Dear Readers,

In September 2022, the McGill Centre for Human Rights and Legal Pluralism (the *CHLRP*) hosted a two-day workshop on human rights and contested agency. We at *Inter Gentes* were absolutely thrilled when we were approached to publish the pieces developed in this symposium, as we have a strong history of collaboration with the CHLRP. Working with the Centre on many initiatives allows us to foster a dynamic research environment, with exchanges between faculty, visiting researchers, and students at all levels.

This special issue allows us to focus this exchange around one specific topic: agency in human rights. Each article explores a refraction of this multifaceted concept in the wide domain of human rights work and research. Through highlighting the complexities of this topic, this issue fulfills *Inter Gentes*' mandate to provide explorations of the intersections between international law and legal pluralism. Reconsidering the agency of various subjects of international law reveals gaps and inconsistencies in the human rights discourse. While human rights' claims can be perceived as the exercise of agency, many voices are left out of the discussion. With concrete examples and case studies, the following articles outline the power dynamics that provide or take away agency from groups and individuals, and allow us to rethink the concept in an inclusive, collective and incisive way. This reflects our attempts to displace unquestioned power hierarchies in legal pedagogy and in the field of international law. We are happy that our journal can partake in these necessary conversations.

We would like to thank the editors of this special issue Horii Hoko and Edward van Daalen, the Inter Gentes editorial team, the authors who contributed their work to this conversation, and of course the readers of our journal.

Enjoy!
Juliette Croce & Sophie Bisping
Inter Gentes Co-Editors in Chief, 2022-2023

Human Rights and Contested Agency

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Hoko Horii

1. Introduction

This special issue is dedicated to a critical exploration of human rights and contested agency, by which we mean the various implicit and explicit ways in which certain forms of agency are contested through human rights law and practice.

All throughout our life, from the moment we are born until to the moment we die, we human beings exercise agency, a concept generally understood to capture our power to think and act to exert influence over the world around us in order to satisfy our needs, desires, ambitions, etc. But just like we had no choice but to be born, we have no choice but to accept that our ability to do so is bound, influenced or produced by a set of interrelated personal, societal and environmental factors. We can think, to name but a few, of mental and physical ability, age, race, gender, sexual orientation, class, different systems of government and ideology, climatic conditions and so forth. For some, the conditions of life are enabling, functioning, supportive, inspiring, stable and permissive enough to exercise our individual and collective agency (as a family, a couple, a group, a movement etc.) in many different ways towards many different goals. Whereas most will agree with the basic normative principle that our freedom to act cannot be without limits to respect that of others, such an environment nevertheless provides a feeling of freedom large enough to sustain the belief that we can shape life in the way we want. For many others, conditions for exercising agency are more challenging due to various complicating factors, such as forms of structural oppression, power differentials, discrimination, violence, poverty, physical and mental illness, climate change, natural disasters, etc. These cut across regions, countries, neighbourhoods and households. One of the principle aims of the 'universal' human rights project is to identify and secure a set of rights that, if respected, provide all people everywhere with conditions and enough freedom to exercise their agency in a way that allows them to shape their lives as they desire it.

The concept of agency is thus anchored in general and specialised international human rights instruments that seek to protect and empower specific groups (e.g., children, women, indigenous people, refugees, people with disabilities). It is central to the recognition of such groups as subjects of a special set of rights, and with the recognition of subjectivity comes the recognition of all humans to act and make decisions on their own behalf. However, as the different contributions to this special issue demonstrate, despite this inclusive ambition, human rights law, custodians, judges and practitioners favour to recognize and take seriously agency when it is considered as the 'right kind', serving the 'right goals' in pursuit of a 'good life'. Other forms that could arguably help one to pursuit simply getting through life, such as choosing to do denigrating work, marrying young, or labour migration, are contested. This brings us to the three questions that constitute the throughlines of this special issue: How is agency conceptualized in various international human rights instruments? Does or should the current conceptualization accommodate the many diverse and challenging ways that agency is exercised? Can or should we think of alternative ways to do so?

In the introduction to this special issue we, as guest editors, first present a cursory account in which we seek to set the stage for a multifaceted exploration of human rights and contested agency by outlining the subversive nature of the institutionalization of agency through human rights law (Section 2). In Section 3 we then sketch an overview of the workshop that sprouted the collective and individual endeavors that led to the papers presented in this issue. We then present these different papers in Section 4, as well three threads that we believe draw the different contributions together. In the final section, Section 5, we leave you, the reader, with some concluding remarks and playful encouragements for how to engage with this issue.

2. The Institutionalisation of Human Rights and Agency

Philosopher James Griffin makes a case for agency being the most important ground for human rights. Through what he identifies as the "best philosophical account of human rights", he argues that human

rights are essentially there to protect our ability to shape life as we desire it, but not to qualify how to do so.[1] In his own words:

> "What seems to me the best account of human rights is this. It is centred on the notion of agency. We human beings have the capacity to form pictures of what a *good life* would be and to try to realise these pictures. We value our status as agents especially highly, often more highly even than our happiness. Human rights can then be seen as protections of our agency—what one might call our personhood. They are protections of that somewhat austere state, the life of an agent and not of a good or happy or perfected or flourishing life."[2]

Yet what strikes us, is that the very term 'human rights' seems to challenge the idea that they are, or perhaps should be, non-prescriptive in nature when it comes how agency is to be exercised. Much like we use the words 'rat' or 'pig' as insults derived from our general negative perception of the creatures we have named this way, we generally invoke the word 'human' in an inherently positive manner because we believe that we are by nature 'good'. A 'humane' or 'humanist' approach is considered a loving, caring and inclusive one. Something done with a 'human touch' is the kind of thing we encourage and appreciate. Despite all the evil and atrocities that we have committed throughout our history on earth, 'human' thus remains a standard of 'good'. The term 'rights' has, by definition, a similar goodness about it. In their popular understanding, rights are about having 'righteously' justified ethical or legal claims or entitlements on the actions of other people and the institutions that govern us. As the following discussion on the institutionalisation of human rights will demonstrate, this semantic indication of an embedded prescriptiveness is reflected in practice. Human rights law does indeed seem to concern itself with questions of what kind of pictures and realizations of life are 'good'? In fact, it seems rather pronounced on what kind agency is worthy of recognition and protection, and what should be contested. As we hope to make clear, far from 'the best philosophical account', this realist dimension of human rights is inherently political and unstable.

The history of human rights did not start in 1948 with the adoption of the UN Universal Declaration of Human Rights (UDHR). Nor has it been a linear process for the progression of individual liberal freedoms as theorised by Western enlightenment thinkers. As sociologist Neil Stammers has shown, both the struggle *for* and institutionalisation *of* human rights have a strong social movement dimension and can be traced to many different 'non-Western' places and peoples.[3] Take for instance Article 4 of the UDHR which states that "No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms".[4] Few human rights issues relate so directly to freedom and agency as slavery, and it was one of the first matters to arouse wide international concern. The Haitian revolution (1791-1804), known to be the only successful slave revolution, undoubtedly played a key role in this development. After a long century of continuous colonisation, transnational slave trade and slave labour, a long decade of uprisings, resistance and warfare resulted in the retreat of the French, and the signing of the 1804 Haitian Declaration of Independence.[5] The document was a formal acknowledgement of the personhood, freedom and agency of all who fought against slavery: "We have dared to be free, let us be thus by ourselves and for ourselves".[6] The subsequent Haitian Constitution of 1805 codified the abolishment of slavery, as well as a set of rights that were to protect the freedom and agency of all Haitians. The constitution, monumental as it was for the furtherment of human rights in Haiti and far beyond, also showed that the institutionalisation of agency holds subversive components. It became clear that the formal recognition and protection of agency was underpinned by a strong idea of how to use this agency to build a 'a good society', and who was encouraged to do so. A striking example was the article that stated that: "No person is worth of being a Haitian who is not a good father,

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[1] James Griffin, "Discrepancies between the best philosophical account of human rights and the international law of human rights" (Presidential address delivered at the Meeting of the Aristotelian Society, University of London, 9 October 2000) (2001) 101 Proceedings of the Aristotelian Society 1 at 1.
[2] *Ibid* at 4.
[3] See Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009).
[4] *Universal Declaration of Human Rights*, UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).
[5] Cyril Lionel Robert James, *The Black Jacobins: Toussaint L'Ouverture and the San Domingo revolution* (New York: Vintage Books, 1989).
[6] Julia Gaffield, ed, *The Haitian Declaration of Independence: Creation, Context, and Legacy* (University of Virginia Press, 2016) at 243.

a good son, a good husband, and especially a good soldier".[7] There was no mention of mothers, daughters, or indeed wives. Furthermore, in the new republic everyone was considered equal in the eyes of the law, but no 'whiteman' was allowed to hold property. There were good reasons for this, of course, but it reveals the exclusionary power and contesting nature of human rights institutionalisation. Moreover, this all happened within a broader international political (economy) context, and the independence and freedom of Haiti and Haitians had immediate restrictive consequences for the agency of its citizens. France forced the new republic to pay crippling 'reparations', and together with the economic and political isolation imposed by the US and several European states, this pushed Haiti into ongoing impoverishment and instability which continues, to this day, to heavily restrict the opportunities of most Haitians to realise their pictures of a good life.[8] In trying to make it through life, thousands are bound to use their agency to in ways that many defenders of human rights would contest as morally questionable, undignified and unwanted. Take, for instance, child labour.[9]

Children's work is an important shock absorber to families who find themselves in economic precarity, not only in Haiti but in all around the world, in the Global North and Global South.[10] Few would contest that children tend to be more vulnerable to exploitation and to the risks that are associated to work than most adults are, especially work of the hazardous sort. Additionally, it is generally believed that children should be in school, and that working impairs them to do so. The UN Convention on the Rights of the Child (UNCRC) thus recognizes every child's right to education (Article 28) as well as the right to be free from economic exploitation (Article 32).[11] To secure these rights, ratifying states are obliged to set a minimum age for employment. The underlying idea is that work under a certain age is detrimental, no matter the context or conditions, and that children are likely to not be capable enough to fully understand this. This effectively means that children under a certain age are not allowed to exercise their agency to earn money for themselves or their family, even if they would want to. But the practice of restricting children's agency to work under the guise of protecting them from others as well as from themselves becomes more complicated when we consider that besides the UNCRC, almost all states have also ratified the 1973 International Labour Organisation's (ILO) Minimum Age Convention No.138 on which binds states to set this minimum age to work at 15 years.[12] This convention was primarily created to secure the economic position of Western states by imposing labour standards onto 'third world countries', who were becoming fierce competitors on the global market.[13]

We hope that these few examples of human rights institutionalization provide a sense of how different forces and agendas influence how agency is normatively valued and contested, and how it can be said to shape people's behaviour fronted by certain moral foundations such as a 'good citizen' or a 'good childhood'. More broadly, it helps us to argue that when it comes to international human rights, the recognition and protection of agency is inherently political and generally constraint by more narrow conceptions of *the good life* then their universal and inclusive aspirations might suggest. The ever-changing nature of the material, social, political, economic and ecological circumstances under which people are exercising contested forms of agency, combined with the ongoing thirst for human right legislation and the interpretive nature of law, means that question of agency and human rights thus demands the continuous engagement of critical thinkers; a task that this special issue seeks to facilitate. Before providing an overview of the different contributions to the special issue, we belief it to be relevant to provide the reader with a brief account of the creative process which underpins his project.

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[7] Carolyn E Fick, "The Haitian revolution and the limits of freedom: defining citizenship in the revolutionary era" (2007) 32:4 Social History 394 at 413.

[8] See Charles Forsdick, "Haiti and France: Settling the Debts of the Past" in *Politics and Power in Haiti* (Springer, 2012) 141.

[9] See Tone Sommerfelt & Jon Pedersen, "Child labor in Haiti" in *The World of Child Labor* (Routledge, 2014) 427.

[10] Michael Bourdillon et al, *Rights and Wrongs of Children's Work* (New Brunswick: Rutgers University Press, 2010) c 4.

[11] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTC 3 [*UNCRC*].

[12] *International Labour Organization (ILO) Minimum Age Convention*, 26 June 1973 art 2 [*C138*].

[13] Edward Van Daalen & Karl Hanson, "The ILO's Shifts in Child Labour Policy: Regulation and Abolition" (2019) 11 International Development Policy 133.

