faut mettre fin au colonialisme et à toutes les pratiques de ségrégation et de discrimination... ».

Cette réponse négative autorise à s'interroger sur la nature de la collusion entre le Secrétaire général de l'ONU et le gouvernement français pour qu'une telle demande d'audit soit refusée au peuple kanak alors qu'un tel procédé relève précisément de la compétence du Comité pour la décolonisation.

Comment ce même Secrétaire général peut-il parler de peuples qui attendent que la promesse de l'autonomie se concrétise alors qu'il refuse à l'un d'entre eux le money d'avancer dans la structuration de son indépendance.

On voit, à propos de ce refus d'audit, que le processus de décolonisation reste un lieu de tension où normalement le politique et le droit devraient s'affronter mais où ne s'affrontent toujours que des rapports de force basés sur les aspects financiers et militaires, si besoin.

Il faut aussi admettre que la Charte pose d'une part, les principes de « l'égalité de droit des peuples et de leur droit à disposer d'eux-mêmes » (art. 1, 2) ; quant au chapitre XI, concernant les territoires autonomes, il ne s'agit que d'une déclaration qui, à ce titre, n'est pas contraignante. L'ambiguïté de cet article ne réside-t-elle dans le fait que l'on ne parle ni de décolonisation et encore moins d'indépendance ;

1 21 février 2020

2 L'Épique Réinscription de la Polynésie Française sur la liste des pays à décoloniser», Pierre Carpentier, 22/10/2017 sur les blogs de Mediapart.

3 Article 6.5 ; Accord sur la Nouvelle-Calédonie signé à Nouméa le 5 mai 1998 ; JORF n°121 du 27 mai 1998

4 <https://survie.org/pays/kanaky-nouvelle-caledonie/>

5 Dont la présence a été demandée et obtenue par la France ; n'y aurait-il pas conflit d'intérêt car comment répondre aux normes impératives de la Charte des Nations unies quand un pays continue à coloniser et exploiter des peuples qui demandent leur indépendance ?

6 Souligné par Survie

7 <https://www.ohchr.org/FR/ProfessionalInterest/Pages/Independence.aspx>



il n'est question que « d'administrer les populations qui ne s'administrent pas encore complètement elles-mêmes, de favoriser (...) leur prospérité, d'assurer la culture des populations, leurs progrès politique, économique, social, ainsi que le développement de leur instruction, de les traiter avec équité et de les protéger contre les abus ». En fait les rédacteurs de la Charte n'ont fait que mettre en place un droit à la colonisation, sachant qu'en faisant cela, ils rendaient difficile tout processus de décolonisation. Les Etats occidentaux ont bien écrit une Charte pour eux, à leur avantage et à leur image, sans que soit remis en cause l'ordre de la domination, racialisant, raciste et colonial.

Les rédacteurs de l'article 73 laissent poindre, sans aucune vergogne, le paternalisme colonial de ceux qui se réjouissent d'apporter la culture, en un mot la civilisation et qui ne veulent pas perdre ou des intérêts financiers ou militaires.

Tout compte fait, n'est ce pas juste de dire que la Charte des Nations unies de 1945 consacre le droit international positif de ceux qui dominent à la suite de crimes de guerre, de crimes contre l'humanité et de génocide commis lors de la traite transatlantique négrière, la mise en esclavage, le colonisation et le colonialisme ? Cet article 73 n'est il pas tout simplement un instrument garantissant le droit à colonisation plutôt qu'un droit à la décolonisation ?

Peu importe les peuples. Ils restent asservis et leurs aspirations d'en finir rapidement et « inconditionnellement avec le colonialisme sous toutes ses formes et dans toutes ses manifestations » restent lettre morte. Le pays colonisateur en restera à ce que la Charte des Nations unies lui recommande : administrer, assurer la culture, le progrès politique –mais pas trop, les indépendantistes de la Kanaky sont visiblement allés, pour les forces coloniales, trop loin en demandant cet audit tout comme des indépendantistes guadeloupéens étaient allés trop loin en mai 1967, ce qui avait permis au gouvernement de les accuser de séparatisme, mot revenu à la mode en 2020...

Dès lors le champ lexical colonial s'explique aisément ; en effet, le droit à la décolonisation en 1945 n'était pas d'actualité ; seul régnait le droit international des vainqueurs blancs qui entérinait l'administration des territoires volés et pillés depuis des siècles par les colonisateurs.