3. Workshop on Human Rights and Agency

The contributing authors participated in a two-day in-person workshop on human rights and agency that we, the guest editors, organised at the McGill Centre for Human Rights and Legal Pluralism (CHRLP), in collaboration with the Van Vollenhoven Institute (VVI) of the Leiden University. They were asked to prepare a short presentation in which they reflected on the following set of questions in light of previous or ongoing research: How is agency conceptualized in various international human rights instruments? Does, can and should the current conceptualization accommodate the diverse and challenging ways that agency is exercised? Can and should we think of alternative ways to do so? The underlying idea was to collective tease out reinterpretations and new perspectives to feed a critical and continuous discussion. Such a discussion indeed unfolded and flowed from presentation to presentation over the two days we spent together. Inspired by each other's research and insights, an array of pertinent questions were debated. We questioned the nature of agency. Is it freedom, empowerment or perhaps being capable to take sensible decisions under the right conditions? We debated the usefulness of conceptualising different kinds of agency, e.g., individual, libertarian, collective, relational. The different case studies provided ample examples to question the circumstances and power differences under which people exercise agency, and under which we can or supposedly cannot give consent. We agreed that under the guise of liberty and protection, the human rights project does indeed seem to carry a prescriptive mandate to determine what kind of behaviour is desirable, couched in implicit values of dignity and good citizenship. But when we talk about 'good' and 'bad' freedom, have we not just stopped talking about 'freedom'? The colonial legacy of the human rights did not escape our attention neither. Nor did the notion that this 'modern' project seems to have a created a blind spot for more 'traditional' and non-Western ways in which agency is being exercised. And so how do we make sense of people who use their agency in ways that seem to go against the human rights legal framework, against prevailing ideas of dignity and the good society? Perhaps is it not so much about agency, but primarily a conflict of values, it was suggested. But then again, is human rights law even meant to change the lives of actual people, or merely the behaviour of states?

The strength of this special issue, we believe, lies in the fact that all these problems and critical questions resonated with all participants, and that it inspired each of us to flesh these out in an 'idea paper'; a format that holds the middle ground between a long essay and an academic paper. We, as the coordinators of the workshop and this special issue, like to provide some threads that we see as connecting the different contributions which are outlined below. These threads, we hope, will help you dance with each paper individually, and ultimately with all together.

4. Overview of Contributions

The first thread is the **moral life of human rights**. The first three papers of this special issue most explicitly explore how agency is conceptualised in human rights law, and how the latter seems to function to model societies that hold themselves and each other to a moral standard that 'we' seem to have agreed on as 'a good life'. **Frederic Megret**'s paper takes up the phenomenon of 'dwarf-tossing' to demonstrate and question how moral agency is repressed through, not despite, human rights. He suggests that the concept of 'dignity' was invoked by different courts against the repeatedly and insistently stated agency of a little person himself. It resulted in a landmark human rights decision that was adopted against the believes and wishes of the very person alleging a human rights violation. What does the human rights framework has to offer to people who use their agency in a way that challenges the implicit moral dimension? How problematic is it that the human rights seem to project a specific model of human subjects, while the whole point of human rights is to have basic rights that allow for diversity and dissonance? The dwarf-tossing case, and how it was assessed by the human rights apparatus, opens up many avenues to explore broader questions around issues where claims of consent and necessity have been overridden by an often paternalistic and vague societal emphasis on dignity, for instance sex work, organ donation, euthanasia.

Vishakha Wijenayake's enticing paper helps us to further explore these questions, by discussing the agency of suicide attackers in the context of international human rights law. As she explains, in modern Western societies, suicide is pathologized and generally considered as behaviour caused by psychological issues, not an agentic act in which the person pursues an idea of life and death

they themselves define. International human rights law reflects this medicalized approach of end-of-life decisions in its legal construction of warfare and combatants, which clashes with other narratives that depict the deaths of suicide attackers as agentic acts. Considering that these alternative narratives are actually prevalent in many different places, the author questions the culture and genealogy that are dominant in the international human rights discourse. She suggests that a more culturally nuanced articulation of agency would be more adept at depicting how international law can relate to the narratives of agency constructed around suicide attackers.

Hoko Horii's paper on age of consent law illuminates that the moral life of rights and law take shape under different names. In the case of dwarf tossing as discussed by **Frederic Megret**, the concept of 'dignity' was invoked to negate the agency stated by the persons themselves. In a similar vein, Horii shows how in the context of criminalizing underage sex and modelling what a 'good life' and a 'bad example' of adolescent sexuality are, the concept of harm is deployed in legal processes to denounce certain sexual behaviours. As such, a legal reality is simultaneously being constructed in which it is assumed that adolescents under the set age of consent cannot consent to sexual activities, even if they claim they want to. In other words, the legal process exercises the power to determine what these adolescents' agentic acts are and what are not, based on the societal moral standard, which is often in fact the standard held by the individual legal actors dealing with the cases. The impossibility of consent is used as a paternalistic tool, to ban sexual relationships between whom power differentials exit. But such a strict and prohibitionist approach alienates the less powerful actor, because if we follow this logic they are considered to have no way of making an informed decision. Horii thus shines critical light on how international human rights treat children's agency, and pushes back against the assumed believe that children not (yet) 'full-fledged' humans, and that they subsequently lack 'full control' of their agency.

These three papers highlight that we encounter contradictions when we look closely at the discourse and practice of agency within the international human rights project. Despite that the core principles of human rights are considered to be universal, it seems that a conflict of values is always present. Otherwise said, whereas it is essentially a freedom-maximizing project that is supposed to be minimalistic, it has developed into a thick and value-laden regime. The moral life of human rights law is in the backdrop of the complex and problematic process of how certain subjects' agency may be further contested.

The second thread that runs through our collective inquiry is **the political life of human rights**. **Tanya Monforte**'s paper shows how neo-liberal market forces shape armed conflicts and the role of children herein. Her paper contends that children are used as market levers to control and regulate conflict to secure the global market. There is economic rationality underpinning the continuation of wars, and the presence of child soldiers subsequently prolongs wars. The way in which children are managed as zones of peace, fits into a security logic that tries to control conflict. Essentially, children, as 'human potential' and cast in economic terms, are read as human and social capital and thus become a repository of meanings. This intrinsically neoliberal market ideology excludes children's agency within armed conflicts. The author suggests that rather than denying the rationality and agency of youth, it is important to understand what their choices signal. Her paper reminds us that there is a political economy of human rights that imposes rules and constrains options available to individuals and their agentic acts.

In a similar vein, **Camille Marquis Bissonnette**'s paper on terrorists and terrorism critically engages with the political nature of international human rights law and its consequences for the agency of those involved. The deprivation of the agency of 'terrorists' and 'terrorist groups', which takes the form of various stringent sanctions, is done through a politically motivated, and rather arbitrary process of 'labelling'. The space for the arbitrariness of counterterrorism measures is increased in proportion to the limited agency of individuals and groups labelled as terrorists. Whereas Tanya Monforte's contribution points out the mechanism of protection under the guise of capitalism, Marquis Bissonnette illustrates how the mechanism of labelling functions to deprive agency under the guise of 'security'. This contribution strongly resonates with Wijenayake's paper on the agency of suicide attackers which equally criticises the practice of labelling, and the ease by which it is mobilized when there are clear political, and international security concerns.

In relation to these observations on the contradictory nature of agency in international huma rights, the third thread is **the mobile life of human rights.** On this, **Francois Crepeau** and **Idil Atak**

explore how the protection, empowerment and agency of migrants has been conceptualised in the 2018 Global Compact on Migration. Key to the Global Compact is the emphasis on the desired 'facilitation' of mobility by states. This means allowing migrants to go where they will thrive and reduce barriers to mobility; a policy which thus relies on recognising the agency of migrants. This has additional instrumental advantages. For instance, since people ask for asylum because there is no regularized worker migrant status, it will reduce pressure on refugee determination systems. It also diminishes the power of criminal networks, as prohibition breeds crime. Recognising and facilitating the agency of migrants to go where they can thrive, find their place in the host society, will contribute their voice to social progress and human security. In practice, unfortunately, there are a plethora of reasons for why governmental actors contest migrant's agency instead.

Laurence LeBlanc, focusing on independent migrant children who participate in the evacuation protest in Tunisia, argues that they exercise their agency as a process of self-identity formation and articulation. By claiming to not belong in Tunisia, their sentiments grew and changed, and their identities developed and were articulated publicly. By protesting, these children provide important insights that migrant children are not passive subjects of global migration governance and protection, but subjects of action. The piece then suggests that governments and institutions should legitimate their protests and expressions even as they challenge global migrant controls. Her observation finds that, by acting as subject and being recognized as such, the children give insights into the value of recognizing agency. This piece, together with all other contributions to this special issue, suggest that the current conceptualization and regulation of agency in human rights praxis have not succeeded in accommodating the diverse and challenging ways that agency is exercised. The question here is whether we can and should think of alternative ways to do so.

One of the ways, suggested by **Nandini Ramanujam** and **Kassandra Neranjan** in the last contribution of this special issue, lies withing the training of a new generation of human rights practitioners. By assessing the experiences of university students in a human rights internship program, the authors demonstrate that the philosophical underpinnings of the capability approach – understanding agency as a critical element of the freedom to pursue desirable opportunities which allow for the enjoyment of a life one values – has been effective in fostering a nuanced, real, pluralistic understanding of advancement of human rights. Their piece highlights the value of critical human rights education and the role different understandings of agency plays in it. In coming to terms in how the different theoretical ponderings presented in this special issue apply to everyday praxis, the authors invite us to think of agency as the link that transforms abstract 'human right' into an actual 'human capability'.

5. Concluding Remarks

We, the guest editors of this special issue, enjoy baking banana bread. We have tried emulate this process of magical chemistry and unexpected outcomes to the academic project presented here. Sometimes, bringing new and vastly different ingredients or studies together, produces new flavours and insights. Sometimes, adding a pinch of spices or a bit of boldness, creativity, curiosity and openness advance intellectual activities. Such endeavour is essentially collective. Daring to mingle and to share our work, ideas, coffees and meals, as well as the enjoyment of an intellectual life one values, seems to us a necessary quality for bettering our academic environment and outcomes. This special issue, by showing that human rights law, its enactments and implementation complexify the idea that they are to promote or protect human agency and challenges the normative purpose of introducing agency to the human rights instruments. It invites us to probe underlying ideas about what a good life is, and to do so by taking a close look at different cases, subjects, groups and their identities, conceptions, and ways to discuss different lives we value. It challenges and complexifies the primary function of protection of agency, and opens up the possibilities for an alternative form of advancing human rights, which is fairer, truly emancipatory, and efficient in practice.

"Dwarf Tossing", Human Dignity and Individual Agency

Frédéric Mégret

Introduction: A Look Back at Wackenheim v. France

"Dwarf tossing" (as the activity is known) is a practice that emerged in some bars and discos in the early 1980s, probably in Australia, as a form of entertainment. Persons of short stature wore padded clothing, sometimes an American football helmet, and were thrown onto mattresses or velcro-coated walls. The aim was to throw them as far as possible. A variant known as "dwarf-bowling" involves putting little persons on a skateboard and using them as a bowling ball.

The activity, due to its problematic name and nature, has been highly controversial and remains so into the 21st century. Mindful of the sensitivities around naming, in this article I will use the term "little persons" which seems to be currently favored organizationally by said little persons (LPs) at least in the English-speaking world, except when describing the activity of "dwarf tossing" as it was/is known by its practitioners.

In the 1990s, the mayor of the small French municipality of Morsang-sur-Orge adopted a bylaw prohibiting dwarf-tossing, which was then practiced in a local club (the "Embassy Club"). This followed a recommendation by then Interior Minister Philippe Marchand to stop dwarf tossing as an "intolerable attack on human dignity" and a form of exploitation. That order was then challenged and found to be illegal by the Cour d'appel of Versailles (and, in a separate case involving a similar ban in Aix en Provence, by the Cour d'appel de Marseilles). The case was appealed and went all the way to the French Conseil d'Etat, France's highest administrative court (the case was decided under administrative law given that the impugned decision was one taken by a municipality).[1] Following a failure to overturn the ban there, the case was taken first to the European Commission on Human rights (where it was held unreceivable for reasons of non-exhaustion of local remedies not pertinent to this article)[2] and then to the Human Rights Committee, the monitoring body for the International Covenant on Civil and Political Rights, which found the ban to *not* be in violation of France's human rights obligations under the Pact.[3]

Although a little neglected today, I propose that the case is emblematic of a deep tension between conceptions of human rights focused on human dignity and conceptions of human rights focused on human agency. On the one hand, both the mayor, the Conseil d'Etat and the Human Rights Committee aligned to stress that banning dwarf tossing was an appropriate limitation of human rights on public order grounds given how it offended human dignity. On the other hand, and crucially, the ban was challenged not by the club owner but by a certain Manuel Wackenheim, also known by his *nom de scène* "Mister Skyman" – the very little person who habitually made a living of being thrown in said club – and his company (Société Fun Production) who argued that it deprived him of his living.

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[1] Conseil d'État, arrêt N° 136727, 27 octobre 1995.
[2] Wackenheim v. France, Case n° 29961/96, 16 Octobre 1996.
[3] Human Rights Committee, Manuel Wackenheim v. France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002).

In other words, a case *about* agency (could his autonomy override whatever wariness society might have with the practice he subjected himself to?) also turned out to *rely on* agency, that of the principally interested person. Wackeheim was both "celui par qui le scandale arrive" and someone willing to take the case through the quasi-entirety of the French legal system and to the international level.