Et peu importe si, pour y parvenir, ceux qui assurent des

fonctions de domination jouent avec le droit à l'autodétermination, fondement du droit international, reconnu et consacré par la Charte des Nations Unies et proclamé par l'ONU comme étant le droit de tout peuple à se soustraire à la domination coloniale.

Ce droit, qui devrait être la garantie d'une société pluraliste et démocratique, selon la formulation contenue dans la revendication en faveur d'un nouvel ordre économique international de 1974⁸, est neutralisé non seulement par certains Etats qui refusent d'abandonner leurs colonies et par les sociétés transnationales, le tout avec l'aval de l'ONU. Ce qui explique que le Secrétaire général de l'ONU puisse donner raison à un Etat colonial plutôt qu'à un peuple à qui est imposé une subjugation une domination et une exploitation étrangères, ce qui constitue un déni des droits fondamentaux de l'homme, (...) et compromet la cause de la paix et de la coopération internationales... ».

Comme le souligne encore Survie « l'Histoire regorge d'exemples où le mandat de l'ONU a été interprété librement, dès lors que la volonté politique existait, voire détourné franchement, comme en Côte d'Ivoire⁹!.

Ce refus est une preuve supplémentaire, s'il en fallait encore une, de la colonialité du pouvoir que la France exerce dans le cadre de ses relations internationales lorsqu'il s'agit de préserver l'exploitation de mines de nickel mais aussi d'assurer une présence française dans les eaux du Pacifique sud ; d'autant que la France considère le peuple kanak comme un peuple de seconde zone, plus précisément en terme décolonial, un peuple de Non Êtres habitant dans une zone où l'Etat de droit peut être instrumentalisé au gré des intérêts de l'Etat. Dans ce contexte, il n'est plus question des droits fondamentaux et du droit à l'autodétermination du peuple kanak.

L'Etat français, d'accords en accords, que ce soit ceux de Nouméa ou de Matignon, n'a cessé de bafouer les droits fondamentaux du peuple kanak et ce n'est pas pour rien que le FNLKS a demandé l'inscription de la Kanaky sur la liste dont se charge le comité spécial de la décolonisation. Lors du premier référendum -4 novembre 2018-, les partisans du maintien de la Kanaky dans la France l'avaient emporté avec 56,7 % des suffrages. En amont de ce référendum, l'ONU avait envoyé des observateurs qui avaient pointé

8 C'est lors de la conférence d'Alger qu'a été défini le Nouvel Ordre Economique International -Résolution 3201 votée par l'Assemblée générale des Nations Unies. Il insiste sur le fait que le l'ensemble repose sur un système fondé sur « l'équité, l'égalité souveraine, l'interdépendance, l'intérêt commun et la coopération entre tous les Etats, indépendamment de leur système économique et social, qui corrigera les inégalités et rectifiera les injustices actuelles, permettra d'éliminer le fossé croissant entre les pays développés et les pays en voie de développement »

9 Lire « Côte d'Ivoire : la guerre et l'ingérence militaire soulignent et aggravent l'échec de l'ONU et de la France », communiqué de Survie, 06/04/2011



l'absence effective de recours pour l'inscription induite de certaines personnes sur les fichiers électoraux, les accords prévoyant notamment des conditions d'ancienneté¹⁰ dans le pays pour pouvoir voter. Les partisans du non à l'indépendance ont bataillé dur pour que tous les habitants de la Kanaky soient inscrits sur la liste électorale spéciale, où les Kanaks de droit coutumier sont inscrits d'office alors que les natifs du territoire de droit commun bataillent pour y figurer, et que les quelque 40 000 expatriés voudraient bien y être inscrits pour défendre leurs intérêts.

Le 4 octobre 2020, le « non » à l'indépendance l'a emporté avec 53,26% des voix. Compte tenu de ces résultats, un troisième référendum¹¹ doit avoir lieu d'ici à 2022. L'enjeu de la gestion des listes électorales sera une question majeure de ce 3^{me} référendum.

La question posée par cette gestion renvoie aux pratiques napoléoniennes coloniales qui ont prévalu à partir de 1854 où les Français se sont implantés à Nouméa et ont maintenu leur pouvoir sur les Kanaks en organisant des opérations militaires chaque fois que ceux-ci refusaient en résistant cette présence coloniale qui pillait leurs richesses et volait leurs terres.

À partir de 1863, le pouvoir français garantit son emprise sur ce territoire avec l'externalisation du bagne installé sur des terres volées aux Kanaks. C'est ainsi mise en place une colonie de peuplement composée d'une partie de la population pénale qui, au fil du temps, a été rejointe, après la fermeture du bagne en 1879, par des Européens, entraînant de fait un métissage de la société kanak.