In this article, I propose to contextualize Wackenheim's complaint notably by uncovering interviews that he quite freely gave at the time and since. Although the fact that the Wackenheim case was unmistakably about human dignity and discrimination has not been lost, the details of his own views and involvement were always at risk of being sidelined by a conversation about dignity and even autonomy which, in the end, was not about him specifically but about these issues understood in the abstract. In uncovering his voice, I at least want to complicate the dominant narrative and emphasize the extent to which, in that case at least, "dignity" was invoked very much against the repeatedly and insistently stated agency of Wackenheim: a landmark human rights decision, it turns out, was adopted against the claims and wishes of the very person alleging a human rights violation.[4]

The point of the exercise is not necessarily to suggest that Wackenheim was "right" and that the authorities were "wrong" but that the passage of time and the way landmark human rights decisions are remembered themselves sometimes partly erase the agency of those involved. Although they lend their names in perpetuity to the legal system, the reasons why victims brought a case, what it meant for them to bring it, and how their agency framed the case become occluded. This is particularly the case when, as is the practice in French law, judgments are terse and only minimally seek to restitute context. In superimposing the voice of Wackenheim against the words of various judgments, then, I seek to reclaim and keep alive the dialogue between "dignity" and "agency" as one that is ongoing, fraught and, in fact, extends far beyond the particulars of "dwarf tossing."

The Dynamics of Bans and Ban Contestations

The Wackenheim decision needs to be understood in the context of efforts before and after to ban or on the contrary protect "dwarf tossing" as a practice, with varying degrees of success. In the French decisions, it is public order that is invoked and public order that is found to have been violated. This is crucial because the authorities were aware, on the basis of previous case law, that they had no a priori competence in France to limit rights on the basis of "morality." This would have infringed freedom of conscience and represented an arbitrary interference. A violation of public order is a higher threshold to clear, but it is also potentially a more incontrovertible basis. What this traditionally required in French law, however, was proof of "local circumstances" that made a ban particularly necessary (as in the case of the projection of an "immoral" film in the pilgrimage city of Lisieux).[5] Here, the Cour de cassation nonetheless bypassed that requirement on the grounds that something as momentous as "human dignity" was involved. The suggestion, then, was that dignity had a self-evident quality that put it beyond ordinary disagreements about the proper scope of morality.

[4] Although in itself this is arguably quite common. Marie-Bénédicte Dembour, *Who Believes in Human Rights?: Reflections on the European Convention* (Cambridge University Press, 2006).

[5] Jean-Paul Valette, "'Cinéma et liberté d'expression : la censure préventive française au tournant des années 1970'." (2019) V:10 Revue d'histoire et de prospective du management 5.

The decision of the conseil d'Etat was not to the effect that dwarf tossing should always be banned, merely that it *could* if the authorities so wanted. The Court was not asked evidently to pronounce itself as a legislator but as a jurisdiction specifically required to review an administrative decision. What it found was that the municipality was within its rights to invoke public order to cancel a show such as the one featuring Wackenheim. This was because the "power of municipal policing" allowed the city to adopt any measure to prevent an infringement of public order and that "respect for the dignity of the human person is one of the components of public order."[6] The Human Rights Committee subsequently fully aligned itself with that finding, concluding that France had "demonstrated (…) that the ban on dwarf tossing as practised by the author did not constitute an abusive measure but was necessary in order to protect public order, which brings into play considerations of human dignity that are compatible with the objectives of the Covenant." The ban was "based on objective and reasonable criteria."[7]

The argument that "dwarf-tossing" was incompatible with human dignity had, it is true, been asserted by France consistently. It was even suggested that the practice might constitute a violation of article 3 of the European Convention on Human Rights on inhumane and degrading treatments. The Cour de cassation found, specifically, that:

> […] l'attraction de lancer de nain consistant à faire lancer un nain par des spectateurs conduit à utiliser comme un projectile une personne affectée d'un handicap physique et présentée comme telle ; que, par son objet même, une telle attraction porte atteinte à la dignité de la personne humaine.[8]

Two things in particular were irrelevant: the fact that protective measures had been taken to ensure the safety of the person involved (e.g.: Wackenheim wore a helmet) and, notably, that person's consent to the activity in exchange for payment. In particular, "respect for the principle of freedom of work and the principle of freedom of commerce and industry" were not obstacles to a ban given the danger to public order. Subsequently, the Human Rights Committee also found that there was no discrimination involved even though the ban applied only to "dwarves" since "if these persons are covered to the exclusion of others, the reason is that they are the only persons capable of being thrown."[9]

Subsequent legislative efforts to ban dwarf tossing outright have met varying degrees of success. In Canada, a private member's public bill was introduced in 2003 by Windsor West MPP Sandra Pupatello in the Legislative Assembly of Ontario. Crucially, this included penal measure in the form of a fine (up to $ 5 000) and even imprisonment (up to 6 months).[10] The bill was defeated, however,[11] as was a similar attempt in South Carolina. In the US, efforts to ban dwarf tossing are older and still ongoing. Both Florida (1989)[12] and New York (1990)[13]

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[6] Conseil d'Etat, supra note 1 (author's translation).
[7] Human Rights Committee, supra note 3.
[8] Conseil d'Etat, supra note 1.
[9] Human Rights Committee, supra note 3.
[10] Bill 97, Dwarf Tossing Ban Act, 2003.
[11] Andrea Baillie, "Windsor MPP's appeal in legislature fails to stop dwarf-tossing at nightclub", *The Globe and Mail* (13 June 2003), online: <https://www.theglobeandmail.com/news/national/windsor-mpps-appeal-in-legislature-fails-to-stop-dwarf-tossing-at-nightclub/article1017359/>.
[12] See 61A-3.048. Exploitation of Dwarf, Florida Administrative Code.
[13] "New York Governor Signs Dwarf Tossing Ban | AP News", online: <https://apnews.com/article/5548a9ee13371159a141d72995c5dabe>.

state legislatures have adopted laws that ban the practice, and other states have or are contemplating similar bans.

The bans have been introduced by legislators concerned about the practice on general grounds of dignity. Crucially, however, they are supported by at least some representative organizations. In particular, Little People of America has been active in promoting a ban in the US. But it is also worth noting that, along very similar lines as Wackenheim, such bans have been challenged both judicially and legislatively, including by some little persons. In 2001, for example, Dave Flood ("Dave the Dwarf") filed a lawsuit seeking to overturn the 1989 Florida law allowing the state to fine or revoke the liquor license of a bar that allows dwarf-tossing.[14] The bans have also been challenged occasionally by individuals who are not little persons, on libertarian or non-discrimination grounds.

Legitimate Rights Paternalism or Authoritarian Dignity?

At stake in the Wackenheim decision, then, is not the tackiness or bad taste of "dwarf tossing", at least not in themselves, but the assault that dwarf tossing is said to represent on human dignity. At the opposite end of the spectrum are civil libertarians who simply argue that the state has no legitimacy in intervening to prevent people from doing what they want. As Florida House of Representatives Ritch Workman put it in introducing legislation to overturn that state's ban on dwarf-tossing, it is an "unnecessary burden on the freedom and liberties of people" and "an example of Big Brother government."

Both these arguments, in their generality, can be seen as unhelpful platitudes. A range of behavior may run against dignity, but not to the point that it should be banned. For example, it may reduce one's dignity to beg, but ordinances banning begging are widely reviled as persecuting the poorest. Conversely, a range of behavior might conceivably be justified on the basis that it follows fundamental human agency, and still be illegal. Criminal activity obviously comes to mind. The conversation on the relationship of dignity and autonomy is always, if anything, better understood as a conversation about their rightful scope.

But where Wackenheim's agency is crucial is that it intervenes to disrupt the *tête-à-tête* between two stylized positions that speak above his head, to an intellectual tension rather than his personal circumstances. Wackenheim could be seen as falling on the civil libertarian end of the spectrum, but we should not make too much of this. His argument is not (at least, we have no reason to think that it is) a *general* civil libertarian argument. For all we know (we do not actually know about Wackenheim's political opinions), Wackenheim might be a big state collectivist in many other respects. His position is not the same as Florida Representative Workman who we have reason to think is first and foremost a defender of libertarianism and second only and at best, a more or less opportunistic defender of some little peoples entrepreneurial liberty.

Indeed, nor can we take it for granted that Wackenheim is insensitive to the dignity argument. In fact, we would have to assume that he knows only too well the indignities that being a little person in early 1990s France meant one had to endure. In many other respects, it is not unreasonable to think that Wackenheim would strongly oppose undignified treatment of little

[14] Graham Brink, "Judge likely to throw out dwarf-tossing suit", *Tampa Bay* (27 February 2002), online: <https://www.tampabay.com/archive/2002/02/27/judge-likely-to-throw-out-dwarf-tossing-suit/>.

persons. In fact, unlike the authorities and the courts for whom dignity might be understood as a generality (involving other situations and persons and acting as a sort of conceptual linchpin for the human rights edifice) the argument for human dignity is, in his case, a concrete aspiration.

It is precisely because of this that his reading of his *own* dignity is highly circumstantial and susceptible to inflexion, a reading of lived dignity mediated by agency. Presumably there are things that Wackenheim would not do for a living, although in this case he felt that lending himself to dwarf tossing was not below that threshold. The point is that dignity and agency, when coexisting in one person, do not live as absolute opposites: dignity is framed by agency, agency is a condition of dignity. For the courts, however, the question was always a more systemic one, involving the broader architecture of human rights and, in particular, competing claims about the power of the state.[15]
To the claims of the French state, Wackenheim opposed his undoubted own sense of agency, including as it manifested itself in terms of his understanding of dignity. No doubt the case for freedom and autonomy here was particularly strong given the fact that the activity was a freely consented to commercial one in a private space, not involving the state and its powers of coercion. This created a particular hurdle since dignity had to be conceived not, as it often is, as a mere negative liberty requiring the state to let Wackenheim do something, but as the exact opposite: as something that would allow the state to prevent him from doing something, in the name of his own dignity.

For the authorities, the natural road was to analyze the situation in terms of conventional rights limitation analysis. Public order provided the notional and familiar basis. But it was quite clear from the decisions that it was not public order itself which was directly doing the work, as much as dignity. The Courts never clarified, for example, how public order would be disrupted by "dwarf tossing." No evidence was adduced that suggested that the events might lead to conventional breaches of public order (violence, for example). In short, there was little that suggested a specific understanding of public order as distinct from an underlying concept of dignity.

This, in turn, made it look dangerously like the French Courts were re-introducing considerations of morality through the back door of public order. As the plea of counsel for Wackenheim before the HRC was summed up by the Committee:

> Case law of this kind at the dawn of the twenty-first century revives the notion of moral order […] directed against an activity that is both marginal and inoffensive when compared with the many forms of truly violent, aggressive behaviour that are tolerated in modem French society. The effect […] is to enshrine a new policing authority that threatens to open the door to all kinds of abuse: are mayors to become censors of public morality and defenders of human dignity? Are the courts to rule on citizens' happiness?[16]

In fact, the reliance on dignity was all the more surprising given the somewhat shaky status of dignity in human rights law. Although dignity is sometimes referred to as a sort of implicit

[15] In fact, in the telling title of an article published subsequently, the question is not what "Wackenheim" may have thought of the case, but what "Kelsen" would have thought of it. Paul Martens, "Sixième leçon. Qu'eût pensé Kelsen de l'arrêt « Wackenheim » (« lancer de nain ») ?" in *Le droit peut-il se passer de Dieu ?* Droit (Namur: Presses universitaires de Namur, 2020) 127 container-title: Le droit peut-il se passer de Dieu ?
[16] Human Rights Committee, supra note 3.

conceptual linchpin to human rights, there is no "right to dignity" even as there is, by contrast, clearly a right to employment (understood at least as the right to not be unreasonably denied the employment of one's choice), a right not to be discriminated against and, more generally, a default assumption that, in a liberal society, that which is not prohibited is and should be allowed. In other words, dignity, a mere principle whose incidence might have seemed to be mostly interpretative, was elevated to the level of a rule.[17]

Dignity refers traditionally to the non-instrumentalization of human beings and their inherent worth. Human beings should not be treated as mere means but as ends in themselves. Specifically, it has sometimes been framed as a taboo about the commodification of human beings. In the case of "dwarf tossing" it is not difficult to see how the practice is a sort of spectacular, almost literal illustration of precisely what one is not supposed to do under a dignity framework. But here there is of course one significant caveat which is that the supposed direct victim of an assault on his dignity (and whoever else may be affected indirectly, there is little doubt that in all reasonings Wackenheim himself is identified as a victim) has agreed to the practice. The case seems almost destined to confirm some of the worst suspicions about "dignity's" role in human rights as a standard that is highly indeterminate and vague and that can be used to bypass serious argumentation about the content of rights.[18]

Moreover, it is not even clear whose dignity is at stake. Is it Wackenheim's? But then how did one reconcile upholding his dignity against his own, very clearly articulated personal wishes? Is it society's conception of dignity, but then how did one not risk upholding some right-thinking majority's sense of *bienséance* (to use a French word) and perhaps even a sort of bourgeois revulsion at "vulgar" working class entertainment? Or is it little peoples' dignity more generally that was at stake? But in this case, was one effectively accusing Wackenheim of being untrue to his own, perhaps implicitly accusing him, in his selfish drive to make a decent living, of compromising the well-being of one larger class of peoples to which he belonged?