Métissage sur lequel joue et le gouvernement –de manière perfide, il a quand même signé les accords de Nouméa et de Matignon–, les Caldoches et les expatriés pour faire tout ce qui est en leur pouvoir pour que la Kanaky reste sous colonisation française. Dès lors, la bataille pour la gestion des listes électorales sera décisive pour le 3^e référendum.

On comprend beaucoup mieux pourquoi la France s'est adressé à la cheffe du groupe du Département des affaires

politiques de l'ONU à propos de l'audit demandé par le FNLS et pourquoi le Secrétaire de l'ONU, soutenu par la France au moment de son élection, a, en quelque sorte, renvoyé l'ascenseur à ses amis français en donnant au FNLS une fin de non recevoir. Le paradigme de la domination doit rester là où il a été installé depuis des siècles et entériné au moment de la signature de la Charte des Nations en 1945. Force est de constater qu'il y a bien quelques similitudes entre tous les territoires colonisés par la France ; la situation coloniale repose sur des invariants concernant la terre, la culture, l'éducation, l'économie, l'environnement et les droits civils et politiques qui échappent aux racisés.

Ce qu'on retrouve dans la gestion des colonies de peuplement, la Kanaky bien sûr mais aussi la Guadeloupe, la Martinique, la Réunion et la Guyane avec un corollaire qui a voulu qu'à partir des années 70, ces territoires colonisés ont vu se mettre en place un mouvement d'émigration de leurs populations, présenté comme la solution à une démographie importante de ces territoires, un préalable au développement de ces colonies mais surtout comme le moyen de régler la pénurie de main d'œuvre dans la métropole coloniale. Non seulement, les territoires ont été acquis par le crime et le vol mais les populations sont déplaçables et utilisables selon les besoins du pouvoir colonial qui a pris le contrôle sur le processus d'émigration. Où est le droit à la dignité et à l'égalité dans la mise en place d'un instrument comme le BUMIDOM¹² qui a géré l'exil des Antillais et des Réunionnais ?

Après avoir arraché des millions d'Africains à leur continent, la puissance coloniale française organise le départ des descendants des mis en esclavages vers la métropole, ce qui ne règle pas plus la question du non emploi dans ces territoires que du manque de main d'œuvre en métropole. Mais cela permet à une immigration blanche, les Métropolitains, de s'installer dans les territoires colonisés, ce qu'Aimé Césaire dénoncera comme un « génocide par substitution¹³ ». S'il y a bien un lieu où le remplacement est à l'œuvre c'est bien aux Antilles, où les postes à responsabilité sont tenus par les Blancs de France, la terre est toujours entre

10 <https://blogs.mediapart.fr/aisdpk-kanaky/blog/281216/le-referendum-sur-l-avenir-du-pays-en-2018-qui-peut-voter>

11 Article 5 ; Accord sur la Nouvelle-Calédonie signé à Nouméa le 5 mai 1998 ; JORF n°121 du 27 mai 1998 ; « Si la réponse des électeurs à ces propositions est négative, le tiers des membres du Congrès pourra provoquer l'organisation d'une nouvelle consultation qui interviendra dans la deuxième année suivant la première consultation. Si la réponse est à nouveau négative, une nouvelle consultation pourra être organisée selon la même procédure et dans les mêmes délais. Si la réponse est encore négative, les partenaires politiques se réuniront pour examiner la situation ainsi créée ».

12 Bureau de Migration des Départements d'Outre Mer, fondé en 1963 par le gouvernement

13 « L'aspect le plus connu des Antilles-Guyane est sans doute celui de terres d'émigration, mais... elles deviennent en même temps et parallèlement des terres d'immigration. Les nouveaux venus ne sont pas un quarteron de Hmongs pitoyables qu'il convient, en effet, d'aider, mais d'autres allogènes, autrement organisés, autrement pourvus, autrement dominateurs aussi et sûrs d'eux-mêmes, qui auront tôt fait d'imposer à nos populations la dure loi du colon. Je redoute autant la recolonisation surnoise que le génocide rampant. » ; Assemblée Nationale, débat sur le budget des DOM, ICAR du numéro 192 du 13 novembre 1977



les mains des descendants de propriétaires de mis en esclavage et le nombre de Blancs augmente sans cesse au point qu'une situation comme celle de la Kanaky pourrait arriver si les peuples martiniquais, guadeloupéens, guyanais revendiquaient un changement statutaire s'inspirant de la formule institutionnelle de décolonisation britannique appliquée dans la région caraïbe. La gestion des listes électorales serait un enjeu majeur tout comme il l'est aujourd'hui pour l'indépendance de la Kanaky.