Beyond Dignity and Agency?

Traditionally, there are several ways for states around consensual but nonetheless undignified activity. A first is to describe the activity in question as essentially a type of self-harm. Clearly the state routinely prohibits and even criminalizes the consumption of certain drugs, even when it is very much persons' expression of their agency to have access to them. 'We' (or at least a part of 'us') need to be protected against the 'worst' version of our layered selves by, for example, being forced to wear seatbelts even if we think that we are impeccable drivers.[19]

But this is a potentially problematic move from the point of view of human rights, not least because in this case the nature of the harm to Wackenheim was somewhat elusive and, in fact, not adduced by the French state. In such a scenario, it seemed to deny human agency and freedom – which one otherwise have every reason to think are central to human rights – on the grounds that their exercise offends a public canon. This sort of paternalism, reintroducing a kind of pre-modern abuse of self delictum, opens up an avenue for civil libertarians who, as Representative of Florida Workman put it (himself supposedly not a fan of dwarf tossing): "if

[17] Martens, *supra* note 15.
[18] Giorgio Resta, "Human Dignity" (2020) 66:1 mlj 85–90.
[19] John Kleinig, "Paternalism and Human Dignity" (2017) 11:1 Criminal Law, Philosophy 19–36.

a little person wants to make a fool out of themselves for money, they should have the same right to do so as any average sized person."[20]

Another route, then, is to say that the consent to such activity is vitiated from the start because one cannot, in fact, have consented to one's harm. The problem is that this is still hard to maintain in the face of lucid and insistent claims by those involved that they are very much aware of what it is they got themselves into (including evidence of their own calculus about the cost-benefits of engaging in the activity, etc.). The only way to do so is to claim that the individuals concerned are: (i) being coerced, by others or circumstances, to make bad choices, but there was little evidence of at least the former at least as regards Wackenheim and the latter seems very vague; (ii) incapable of giving their consent which could work with children but not Wackenheim and connects to a whole, profoundly liberticide, tradition of thinking that women or the disabled for example are "minors" incapable of making decisions for themselves; or (iii) alienated, i.e.: that they operate on the basis of some form of false consciousness so that Wackenheim does not "know what is good for him," but that the state does. The latter sort of paternalism is evidently quite difficult to reconcile with the libertarian thrust of human rights.

Or, to put it differently, it is difficult such a strong dignity-based line of argument without revealing the human rights project not as a project of liberty but as project of engineering and rewarding a certain kind of "right" subject, i.e.: the subject who does not engage in behavior unbecoming of their human (or otherwise specified) status, and of punishing those subjects that do not conform to human rights' ideal of subjecthood. On its own, then, this is a difficult and even improbable route to follow because of the way it clashes with widespread beliefs that, if freedom in society is to mean anything, it must include behavior that many would frown on as undignified. Broad repression of "hooliganism" as a kind of byword for deviant behavior (homosexuality, hippiness, punkness, etc), for example, is readily associated with authoritarian regimes.

This then leaves open another possibility which is that Wackenheim is not in this on his own and that the state must be mindful of how his behavior might impact others. In allowing himself to be tossed, he is not only compromising his own dignity (something which society might live with), but the very notion of dignity. Ultimately, the point is that his dignity is not for him to define because of the way in which his "indignity" stands to affect not just well-meaning society but, crucially, other little persons.

Here the suggestion is that, whatever reasons Wackenheim may have to allow himself to be tossed, these pale in comparison to the general prejudice that dwarf tossing inflicts on the little persons' community by reinforcing prejudices that concern them. This is, in fact, the argument that some little persons' groups make. In France, famous little person and actress Mimy Mathy spearheaded a movement to ban dwarf tossing and the French government's argument was that Wackenheim was indeed very much the minority among little persons. Such arguments are also at the heart of the Little People of America's advocacy: ″Dwarf-tossing may help financially the person who does it. [...] However, it tears down the structure and the esteem that little people are trying to gain.″[21] Evidently that argument gathers strength not just on its own merits but because who it is uttered by.

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[20] Paul Bois, "Republican State Senator Wants To Ban 'Dwarf-Tossing' In Washington", *The Daily Wire* (26 January 2019), online: <https://www.dailywire.com/news/republican-state-senator-wants-ban-dwarf-tossing-paul-bois>.

[21] Ap, "Little People Oppose Events In Which Dwarfs Are Objects", *The New York Times* (3 July 1989), online: <https://www.nytimes.com/1989/07/03/us/little-people-oppose-events-in-which-dwarfs-are-objects.html>.

At the same time, all that this may bring attention to is that little people are not a homogenous, non-political group. They include, presumably, individuals who err on the side of a strong sense of their liberty and others who emphasize the importance of a sort of common dignity. There are conservative, left wing and centrist little persons and many shades in between: little persons have just as much agency as everyone else and therein even lies part of their dignity, the dignity of not being reducible (and particularly not by others or by the state) to membership in a particular group.

In other words, even a representative organization cannot rule over the lives of its members or even claim to represent them wholly. We should be wary, in particular, of the loose invocation of majoritarian claims within the community of reference. Note moreover that one may be sensitive to the argument taken from dignity on general moral grounds, but not think it reaches the level where one has the authority to stop individuals from exercising their liberty, in extremis. This is not a situation where people with different reasonable views discuss the general merits of allowing oneself to be tossed, but one where the state is called in to intervene and bring about change through law, a change that stands to affect all involved even as, inevitably, it generalizes a particular sensitivity about "dwarf tossing" (pro or con).

It is important to understand, however, exactly what this means for Wackenheim. Deep below the metrics of human rights limitations and public order, this is potentially quite a vicious accusation. It essentially faults Wackenheim and those like him for a lack of solidarity, perhaps even of advancing their own dubious self-interest at the expense of those of the broader community of little persons. This seems, first, particularly petty, almost like a divide-to-rule tactic, where the majority pits a minority within the minority against the majority within the minority. It lays a huge amount of blame at the door of Wackenheim, as if he were, essentially, solely responsible for dwarf tossing. And it also punishes the agency of someone from a vulnerable minority who genuinely (and one might think, with some reason) thought he was unfairly deprived of a job by hinting that, in making a fuss, they are further entrenching their own indignity.

The move also has several other effects. For one, it identifies Wackenheim as having duties, perhaps primarily so, vis-à-vis fellow little persons. This is a way of further typecasting him into his identity. We do not know what Wackeneheim's identification with the community of little persons was or is. But it is perfectly possible and it would be perfectly acceptable for Wackenheim to not particularly think of himself as a little person, or as someone destined to socialize with or identify with little persons. One could imagine similar situations where persons do not particularly identify with their co-religionists, their ethnicity, nationality or race. Wackenheim is not just a little person: he is also, in good intersectional analysis, a cis-gendered white working-class male from Eastern France. Again, holding someone to account on the basis of a primary identity one assigns to them might be seen as guilty of the very thing that one accuses the "Embassy Club" of doing: little persons are only little persons after all.

But on one reading, Wackenheim's position is even worse. He is not only a traitor to little persons, but a traitor to humanity. Because human dignity belongs to all, the harming of the dignity of any group within humanity harms the dignity of all. In that scenario, Wackenheim is not only the artisan of his own downfall (unbeknownst to him); he is also guilty of nothing less than trampling upon the basic common fabric of human dignity. Of course, under that scenario, the shock of the community at the spectacle of dwarf tossing and the harm to

humanity at large become one thing. The community understands itself to, conveniently, speak for humanity. Wackenheim is guilty of not doing his share to uphold humanity's dignity.

Here, however, what is interesting is how Wackenheim tries (even though he ultimately fails) to turn the tables on society by providing an entirely distinct account of what is going on. Wackenheim's argument was that he indeed had no choice, but not because he was alienated and did not know better, quite the contrary. Wackenheim had no choice because French society afforded him no other opportunities of gainful employment than participating in dwarf tossing. Essentially, Wackenheim refused to be blamed for his own oppression/discrimination, turning the mirror on society. As he himself put it in an interview 20 years after he lost a job that had seen him tour France and obtain a measure of success, but who was now condemned to (the indignity of) odd jobs:

> J'avais galéré longtemps avant de trouver cette voie et surtout un moyen de gagner ma vie. On m'a retiré mon métier, mais sans rien me donner en compensation. J'ai essayé d'expliquer ça à ceux qui étaient contre moi. Rien à faire.[22]

One could dispute this factually: maybe there is always something else that Wackenhem might have done; but the courts are not well placed to make these judgment calls in lieu of the agency of the plaintiff. More poignantly, Wackenheim's argument was that protecting society from the indignity of "dwarf tossing" effectively pushed him into the indignity of a life of barely eking a living. As he put it, "Pour moi ce qui est dégradant et humiliant, c'est plutôt de ne pas avoir de travail."[23] Or, as the Human Rights Committee summed up his line of argument (only to better reject it): "his job does not constitute an affront to human dignity since dignity consists in having a job."[24]

If one follows Wackenheim, then, it is not him who is alienated, ultimately, but society itself: society thinks it is protecting dignity when all it is doing is piling up on the weakest individual and faulting him for its sins. At the same time, society is oblivious to the ways in which it brought about that indignity in the first place and continues to perpetuate it by fixating on decisions taken by those who have been left with very diminished life opportunities. Where the Cour de cassation saw a quintessential scenario where dignity defined along narrow parameters was violated, Wackenheim saw a complex economic and social situation of alienation which he had sought to navigate as well as possible.

But of course, the story is a complex one. Where Wackenheim sees undue state interference in his liberty, one might also see the rampant, thoroughly commodifying logic of the market and human exploitation. As "Dave the dwarf" put it on the other side of the Atlantic, "I'm capitalizing on what I have. If I was 7 feet tall, I'd get paid to put a basketball through a hoop. I'm not 7 feet tall. I'm 3-feet-2 and a dwarf, so I'm capitalizing on getting tossed."[25] Wackenheim's view of his own dignity as, essentially, his private right to dispose of, surrendered perhaps a little too easily to that powerful logic, one which one has reason to fear

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[22] Antoine Pétry, "Lancer de nains : l'interdiction a brisé sa vie", *Le Dauphiné* (17 February 2014), online: <https://www.estrepublicain.fr/actualite/2014/02/16/petite-taille-grande-rancoeur-nwdg>.
[23] "Manuel Wackenheim : "Mimie Mathy, le drame de ma vie"", (28 February 2014), online: *Public.fr* <https://www.public.fr/News/Manuel-Wackenheim-Mimie-Mathy-le-drame-de-ma-vie-1735392>.
[24] HRC, supra note 3.
[25] "Give Me a Break: Dwarf-Tossing - ABC News", *ABC News* (8 March 2002), online: <https://abcnews.go.com/2020/story?id=123931&page=1>.

ultimately has very little to do with dignity.[26] Yet the point may be that the market was at least there for him, where the state would have neither allowed him to continue his job nor provided any suitable altnerative.

Dwarf tossing as Metaphor?

The argument by Wackenheim was, in the end, clearly inaudible. Even Mimie Mathy, a fellow little person but crucially one of the most successful one in France, was harsh towards Wackenheim: "Pour moi, il y a en tous cas d'autres solutions pour s'en sortir que d'être ridicule et dans une situation dégradante."[27] Ultimately, it seems, holders of rights are expected to do their part for the upholding of their own fundamental dignity, even if society constantly puts some of them in situations where their only way to attain a certain dignity (the dignity of an income-making life) is by, arguably, harming their underlying symbolic self-worth. Individuals do not just have rights, they also have duties, and the price of living in society is that one must uphold a certain abstract concept of self as the right sort of human even against one's own interests as a concrete human.