C'est ainsi que lorsque des rapports de force sont ou inexistantes ou insuffisants, les peuples aspirant à la liberté alors qu'ils sont colonisés depuis bien avant 1945, ne peuvent accéder à leur souveraineté pour des raisons d'intérêts financiers ou géostratégiques.

Aujourd'hui, pour l'ordre mondial basé sur l'Ordre et la Loi, le droit à la décolonisation tel que défendu lors de la Conférence de Bandung et introduit aussi bien dans la Résolution 1514 que dans l'article 1 commun aux deux protocoles de 1966 -l'un sur les droits économiques, sociaux, culturels et environnementaux et l'autre sur les droits civils et politiques- a été vidé de tout sens normatif tels que le droit à l'autodétermination, le droit à disposer d'eux-mêmes, le droit à la souveraineté et tout simplement le droit aux droits fondamentaux et à la dignité.

On se doit de remarquer que le Secrétaire général ne fait plus entendre les principes fondateurs de la Charte ou ceux portés par la Résolution 1514 ; en 2020, il réduit le droit à la décolonisation à « des aspirations et des besoins des communautés qui vivent dans les territoires non autonomes et à l'obligation pour la communauté internationale « d'amplifier leur voix ». Pire, il réduit les aspirations de peuples toujours colonisés à des défis dus aux changements climatiques et à l'émergence d'économies durables et autosuffisantes ».

Si l'ONU sacrifie le droit à l'autodétermination des peuples, laissant les rênes libres aux Etats anciennement colonisateurs, c'est qu'elle refuse d'affronter politiquement les Etats qui violent les principes de l'ONU, les normes impératives qui en découlent, car aussi bien ces Etats que cette organisation ont des enjeux conjoints.

On ne peut que déplorer que l'ONU, dans le cas des pays colonisés, n'a jamais cessé de fonctionner comme une oligarchie. Les pays occidentaux, dont les Etats-Unis en tête, agissent avec le droit à la décolonisation d'une manière incompatible avec le droit international et les normes de protection des droits humains. Les pays membres perma-

nents du Conseil de sécurité n'hésitent pas à utiliser leur « puissance » pour acheter certains des neuf autres pays qui se trouvent être sous dépendance financière ou militaire. De nombreux exemples illustrent cette transgression des principes mêmes de la Charte ; la Palestine, Libye, l'Irak, le Sahara occidental, pour ne citer que ceux-là ...

Ce n'est pas faute de proclamation de résolutions émanant de l'Assemblée générale qui viennent contredire et dénoncer les positions hégémoniques du Conseil de sécurité. Ainsi, ce Conseil de sécurité a-t-il toujours pour objectif de maintenir la paix et la sécurité internationales alors qu'il apparaît clairement comme l'instrument des Etats-Unis et de leurs alliés ? Il est l'instance suprême d'interprétation arbitraire au service des grandes puissances. Le pouvoir discrétionnaire qui lui a été attribué par la Charte des Nations Unies est mis au service des seuls intérêts des plus forts. Rien d'étonnant à cela, puisque les cinq membres permanents sont les pays sortis vainqueurs de la seconde guerre mondiale.

Si l'on veut un ordre démocratique débarrassé du colonialisme, le préalable est la reconfiguration des relations internationales.

L'asservissement de l'ONU s'accompagne d'une mise au pas économique globale au nom des marchés et du dogme libéral érigé en doxa indépassable de la gestion efficace des économies et des sociétés. Le partenariat de l'ONU avec les sociétés transnationales a été officiellement proclamé à New York par le Secrétariat général à travers le Global Compact, le 25 juillet 2000.

Parmi les participants de la " société civile " apparaissaient British Petroleum, Nike, Shell, Rio Tinto, Novartis, toutes avec un curriculum éloquent en matière de violations massives et graves des droits humains, du droit du travail et de destruction de l'environnement. Il faut citer également Suez (anciennement Lyonnaise des eaux jusqu'en 2015), dont les agissements en matière de corruption de fonctionnaires publiques afin d'obtenir le monopole de la distribution d'eau sont bien connus en Argentine, en Bolivie, au Chili mais aussi en Kanaky et en Guadeloupe. Ce processus de partenariat avec les sociétés transnationales va à l'encontre des réformes démocratiques nécessaires au sein de l'ONU et renforce leurs politiques de mainmise sur les ressources et les biens publics appartenant aux peuples.

Il n'est pas faux de dire que tout le système institutionnel de l'ONU est pris dans la tourmente de la mondialisation capitaliste.



La question de la destruction des acquis sociaux, de la destruction du cadre juridique de la protection internationale des droits humains, l'utilisation de la force armée contre les peuples, la tendance généralisée du glissement vers des Etats de plus en plus autoritaires et répressifs, sont autant d'éléments qui doivent être lus à la lumière de ce processus de mondialisation. Force est de constater que plutôt que de tout mettre en place pour que « la sujétion des peuples à une subjugation, à une domination et à une exploitation étrangères » cesse de « constituer un déni des droits fondamentaux de l'homme ... » l'ONU joue un rôle de premier plan dans un processus dans lequel le droit international de nature économique reflète le mieux les mutations de l'ordre politico-juridique du monde. Sa principale caractéristique sur le plan juridique est la confusion et la fusion du droit avec les intérêts des marchands. C'est Leur droit. C'est l'imposition du droit commercial au sens strict du terme: les ressources naturelles, les microorganismes, les écosystèmes, le corps humain, la santé, l'éducation, la culture, la recherche scientifique, les médicaments, la production des biens sont tous soumis à la loi du marché. La demande légitime d'indépendance du peuple Kanak

Tous les peuples sont soumis à des règles juridiques où les grandes mutations du droit international ont été déterminées par le changement substantiel des rapports réels entre les principaux acteurs de l'histoire et, ce changement est, à son tour, déterminé par la nature des acteurs en présence. Certainement, la violence joue un rôle de premier niveau dans le processus de mutation de l'ordre économique mondial.

Aujourd'hui, l'on retrouve la violence des pratiques coloniales mise en œuvre dans les territoires mêmes des colonisateurs. L'exclusion de larges catégories des populations dans les « démocraties avancées », la précarité et les stigmatisations ethno-culturelles-religieuses sont les indicateurs clairs que la globalisation libérale fondée sur des stratégies coloniales n'épargne personne. Les Etats occidentaux, parangons de la Modernité euro-centrée, affirment tout à la fois être les seuls à détenir le modèle démocratique achevé et le modèle économique par excellence et mettent en œuvre des politiques de domination et d'aliénation caractéristiques du système colonial le plus rassis. Ironie de l'Histoire et démonstration implacable de la continuité des méthodes du libéralisme !

Comment en finir avec le colonialisme s'exprimant par la colonialité du pouvoir exercée sur les corps des colonisés, des racisés et des dominés ?

Le droit international de nature économique est sans conteste, le corpus juridique qui reflète le mieux les mutations de l'ordre politico-juridique du monde. Sa principale caractéristique sur le plan juridique est la confusion et la fusion du droit avec les intérêts des marchands. C'est Leur droit. C'est l'imposition du droit commercial au sens strict du terme: les ressources naturelles, les microorganismes, les écosystèmes, le corps humain, la santé, l'éducation, la culture, la recherche scientifique, les médicaments, la production des biens sont tous soumis à la loi du marché et font l'objet d'appropriation « légale » par les firmes privées et par les grandes corporations transnationales. Les institutions multilatérales d'ordre économique (FMI/BM/OMC), leurs tribunaux (ORD, CIRDI) ainsi que les pouvoirs de facto (G8, Club de Paris...) constituent le fer de lance de ce nouvel ordre économique international.

Dès lors, comment sortir du colonialisme pour rompre avec les logiques pathogènes du libéralisme et avec les instruments de domination que l'Occident utilise massivement pour maintenir les peuples et les pays du Sud dans une logique de dépendance et qu'il retourne, dans une logique mortifère, contre ses propres sociétés ? Comment réformer l'ONU pour que cette organisation revienne à ses fondements et principes en redevenant l'élément de contention et de régulation juridique de la violence et qu'elle arrête de participer à la croisade de conquête du monde par les sociétés transnationales et le système financier ?

Mireille Fanon-Mendès-France a travaillé dans plusieurs secteurs, Education nationale, UNESCO, Assemblée nationale, Université René Descartes-Paris V ; actuellement elle est consultante et co-présidente de la Fondation Frantz Fanon. Elle a, de 2011 à 2017, été experte auprès du Conseil des droits de l'Homme de l'ONU.



IADL

The International Association of Democratic Lawyers is a global organization of lawyers' associations, individual lawyers and judges from over 90 countries committed to equality amongst peoples, the elimination of imperialism and colonialism and the protection of the rights of all. IADL is a Non-Governmental Organization accredited to ECOSOC and UNESCO.

www.iadllaw.org
info@iadllaw.org