I suggest that this is, in fact, part of a broader genus of arguments based on human dignity, where individuals are held hostage to a certain concept of what their dignity entails. This then trumps not only any consideration of their agency but also of how their being in a position of indignity is, in the circumstances, a dignified response to material conditions of indignity. These include debates on prostitution, organ donation, surrogacy, euthanasia or wearing of religious symbols (and before those on homosexuality or sadomasochism)[28] where claims of consent and necessity have often been overridden by a vague societal emphasis on dignity. In fact, Wackenheim himself made the connection to the prostitution debate: "Les putes gagnent bien leur vie avec leur cul. Pourquoi je ne pourrais pas être lancé en France? »[29]

This article could only hint at the depth of these issues and the continued price that decisions such as Wackenheim exact on the most vulnerable by only seeing their agency to the extent that it suits a broader pre-ordained conception of dignity. It has suggested that the debate is, ultimately, less one about a stylized opposition between heavy handed, top down "dignity" v. bottom-up, libertarian "autonomy," than it is about how certain societal conceptions of dignity get foregrounded that minimize and deny the many ways in which dignity is also largely in the eyes of the beholder. The ways in which, in fact, dignity is profoundly conditioned by the very possibility and the peculiar reality of agency. As Wackenheim himself put it: "Dignité humaine ? C'est bien beau tout ça. Moi, je gagnais ma vie comme je pouvais."[30]

[26] Olivier De Schutter, "Waiver of Rights and State Paternalism under the European Convention on Human Rights" (2000) 51:3 N Ir Legal Q 481–508.
[27] Xavier Frere, "Mimie Mathy : « Il aurait pu se reconvertir autrement »", (17 February 2014), online: <https://www.ledauphine.com/france-monde/2014/02/17/mimie-mathy-il-aurait-pu-se-reconvertir-autrement>.
[28] Antonin Sopena, "La dignité à l'épreuve du sadomasochisme, et inversement" (2010) 51:2 Vacarme 74–77.
[29] Quentin Girard, "Manuel Wackenheim, cloué au sol", *Libération* (30 January 1924), online: <https://www.liberation.fr/societe/2014/01/30/manuel-wackenheim-cloue-au-sol_976662/>.
[30] Pétry, *supra* note 22.

To Live or Not to Live:
International Human Rights Law's Biases on Agency in Suicide

Vishakha Wijenayake

A. Introduction

Medicalization has become a central feature of modernity's approach to suicide, leading to suicides being viewed as private acts that become public to the extent that medical intervention becomes necessary.[1] The advancements and contributions that medical sciences have made towards diagnosing, decriminalizing, and preventing suicide cannot be denied. However, it is possible to simultaneously critique the essentializing effect medicalization has had on understanding narratives of agency in suicides as they occur in various cultural contexts.

The scientific narrative of suicide is constructed in an objective language and then treated as being universally applicable. Ian Marsh critiques this empiricist discourse that is articulated as and accepted by scientific experts to be universal truths that are "acultural and ahistorical",[2] ignoring the cultural assumptions that are embedded in this understanding of suicide. This universalistic narrative pathologizing suicide tends to individualize the act while diluting social and communal constructions of suicide that frame it as an agentic act.[3]

The pathologizing of suicide also promotes the idea that ending one's own life, in most instances, cannot be a rational decision. This narrative stems from a modern assumption that "healthy people would not choose to take their own lives unless they were not healthy. Life thereby becomes the ultimate value, and the right to reject it is denied."[4] The essentialization of all types of suicides prevents critical investigation on how pathologizing suicide projects cultural biases that may conflict with various societal understandings of death. Therefore, a critical study of suicide calls for an integration of the term agency in the study of social and cultural norms that influence human behavior.[5]

In this article, I do not take agency to be limited to actions that resist oppression and conform with certain ideals of human wellbeing. As Laura M Ahearn argues, "agentive acts may also involve complicity with, accommodation to, or reinforcement of status-quo[.]"[6] Moreover, I adopt a relational approach to agency that recognizes the communal and social dimensions of agency. Catriona Mackenzie and Natalie Stoljar in their influential piece, "Introduction: Autonomy Refigured", adopt a feminist lens to challenge the idea that the notion of autonomy is

[1] Katrina Jaworski, "Suicide, Agency, and Limits of Power" in Ludek Broz & Daniel Munster, eds, *Suicide and Agency: Anthropological Perspectives on Self-Destruction, Personhood, and Power* (New York: Routledge, 2006)183 at 183.
[2] Ian Marsh, *Suicide: Foucault, History and Truth* (Cambridge: Cambridge University Press, 2010) at 32,39 [Marsh].
[3] *Ibid* at 72-74.
[4] Susan K. Morrissey, Margot Finn & Keith Wrightson, *Suicide and the Body Politic in Imperial Russia* (UK: Cambridge University Press, 2007) at 1 [Morrissey et al].
[5] Laura M Ahearn, "Agency." (1999) 9:1/2 Journal of Linguistic Anthropology 12 at 13.
[6] *Ibid*.

fundamentally individualistic and rationalistic.[7] They propose that autonomy can be relational, thereby focusing on "social dimensions of selfhood."[8] Similarly, Jennifer Nedelsky disputes the Anglo-American tendency to equate autonomy to independence.[9] Rather than insisting on traditional liberal individualism, respect for persons can be pursued by focusing on "relations that constitute those individuals and that make their values real for them."[10] A relational theory of law opens avenues of constructing agency without building purely individualistic ideals of autonomy.[11] Thereby, autonomy becomes complementary to cultural and social structures.[12]

In Part B of this article, I argue that International Human Rights Law jurisprudence on end-of-life decisions mirrors modernity's universalistic assumptions about the agency of the person committing suicide. In Part C, I problematize these assumptions by comparing the idea of agency in International Human Rights Law pertaining to end-of-life decisions with specific narratives of agency constructed around deaths of suicide attackers. In doing so, I acknowledge that the agency exercised by the suicide attacker in their death presents a thorny issue with no straightforward explanations. The objective of this article is not to make categorical claims about suicide attackers' agency but to evaluate scholarly analyses of how communities view their agency, for the specific purpose of critiquing assumptions in International Human Rights Law regarding the agency exercised when persons end their own lives.

B. Some assumptions undergirding International Human Rights Law's views on end-of-life decisions

International Human Rights Law's approach to assessing agency of those who make end-of-life decisions cannot be decoupled from the general legal approach towards suicide. Many Western countries criminalized suicide prior to it being decriminalized in late 19th and 20th centuries. It remained a crime in England and Wales until 1961 and in Ireland until 1993.[13]

One reason for its criminalization was that suicide was deemed to be against the objective normative framework set out by the State through its laws and a usurpation of the rights of the sovereign over its subjects.[14] The legal condemnation of suicide disallowed the exercise of agency over one's own death. This was an act forbidden by the State, who was the promulgator of the prevailing dominant normative framework over life and death decisions. Despite England's decriminalization of suicide, through its colonial promulgation of criminal statutes, its own cultural values criminalizing suicide were replicated and continue to be preserved in penal codes of its

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[7] Catriona Mackenzie and Natalie Stoljar, "Introduction: Autonomy Refigured" in Catriona Mackenzie and Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press, 2000) 3 at 3.
[8] *Ibid* at 4.
[9] See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press: UK, 2012) at 5.
[10] *Ibid* at 7.
[11] Andrea C. Westlund, "Rethinking Relational Autonomy" (2009) 24:4 Hypatia 26-49.
[12] John Christman, "Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves" (2004) 117 Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition 143 at 146.
[13] Kay Redfield Jamison, *Night Falls Fast: Understanding Suicide* (Vintage: New York, 1999) at 18.
[14] For an extensive critical examination of the history of suicide, see Georges Minois & Lydia G Cochrane, *History of suicide: voluntary death in Western culture* (Baltimore: Johns Hopkins University Press, 1999); and Marsh, *supra* note 2.

former colonized communities.[15] The history of criminalizing suicide frames how it came to be seen as an inappropriate exercise of agency.

In contrast to the criminalization seen in the medieval period until the 19th century, the dominant approach to suicide today is defined by its medicalization. [16] As early as 1821, Jean-Etienne Esquirol's article titled "suicide" was published in the *Dictionnaire des sciences médicales*, providing medical symptoms presented by the suicidal person.[17] According to professionals studying mental diseases at the time, suicide was considered preventable given appropriate medical oversight, making suicidality "a pathological symptom of ill individuals, something to be identified, classified, institutionalized, and prevented."[18]

Today, suicidology remains relatively monolithic in pathologizing suicide as something that happens to a person and not an agentic act carried out by them.[19] It is often considered by medical professionals as a behavior primarily caused by psychological issues affecting individuals, aggravated by socio-cultural factors.[20] The capacity to make rational decisions on the part of the person committing suicide is thereby questioned, creating a narrative that denies them agency over their own death.[21] By considering that the person committing suicide lacks sufficient capacity to exercise agency due to a mental pathology, medical sciences gradually countered the rationale for legal sanctions attributed to this act. In this process, the person committing suicide moved from being an agentic yet deviant actor, to a pathologized victim incapable of exercising agency.

Parallel to decriminalizing suicide, the law has also investigated under which circumstances people can be allowed to exercise agency over other end-of-life decisions. Similar to the medicalized approach to suicide that led to its decriminalization, jurisprudence that examines the legality of end-of-life decisions adopts a highly individualized approach to assessing the agency of a person while also exposing certain cultural assumptions about the measure of wellbeing that make a life worth living.

Such cultural assumptions also shape international law's attitudes towards how persons exercise agency when their body undergoes pain and suffering, these conditions being those that modern

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[15] Mensah Adinkrah, "Anti-Suicide Laws in Nine African Countries: Criminalization, Prosecution and Penalization" (2016) 9:1 African Journal of Criminology and Justice Studies 729 – 792.

[16] Francesca Di Marco, "Act or Disease? The Making of Modern Suicide in Early Twentieth-century Japan" (2013) 39:2 The Journal of Japanese Studies 325 at 325.

[17] See Jean-Étienne Dominique Esquirol, "Suicide," *Dictionaire des Sciences Médicales* 53 (Paris, 1821): 213; see also Ian Marsh, "The Uses of History in the Unmaking of Modern Suicide" (2013) 46:3 Journal of Social History 744–756; see also Jean Etienne Esquirol, *Des Passions considérées comme causes, symptômes et moyens curatifs de l'aliénation mentale*, thèse de médecine de Paris, 1805.

[18] J C Weaver & D Wright, "Introduction" in J C Weaver & D Wright, eds, *Histories of suicide: international perspectives on self-destruction in the modern world* (University of Toronto Press; Toronto, 2009) 3 at 4.

[19] Margaret Pabst Battin, *Endling Life: Ethics and the Way We Die* (Oxford: Oxford University Press: US, 2005) at 164.

[20] See Marsh, *supra* note 2 at 56-57.

[21] See Dariusz Galasinski & Justyna Ziólkowska, *Discursive Constructions of the Suicidal Process* (London: Bloomsbury Academic, 2020) at 45: "the dominant suicidological discourse can be seen as removing the agency of the person involved in suicide."

society seeks to eliminate.[22] Most human rights that are recognized under international law, too, attempt to minimize suffering caused to human beings either directly or indirectly. Amongst these, some rights relate more patently to the alleviation of human suffering, in the form of harm caused to the human person. Prohibition against torture is one such example and is often considered a peremptory norm.[23]

The idea of universal human rights conceives people "as active cooperators in establishing and ensuring the respect which is due them".[24] However, taking individuals to be active cooperators in eliminating suffering presents its own dilemma, where acceptance of their agency is confined to their willingness to conform to the universalizing normative framework that undergirds International Human Rights Law. 'Cooperation', therefore, translates to them being prevented from exercising their agency to waive their legally protected natural rights.[25] This idea is contained in treating human rights as inalienable. The preamble of the Universal Declaration of Human Rights (UDHR) recognizes "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[.]"[26] In this manner, the human rights regime expects individuals to be collaborators in its notion of what makes life worth living.

International Human Rights Law jurisprudence on the cases where carrying out assisted suicide or euthanasia do not violate protected rights also reflect modernity's understanding of human wellbeing. Passive euthanasia, which entails the removal of life-supporting devices, is often premised on the idea that the loss of autonomy over one's physical body equates to an undignified existence.[27] G. Montanari Vergalo and M. Gulino state that passive euthanasia can be justified because it is universally accepted that "advanced life-supporting procedures may preserve a biological and artificially sustained survival, (…) which is difficult to define from an ethical perspective."[28] This is consistent with judicial determinations on assisted suicide that consider the essence of the European Convention on Human Rights to be "respect for human dignity and human freedom".[29] Concerning active euthanasia, the European Court of Human Rights has agreed, at least in principle, that

> "[t]he ability to conduct one's life in a manner of one's own choosing may also include the opportunity to pursue activities perceived to be of a physically or morally

[22] Talal Asad, *Formations of the secular: Christianity, Islam, modernity* (Stanford: Stanford University Press, 2003) at 67; Charles Taylor, *Sources of the self: the making of the modern identity /* (Cambridge, Mass.: Harvard University Press, 1989) at 13: According to Taylor, a feature of the modern understanding of respect is the importance of avoiding suffering, which he claims to be unique among 'higher civilizations'.

[23] E de Wet, "The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law" (2004) 15:1 Eur J Int Law 97–121.

[24] Taylor, *Sources of the self, supra* note 22 at 12.

[25] *Ibid* at 11: Taylor makes reference to Locke to argue that the notion of 'inalienability' was intended to limit the waiving of rights through exercise of autonomy.

[26] *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III).

[27] G. Montanari Vergallo & M. Gulino, "End-of-life care and assisted suicide: An update on the Italian situation from the perspective of the European Court of Human Rights" (2022) 21 Ethics, Medicine and Public Health at 2.

[28] *Ibid*.

[29] *Pretty v. United Kingdom*, Application no. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002 at para 65 [*Petty v. United Kingdom]*.

> harmful or dangerous nature for the individual concerned and even where the conduct poses a danger to health or, arguably, life[.]"[30]

Despite this broad claim, conditions that circumscribe this freedom belie the cultural assumptions that undergird human right law's notion of rational agency. A patient can be allowed to end their lives, if they suffer from a severe and irreversible illness, experience intolerable physical or psychological pain, or are kept alive through life support. These conditions indicate that to be allowed to die, the patient must present themselves as facing circumstances often beyond their control, and that severely questions their quality of wellbeing.[31] Therefore, it is only when insurmountable pain makes life not worth living that agency exercised to end one's life can be considered rational and legitimate. The agency over one's own life or death is framed within this notion of human wellbeing.

In addition to drawing the contours of what makes life worth living, International Human Rights Law jurisprudence on end-of-life decisions also frames dying as an inherently private experience. In active euthanasia, "the right of an individual to decide how and when to end his life," is granted if the "said individual was in a position to make up his own mind in that respect and to take the appropriate action[.]"[32] This right is considered to form part of the right to respect for private life.[33] The individualized nature in which human rights assesses agency can be traced back to Enlightenment-period philosophy when suicide was seen as having the potential to be an ethical choice on the part of the person carrying it out.[34] During this era and beyond, some philosophers favored an individualized idea that valorizes the agency expressed in the act of committing suicide. In his essay "On Suicide", David Hume argues that suicide should not be criminal given that it does not constitute a "transgression of our duty either to God, our neighbour, or ourselves."[35] According to Hume, a person may use reason to decide that dying may cause more happiness to them rather than living and that, given the survival instinct, such a decision to end one's life will be the result of serious deliberation.[36] Friedrich Nietzsche, in Zarathustra's speech "On Free Death" considered suicide as an assertion of freedom and will.[37] Accordingly, suicide has been viewed to represent an individualized existential choice.[38] In this light, suicide becomes an agentic act where the person who commits suicide pursues an idea of life and death they themselves define based on their individual priorities. Reflecting this individualized notion of agency, the European Court of Human Rights has also acknowledged that terminally ill individuals are vulnerable to external influences which may be a cause to deny such person agency over their end-of-life decisions.[39] Here, not only is a life that contemplates death equated to vulnerability but external influences on a person thus situated are viewed as antithetical to agentic choice.

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[30] *Ibid* at para 62.
[31] Vergallo & Gulino, *supra* note 28 at 3.
[32] *Haas v. Switzerland*, Application no. 31322/07, Council of Europe: European Court of Human Rights, 20 January 2011 at para 51.
[33] Ibid.
[34] Morrissey et al, *supra* note 4 at 1.
[35] David Hume, *On Suicide* (New York: Penguin, 2005) at 5.
[36] *Ibid*.
[37] See Friedrich Nietzche, *Thus Spake Zarathustra, translated by Thomas Common (New York: Dover Publications, 1999*) at 46-48.
[38] Francesca Di Marco, "Act or Disease? The Making of Modern Suicide in Early Twentieth-century Japan" (2013) 39:2 The Journal of Japanese Studies 325 at 327.
[39] *Pretty v. the United Kingdom*, *supra* note 29 at 79: "Doubtless the condition of terminally ill individuals will vary. But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question.

As I discussed in this section, despite modernity's understanding of end-of-life decisions as being acultural and objective, the criteria adopted to determine when such decisions are acceptable are intrinsically intertwined with certain cultural biases on death.[40] First, life is deemed worth living when certain physical conditions are met, such as being in control of one's bodily autonomy and not undergoing unbearable physical pain. Second, life and death decisions are considered individual ones, disregarding these decisions' communal or relational dimensions. In Part C of this article, I contrast modern cultural assumptions reflected in International Human Rights Law's understanding of end-of-life decisions with suicide attackers' deaths, which are carried to defy a narrative of self-preservation and for a political purpose to engender communal narratives.

C. Problematizing modern assumption on suicide through narratives on suicide attacker deaths

Suicide attacks complicate modernity's understanding of end-of-life decisions as being acultural and objective. The narratives constructed around the deaths of suicide attackers compel a reassessment of the criteria adopted to determine when end-of-life decisions are deemed acceptable and to acknowledge that these decisions are intrinsically intertwined with certain cultural biases on death.[41] As Hector N. Qirko notes, "[w]hy any given individual commits to suicidal action is influenced by many factors, including adherence to group and community norms and ideologies as well as personal disposition and circumstances, and so can never be fully known or predicted."[42] Those who carry out suicide attacks, both the attacker and the armed group or military they are a part of, intend to spur the creation of public narratives. Some of these narratives, especially those formulated by the attackers' militaries and armed groups or by the communities to which they belong, imbue their act of suicide with political meaning, valorizing both the act and the attackers. Therefore, communities construct narratives that become particularly important to understand whether suicide attackers' deaths are considered agentic acts. In Palestine, each act of martyrdom by a suicide attacker generates new posters that commemorate the life and death of the martyr.[43] In Sri Lanka, the names of suicide attackers were publicized by the LTTE after their operations so they could be individually honored.[44] These narratives often glorify the death of the suicide attacker as an agentic act. The agency is not ascertained by factually delving into the attacker's intention but attributed ex post facto by the social symbolization of the act by the community that supported it.

The social construction of agency is not exclusive to suicide attacker narratives and is prevalent in how narratives on agency generally function. In legal adjudication, an act is deemed agentic, to some extent, based on how others view this act. For example, criminal courts would ascertain the agentic quality of an act based on how the evidence presented and the narratives constructed by legal counsel fit in with the legal norms applicable. This determination of agency remains a highly

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It is primarily for States to assess the risk and the likely incidence of abuse if the general prohibition on assisted suicides were relaxed or if exceptions were to be created."

[40] Morrissey et al, *supra* note 4 at 6.

[41] Morrissey et al, *supra* note 4 at 6.

[42] Hector N. Qirko, "Altruism in Suicide Terror Organizations" (2009) 44:2 Zygon 289 at 292.

[43] Mia Bloom, *Dying to Kill: The Allure of Suicide Terror* (New York: Columbia University Press, 2007) at 30.

[44] Diego Gambetta, "Can we make sense of suicide missions?" in Diego Gambetta, ed. *Making Sense of Suicide Missions* (Oxford: Oxford University Press, 2006) at 103.

interpretive enterprise. As Thomas Osborne argues, in the case of suicide, the inherent ambiguity created by the inability of the person who committed suicide to clarify their state of mind, amplifies the need for external constructions of agency.[45] Dean Sharpe and Natalia Linos point out,

> "Death, it seems, provides a new life for suicides, as their end becomes the object of others' fascination, imagination, and need for explanation. Both their body and their history are taken over and reinterpreted by the broader culture."[46]

Similarly, despite the finality presented in the death of the suicide attacker, the public nature of these suicides tends to leave a mark over time, thereby prolonging narratives of agency surrounding this act.[47] In this context, the suicide attacker's act becomes intertwined with a political or existential struggle of a larger community. Therefore, suicide attacks are not merely acts carried out by an individual, but acts imbued with cultural and communal meaning.

To understand how suicide attacks become a sacrifice for the collective rather than a purely private death, it is crucial to examine cultural understandings of suicide as a collective act. Ronald Niezen argues that in some cultural contexts suicide can become the source of "interpersonal connection and identity":[48] an act of individual agency that is directed toward social belonging. Michael J Kral, exploring the idea of suicide as internalized through culture, similarly argues that suicide is a type of social logic and that the method by which people kill themselves can be highly local and deeply embedded in the cultural system of ideas.[49] The embeddedness in culture does not take away from the agency of the act. Kral insists that it is important to hold on to the idea of suicide as a conscious choice.[50] The understanding of agency in suicide as being culturally embedded does not sit comfortably with the idea in International Human Rights Law that rational exercise of agency is decoupled from external influences.

Viewing agency of the person committing suicide in a culturally contextualized manner also necessitates a reassessment of how International Human Rights Law principles require all individuals to cooperate with its project of a dignified life. Anthropologist Lisa Stevenson's work on the psychic life of biopolitics critiques the State's desire to make people live at the population level, in the context of the epidemic of suicides among Inuit youths. Her article evokes the possibility that those who kill themselves may be acting as agentive subjects by refusing to cooperate with a regime that purports that life is always worth living.[51] She notes that

> "[t]he self-evident truth of the 'suicide apparatus,' its unquestioned certainty, is that life is worth living, that life itself is its own value. (…) To be a good citizen means to cooperate in this regime of life."[52]

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[45] Thomas Osborne, "'Fascinated dispossession': suicide and the aesthetics of freedom" (2005) 25:2 Economy and Society 280-294 [Osborne].

[46] Dean Sharpe & Natalia Linos "Dying to Live in Palestine: Steadfastness, Pollution and Embodied Space" in JC Weaver & D Wright, Eds, *Histories of suicide: international perspectives on self-destruction in the modern world* (Toronto: University of Toronto Press, 2009) at 205.

[47] Osborne, *supra* note 45 at 282.

[48] Sharpe & Linors, s*upra note 46* at 108.

[49] See Kral Michael J, "Suicide as social logic" (1994) 24:3 Suicide and Life-Threatening Behavior 245 at 248.

[50] *Ibid*.

[51] See Lisa Stevenson, "The psychic life of biopolitics: Survival, cooperation, and Inuit community" (2012) 39:3 American Ethnologist 592-613.

[52] Lisa Stevenson, *Life Beside Itself: Imagining Care in the Canadian Arctic* (Berkeley: University of California Press, 2014) at 10.

She underscores the importance of recognizing other cultural views that perceive life and death with more uncertainty.[53] Similarly, International Human Rights Law seeks to make people live by dictating the limited and exceptional circumstances needed for a person to be permitted to end their life. It would therefore consider suicide attacks as being irrational given that their deaths deviate from the assumption that a rational individual in a good physical condition would make decisions that favor self-preservation.

The narratives constructed around the deaths of Kamikaze pilots offer an example that challenges the equivalency between rational agency and preserving one's life. Hazel R Markus and Shinobu Kitayama have adopted a critical lens towards agency, taking into account how many Asian cultures tend to construe individuality as intertwined with the "fundamental relatedness" of one another.[54] The Japanese notion of agency translates to a person's efforts to harmonize their personal goals and emotions with those of the collective.[55] Hence, in the Japanese cultural context the notion of self-preservation is reconsidered in light of how the idea of self is seen as embedded with one's community. Samurai ethics shaped how the deaths of Kamikaze pilots were understood. Renouncing self-interest, even the interest in one's own survival, is fundamental to the Samurai.[56] Japanese cultural narratives present an idea of death that is not mutually exclusive with the preservation of self. In Samurai ethics, victory and defeat were temporary and circumstantial. According to the Japanese notion of courage, "life itself was thought cheap if honor and fame could be attained therewith: hence, whenever a cause presented itself which was considered dearer than life, with utmost serenity and celerity was life laid down".[57] Accordingly, "to an ambitious samurai a natural departure from life seemed a rather tame affair and a consummation not devoutly to be wished for".[58] Kamikaze pilots who died in battle were deified and their names inscribed in a national shrine.[59] Among these, the Yasukuni shrine received special status derived from the fact that the emperor himself paid tribute there to the souls of the war dead. A parting remark supposedly made by soldiers going into battle was "see you in Yasukuni shrine".[60] These cultural practices show how the Kamikaze pilots' 'selves' continue to be preserved long after their biological deaths. This is possible because their idea of the 'self' is socially embedded. This example reveals that in narratives constructed around Kamikaze suicide attackers the notion of well-being was assessed from a fundamentally different cultural point of view which adopted a more fluid understanding of life and death as well as a communal reading of what makes life worth living.

In addition to suicide attacks challenging International Human Rights Law's contours of when life is deemed not worth living, narratives surrounding these attacks also problematize the idea that end-of-life decisions are inherently private. This is most evident when considering the practice of

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[53] *Ibid*.
[54] Hazel R Markus & Shinobu Kitayama, "Culture and the Self: Implications for Cognition, Emotion, and Motivation" (1991) 98:2 Psychological review 224 at 224.
[55] *Ibid* at 228.
[56] Yamamoto Tsunetomo, *Hagakure: Book of the Samurai*, 2nd ed (Tokyo: Tuttle, 2005) at 1.
[57] Inazo Nitobe, *Bushido, the Soul of Japan* (2004) at 97.
[58] *Ibid* at 131-132.
[59] Samuel P Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (US: Harvard University Press, 1956) at 129.
[60] Peter Hill, 'Kamikaze', in Diego Gambetta (Ed) *Making sense of suicide missions* (Oxford: Oxford University Press, 2005) at 15.

martyrdom. The label of martyrdom is attached to certain suicide attacks ex post facto,[61] and requires that the death be witnessed by others. The Arabic term for martyr, *shahid* appears in the Quran "primarily in the sense of 'witness' – that is, Muslims should act as a living testimony for the rest of mankind".[62] Raphael Israeli connects this notion of bearing witness to martyrdom to the ancient Hebrew idea of *"Kiddush Ha-Shem"* which relates to the praising of God's name "in the public square, in speech and in deeds, on every occasion, to the point of sacrificing one's life in that endeavor".[63] Therefore, martyrdom is performed publicly.[64] In these cases, it is not only the person who faces death who engages in the practice of bearing witness. The public nature of the death means that it is communally witnessed as well. Those who witness the death sanctify and commemorate it as heroic martyrdom.[65] It is, therefore, an act that is done in public and then given meaning by the public.

The public dimension of martyrdom makes it a political and performative act. For example, the narratives found in *Dabiq*, a magazine issued by ISIS, memorialize the deaths of martyrs depicting them as intentional deaths towards the revolutionary goals of ISIS' political project.[66] It speaks not to self-interest but to an interest of serving a larger political project. The act is inherently beyond the individual and influenced by external factors. This characteristic of their deaths spurs the attribution of agency by armed groups and the larger public that view its performance. Performativity relates to the repetitive character of acts and their ability to generate new realities and meanings.[67] Nasser Abuharfa alludes to this performative nature of Hamas' use of martyrdom operations and how this led to the creation of a culture of martyrdom in the Palestinian context."[68] Due to the public nature of martyrdom, it transforms the individual sacrifice of the martyr to a cultural performance which helps the construction or the preservation of the identity of a community. Rather than diluting the agency of their act due to external influences, as International Human Rights Law suggests, the performativity of suicide attackers' deaths sustains a project that values the agency of those who engage in martyrdom operations for a political project external to themselves.

D. Conclusion

In this article I argued that International Human Rights Law reflects the medicalized approach of adopting seemingly objective and universal assessment of end-of-life decisions. This approach is challenged by the narratives that portray suicide attackers' deaths as agentic. A precondition to a more culturally sensitive International Human Rights Law is the acknowledgement of biases that undergird its own framework. This is more important given that international law acts as a belief system that does not encourage critical examinations of the "hidden patterns" of its "modes of

[61] Friedrich Avemarie & Jan Willem van Henten, *Martyrdom and Noble Death : Selected Texts from Graeco-Roman, Jewish and Christian Antiquity* (Routledge, 2005) at 3.
[62] Meir Hatina, *Martyrdom in Modern Islam: Piety, Power, and Politics* (Cambridge: Cambridge University Press, 2014) at 36.
[63] Raphael Israeli, *Dying as a Shahid: Martyrs in Islam* (Strategic Book Publishing & Rights Agency, 2019) at 6.
[64] *Ibid* at 2.
[65] *Ibid*.
[66] Erkan Toguslu "Caliphate, *Hijrah* and Martyrdom as Performative Narrative in ISIS *Dabiq* Magazine" (2019) 20:1 Politics, Religion & Ideology 94 at 96.
[67] *Ibid.*
[68] Nasser Abufarha, *The Making of a Human Bomb: An Ethnography of Palestinian Resistance* (2009) at 195.

legal reasoning".[69] One such hidden pattern that the international legal system thrives on is the liberal idea of a perceived "rational consensus" within the international community, while its truth or meaning rests neither on rationalism nor on empiricism but on "the deployment of certain transcendental validators that are unjudged and unproved rationally or empirically."[70] By highlighting the importance of viewing end-of-life decisions through a non-essentialized and less individualized lens, this article identifies the biases that undergird International Human Rights Law's approach to agency, and takes a step in the direction of making it more culturally responsive.

[69] Jean d'Aspremont, *International Law as a Belief System* (Oxford: Oxford University Press, 2017) at 14.
[70] *Ibid* at 5.

The Limits of Sexual Autonomy for Minors: Debating Age of Consent Laws

Hoko Horii

Abstract

Sexual freedom is regarded as a fundamental right that is essential for the development of personal autonomy. Yet, when it comes to childhood sexuality, this freedom seems to become less clear-cut. While the Convention of the Rights of the Child affirms children's negative freedom (protection from sexual abuse and exploitation), it does not address their positive freedom (the freedom to engage in sexual activity). The reservation stems from the belief that children, not fully developed, lack the capacity to make informed decisions and can be easily influenced by older individuals who possess greater knowledge and power.

This paper explores the debates surrounding age of consent laws and legal cases involving 'child sexual abuse', particularly those cases where the minor party appears to be consenting. These limitations on adolescents' sexual freedom are often justified based on the concept of harm, which is identified either as collective harm or foreseeable harm in the future. This paper provides evidence of a moralistic tendency to punish 'deviant' behavior that violates prevailing moral norms, even when harm is not evident.

Introduction

In 1978, a radio conversation took place between Michel Foucault, playwright/lawyer Jean Danet, and novelist/gay activist Guy Hocquenghem, in which they debated the idea of abolishing age of consent laws in France. During the conversation, Foucault asserted that "Consent is a contractual notion". Hocquenghem agreed with this perspective and continued:

> Everybody – judges, doctors, the defendant – knows that the child was consenting – but nobody says anything, because, apart from anything else, there's no way it can be introduced. It's simply the effect of a prohibition by law: it's really impossible to express a very complete relationship between a child and an adult […] In any case, if one listens to what a child says and if he says "I didn't mind", that doesn't have the legal value of "I consent". But I'm also very mistrustful of that formal recognition of consent on the part of a minor, because I know it will never be obtained and is meaningless in any case.[1]

During their conversation, they proposed an alternative approach to setting a legal age limit for sexual consent, suggesting we should "listen to what the child says and give it a certain credence", as "the child may be trusted to say whether or not he was subjected to violence".

However, over the past several decades, the global trend has moved in the opposite direction, with age of consent increasing in many countries. The standard age of consent is now 16.[2] These legal

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[1] Lawrence D Kritzman, ed, "Sexuality Morality and the Law" in *Michel Foucault: politics, philosophy, culture: interviews and other writings* (New York: Routledge, 1988).

[2] Matthew Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Basingstoke; New York: Palgrave Macmillan UK, 2005).

reforms are reflective of shifting societal ideas about children's capacity for autonomous decision-making, a topic that is complex and multifaceted, involving scientific research, politics, and considerations of children's rights and citizenship.

One of the most important principles guiding the UN Convention on the Rights of the Child (CRC) is the principle of evolving capacity (Article 5 and Article 14(2)). The principle seeks to enable children to exercise increasing agency over their lives as they grow and develop their decision-making abilities. The CRC also recognizes children's right to express their views on matters that affect them and to have their opinions given due weight in accordance with their age and maturity (Article 12).

Numerous studies have explored children's capacity to consent, participate, and make decisions. Research has examined topics such as children's capacity to provide informed consent to medical treatment[3][4], to participate in research[5][6], to participation in the digital world[7], to receive child welfare service[8], and to express their views in family law proceedings.[9] The application of the evolving capacity principle has also been tested in juvenile justice systems.[10] These studies suggest that children's capacity for decision-making is intricate and involves a range of factors.

While the use of a biological age limit as a cutoff for legal capacity to consent has practical advantages as an administrative and normative gauge,[11] it also has disadvantages. One such disadvantage is that it does not allow for individual assessment of each child's competence and a differentiated approach to each case. This can result in laws and policies that are paternalistic and diminish children's agency.

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[3] Priscilla Alderson, Katy Sutcliffe & Katherine Curtis, "Children's Competence to Consent to Medical Treatment" (2006) 36:6 The Hastings Center Report 25–34; Elvis Fokala & Annika Rudman, "Age or Maturity? African Children's Right to Participate in Medical Decision-Making Processes Special Focus: The African Children's Charter at 30: Reflections on Its Past and Future Contribution to the Rights of Children in Africa" (2020) 20:2 Afr Hum Rts LJ 667–687.

[4] Alderson, Sutcliffe & Curtis, *supra* note 3.

[5] Perpetua Kirby, "'It's never okay to say no to teachers': Children's research consent and dissent in conforming schools contexts" (2020) 46:4 British Educational Research Journal 811–828; Irma M Hein et al, "Informed consent instead of assent is appropriate in children from the age of twelve: Policy implications of new findings on children's competence to consent to clinical research" (2015) 16:1 BMC Medical Ethics 76; Melodie Labuschaigne, Safia Mahomed & Ames Dhai, "Evolving capacity of children and their best interests in the context of health research in South Africa: An ethico-legal position" (2022) Developing World Bioethics.

[6] Hein et al, "Informed consent instead of assent is appropriate in children from the age of twelve", *supra* note 5.

[7] Perpetua Kirby, "'It's never okay to say no to teachers': Children's research consent and dissent in conforming schools contexts" (2020) 46:4 British Educational Research Journal 811–828.

[8] Tarja Pösö, "Children's consent to child welfare services: Some explorative remarks" (2022) 36:1 Children & Society 52–65.

[9] E Kay M Tisdall, "Subjects with agency? Children's participation in family law proceedings" (2016) 38:4 Journal of Social Welfare and Family Law 362–379.

[10] Ursula Kilkelly, "'Evolving Capacities' and 'Parental Guidance' in The context of Youth Justice: Testing the Application of Article 5 of the Convention on the Rights of the Child" (2020) 28:3 The International Journal of Children's Rights 500–520; Raymond Arthur, "Exploring Childhood, Criminal Responsibility and the Evolving Capacities of the Child: The Age of Criminal Responsibility in England and Wales Special Issue: The Age of Criminal Responsibility" (2016) 67:3 N Ir Legal Q 269–282.

[11] Hein et al, "Informed consent instead of assent is appropriate in children from the age of twelve", *supra* note 5.

The discussion surrounding children's sexual autonomy is particularly intricate. Moore and Reynolds argue that adolescents' rights to partake in sexual decision-making are unlikely to be realized under the CRC, as modern developmental discourse often assumes childhood innocence, immaturity, and asexuality.[12] The prevailing discourses on childhood and sexuality prioritize adult-defined and protectionist perspectives, and these discourses and concerns expressed are rarely about children themselves.[13] Although the UN Committee on the Rights of the Child acknowledges the need to establish a minimum age for sexual consent that accounts for "evolving capacity, age and maturity", the statement remains rather generic and ambiguous.[14] Furthermore, the Committee does not provide guidance on the specific age at which such a minimum age should be set in each state's legal system. It seems that there is difficulty in coming to a common agreement over what the age of consent should be.[15]

I propose that the lack of an established international standard for children's sexual rights can be attributed to the anxiety surrounding adolescents' sexuality. Hawkens and Egans discuss the 'sexualization panic', where young girls are assumed to be unstable and vulnerable, and any dissenting opinions are disregarded.[16] Since the 18th century, child sexuality has been condemned as sinful, harmful, or pathological.[17] In the 19th century, the control of child sexuality was institutionalized,[18] and the age of consent was invented. This institutionalization of child sexuality is grounded in the presumptive innocence and incompetence of children,[19] and its discourse that has been successfully deployed by social and moral conservatives.[20]

Contemporary Western society is dedicated to preventing child sexual abuse more than ever before.[21] However, discussions of childhood sexuality often ignore the subjectivity and agency of children. For example, Freudian theory recognizes children's sexual desires but positions them as non-autonomous objects of adult attention.[22] Similarly, developmental and behaviorist theorists seek to create socially acceptable forms of 'childhood sexuality' rather than acknowledging children's own subjective experiences.[23]

This lack of attention to children's subjectivity means that their ability to give sexual consent is often discounted on the basis of their perceived 'immaturity'. The agency of socially and politically

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[12] Allison Moore & Paul Reynolds, *Childhood and sexuality: contemporary issues and debates* (London: Palgrave Macmillan, 2018), at 73.
[13] R Danielle Egan & Gail Hawkes, "The problem with protection: Or, why we need to move towards recognition and the sexual agency of children" (2009) 23:3 Continuum 389–400.
[14] UN Committee on the Rights of the Child, *General comment No. 4 (2003), Adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4* (2003).
[15] Moore & Reynolds, *supra* note 11, at 87.
[16] Gail Hawkes & R Danielle Egan, "Landscapes of Erotophobia: The Sexual(ized) Child in the Postmodern Anglophone West" (2008) 12:4 Sexuality & Culture 193–203.
[17] Sterling Fishman, "The History of Childhood Sexuality" (1982) 17:2 Journal of Contemporary History 269–283.
[18] *Ibid*.
[19] Joseph Fischel, "Per Se or Power? Age and Sexual Consent" (2016) 22:2 Yale Journal of Law & Feminism.
[20] Kerry H Robinson, *Innocence, Knowledge and the Construction of Childhood: The contradictory nature of sexuality and censorship in children's contemporary lives* (Routledge, 2013).
[21] David Archard, *Sexual consent* (Westview Press, 1998).
[22] Guangxing Zhu, *Protection versus autonomy: The newest developments in age of consent legislation in Europe and China* (Doctoral Thesis, Tilburg University, 2018), at 84.
[23] R Danielle Egan & Gail L Hawkes, "Imperiled and Perilous: Exploring the History of Childhood Sexuality" (2008) 21:4 Journal of Historical Sociology 355–367, at 362.

marginalized individuals often gets nullified when their actions are deemed 'wrong' by more powerful actors or institutions. Apart from age, other social characteristics such as disability, class, sexuality, gender, and ethnicity can also impact the degree to which individuals may be seen as less capable to choose, process information, or resist coercion.[24] Therefore, it is important to examine the circumstances under which children's agency is limited or negated.

This paper will examine when adolescents' consensual or agentic engagement in sexual activities is deemed non-consensual. This article address cases that are clear evidence of physical or psychological force or when minors are in a clearly constrained position, which are unequivocally considered child sexual abuse. Rather, the focus is on situations where minors appear to be giving consent. The study seeks to examine the legal rationales used to criminalize these acts when minors seemingly consent. With respect to research methods, my research involved collecting and analyzing a wide range of primary sources including interviews with legal actors and legal cases of 'child sexual abuse' in three countries: Japan, Indonesia, and the Netherlands. The analysis identified common themes and patterns in the judicial reasoning employed to criminalize sexual acts involving minors.

Collective Harm and Foreseeable Harm

The first pattern is the justification by the invocation of collective, societal, and reputational harm. In Indonesian cases, young boys are prosecuted and jailed for engaging in sexual activity with their girlfriends. For instance, in one case of 'mutual love', a 17-years-old boy and a 16-years-old girl engaged in sexual intercourse, and the boy was sentenced to two years of imprisonment and three months of vocational training. Although the court recognized that "the act of intercourse was done on the basis of mutual willingness and there was no compulsion", the boy was convicted because his actions were "not a good example for other children".[25] The court justified this decision by citing the societal harm caused by premarital sexual intercourse, which breaches the moral code of society and "disturbed the society"[26].

Additionally, many cases framed the harm caused by the sexual acts as damage to the girls' reputation. Losing her virginity results in "a prolonged shame on both the victim and her extended family". The logic is that the boys' actions caused "trauma and shame on the victim among her community and her school".[27] This harm is framed as affecting not only the victim but also her family and extended family, whose lives are embedded within their community, including her school. It is also worth noting that those who are prosecuted are always boys, and never girls, even in cases where the girl was older than the boy. This pattern of prosecution relies on patriarchal and gendered norms that dictate that girls' sexuality must be kept within marriage and that losing their virginity before marriage brings shame to her and her family.[28] This pattern of justification may

[24] Moore & Reynolds, *supra* note 11, at 86.
[25] 28/Pdt.P/2016/PN.Srp. (Indonesia).
[26] 28/Pdt.P/2016/PN.Srp.(Indonesia). Other court decisions (67/Pid.Sus/2013/PN.Dps. (Indonesia), 1/Pid.Sus.Anak/2015/PN Dps.(Indonesia)) also read: "the religious norm that is not to have sexual intercourse outside of husband/wife relationship is violated"; "according to 'religious norms' and 'norms in community', the act is only for legally (sah) married adults"; and "sexual intercourse without adat marriage is against 'norms of decency' and 'legal norms' that damage the reputation of the girl even if it was a case of mutual love."
[27] 28/Pdt.P/2016/PN.Srp.(Indonesia).
[28] Interview with a judge at District Court Depnasar. 16/06/2017.

also be attributed to the socio-legal structure of Indonesian communities, where religious and customary norms are codified and enforced by non-state legal structures alongside state law. The violation of such norms results in the identification of collective harm, which is dealt with through punishment or sanction according to these legal structures.

Unlike in Indonesia, where the harm caused by premarital sex is often framed in terms of collective societal values, some Dutch cases take a more individualistic approach by considering the potential harm to the minor involved. However, socio-ethical norms surrounding age differences and relationships also play a role in determining the legality of the sexual act. Some of the Dutch cases mention "conflict with socio-ethical norm" as a criterion to judge the legality of the sexual act. These norms include factors such as the age difference between the parties and the nature of their relationship.

The second pattern observed is the framing of harm as damage in the future. One Japanese case involving a 17-years-old girl and her high school teacher illustrates this pattern. The student expressed her romantic feelings towards him, and they started a "relationship" in which they engaged in sexual intercourse, despite the teacher being a married man with children. The judgment notes that he "was not in a position to be able to reciprocate her feelings", and sentences him to two and half years in prison. The court's framing of the harm highlights its potential impact on the victim's future development.[29] Similar concerns were raised in another case where teenage girls (aged 16, 17, and 19) seemed to have agreed to have sex with an older man in exchange for cash or a mobile phone. The court noted its concern about the bad influence his actions might have on the young victim's future.[30]

Another case explains the logic as follows: "when a person engages in a sexual act with who is in a less privileged/powerful position, considering it is not hard to imagine there are various reasons why the less powerful party does not/cannot refuse to do so, in most of such cases, the sexual act is not based on genuine/true consent. Thus, we can consider that that person's sexual autonomy has been violated, and it could possibly result in an ex-post psychological disorder."[31] Case 31 clarifies that the interest the law on sexual violence aims to protect is the victims' sexual autonomy.[32] Case 20 emphasizes that some of the young victims "continue to have psychosomatic treatment, as the incident has had a long-lasting harmful impact on their mental health".[33]

Several Dutch cases[34] also mention the foreseeable harm. For example, Case 9 reads: "By his actions, the Defendant seriously violated the physical and mental integrity of the victims. He has crossed a normal and healthy development to which every child is entitled. After all, it is a fact of common knowledge that victims of sexual offences often suffer serious and long-term

[29] Shizuoka District Court, R01.08.28 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/10/30/164021
[30] H13(wa)1063 Saitama District Court H14.06.19 (Japan).
[31] H25(wa)290 Kagoshima District Court H26.03.27 (Japan).
[32] H28(u)493 Osaka High Court H.28.10.27 (Japan).
[33] H20(wa)385 Hiroshima District Court H21.09.14 (Japan).
[34] ECLI:NL:RAMS:2019:9738 (the Netherlands)., ECLI:NL:RBZWB:2015:4630 (the Netherlands)., ECLI:NL:RBNNE:2015:2206 (the Netherlands).

psychological damage. The Defendant did not think about this and put his own lust satisfaction first."[35]

In Indonesian cases, the reputational damage is also framed as the "damage for the future of the victim".[36] The cases from all three countries show that courts refer to future harm, but those from Japan and the Netherlands specifically emphasize the influence of psychological knowledge derived from trauma research. Psychological knowledge is predominant in the debates for the law-making process regarding sexual violence, as well as in court hearings. Psychological experts are often called upon to testify for both the defense and prosecutors. Legal actors strategically use the expert knowledge, which shapes the legal reasoning and outcome. Given the significant reliance on psychological knowledge in legal process involving child sexual abuse, it is crucial to critically evaluate the role and effects of this knowledge. Foucault has argued that psychological knowledge has been used to pathologize and normalize individuals, and also disciplining those who do not conform to social norms.

Presumptive Immaturity and Vulnerability of Children

Another important pattern is the nullification of apparent consent by the age gap between two parties. The age gap seems to be an important criterion for prosecution and conviction, particularly in the Netherlands. Dutch law enforcement officials consider three criteria when assessing cases: (1) the age gap, (2) whether the two parties are in an "affective relationship" over time,[37] and (3) whether the acts are ethical from "a standard point of view". For (2), "genuine mutual affection and commitment"[38] is important, and a temporary sexual relationship, such as a one-night stand, is not considered such an affective relationship.

For instance, in Case 12, a boy (14 years old) was not convicted despite a girl (13 years old) claiming that their sexual act was against her will.[39] Case 7 states that sexual acts between minors between the ages of 12 and 16 may not be considered lewd under certain circumstances, such as when the age difference is slight and the acts occur voluntarily, because such sexual behavior between two peers is "considered normal in the current era".[40] By this logic, the court acquitted this case, in which a 14-year-old girl accused an 18-year-old boy of forcible sexual acts. The victim claimed the sexual act was against her will, but the defense argued that it was voluntary and did not violate "socio-ethical norms", and therefore lacked lewd character. Case 16, involving a 15-year-old girl and a 17-year-old boy within courtship, also mentions that the sexual act lacks the lewd character because it was "a non-exceptional sexual exploration within the context of a voluntary sexual contact between two young people who were dating and whose age difference was relatively small".[41]

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[35] ECLI:NL:RBNNE:2015:2206 (the Netherlands).
[36] 67/Pid.Sus/2013/PN.Dps. (Indonesia), 4/Pid.Sus.Anak/2016/PN Dps. (Indonesia), 28/Pdt.P/2016/PN.Srp. (Indonesia), 84/Pdt.P/2017/PN Srp. (Indonesia).
[37] Juul C W Gooren, *Een overheid op drift: de strafrechtelijke beheersing van seks en jongeren* Leiden University, 2016).
[38] ECLI:NL:RBSHE:2007:BB3296 (the Netherlands).
[39] ECLI:NL:RBLEE:2007:AZ8616 (the Netherlands).
[40] ECLI:NL:RBGEL:2020:5287 (the Netherlands).
[41] ECLI:NL:RBSHE:2008:BD1676 (the Netherlands).

In contrast, if the age gap is significant, the older party may be convicted, even if the younger party had romantic feelings for his female teacher. The court mentions that the boy was not yet 14 years old, and due to his age and the teacher-student relationship, he was in a vulnerable position. She "should have been aware of her special responsibility towards the victim" and "should have adapted her actions to this awareness, by discouraging and adjusting the boy's romantic feelings for her as much as possible and by in any case to refrain from the proven sexual contact".[42]

This reasoning relates to another notable pattern, which is the reference to minors' immaturity, incapacity, or vulnerability. In cases of "prostitution", judgments often mention that the defendants "could understand that the minors in general have too little experience and insight to oversee the consequences of prostitution, and that it cannot be said that their choice of prostitution is a completely voluntary choice".[43]

In Case 20, a man in his 40s is convicted for engaging in sexual acts with multiple late-teens (17-18 years old) by bribing them with money, mobile phones, necklace, shoes, or driving lessons.[44] The court found that he "abused his age and physical and psychological predominance over the young victims" and "put them into a dependent relationship with him".[45] Case 17 clarifies that the age of consent law is intended to "protect the sexual integrity of persons who, because of their young age, are generally considered not to be able to or insufficiently capable of doing so."[46]

Japanese cases use the term "immaturity" for referring to the same. In Case C, the defense argued that the young victims "fully understood the meaning of sexual intercourse, and engaged with the sexual acts based on genuine sexual autonomy".[47] However, the court stated that "the law stipulates that any sexual acts with girls under 13 years old, regardless of the presence of consent, are rape. This is because such sexual acts, by adults, are considered to be exploitative, given the fact that girls under 13 years old are so immature in their sexuality and personal development that it is inappropriate to leave their sexual autonomous decisions up to their free will." Therefore, "we cannot consider that the victims in this case (12 and 11 years old) were capable of exercising genuine sexual autonomy." In Case I, the defense pointed out that the 14-year-old victim sent messages to the defendant expressing her intention to marry him, but the court overruled this claim by stating that it must have resulted from her immaturity and lack of cognitive capacity.[48]

Immaturity is also invoked in other cases involving older teens, such as the case of the 17-year-old girl and her high-school teacher mentioned above. The judgment refers to his act as "a selfish and despicable crime in which he takes advantage of her immaturity and lack of sensible judgment".[49] Interestingly, in another case of a girl of the same age (17 years old) and a 23-year-old man, the court acquitted the defendant because "it is hard to consider that he took advantage of her physical and mental immaturity".[50] Although the victim claimed that the sexual act was

[42] ECLI:NL:RBROE:2008:BD5827 (the Netherlands).
[43] ECLI:NL:RBSHE:2003:AN9794 (the Netherlands)., ECLI:NL:RBSHE:2003:AN9846 (the Netherlands).
[44] ECLI:NL:RBZUT:2008:BC9786 (the Netherlands).
[45] ECLI:NL:RBZUT:2008:BC9786 (the Netherlands).
[46] ECLI:NL:HR:2001:AD5390 (the Netherlands).
[47] Fukuoka District Court, H23.03.17 (Japan). https://okumuraosaka.hatenadiary.jp/entry/20110702/1309603880
[48] Osaka High Court, H29.01.29 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2020/02/10/140053
[49] Shizuoka District Court, R01.08.28 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/10/30/164021
[50] Sendai District Court, H30.02.08 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/07/17/164723

against her will and the prosecutor argued that "they were not in a relationship in which sexual contact is taken for granted", the court declared that "she could have expected that meeting him again could lead to sexual contact" since they had previously had sex.[51]

In summary, young people are considered incapable of making sensible judgments due to their lack of experience, knowledge, and power. Therefore, even if they appear to be consenting to the act, it is a result of manipulation rather than genuine sexual autonomy. However, the difference between these two cases above, involving 17-year-old girls, suggests that the judgment is not only about immaturity or lack of cognitive capacity, but also about normativity, i.e., how their relationship fits in with the standard norms about 'romantic relationship'. Tambe's research on League of Nations' efforts to track ages of consent also concludes that "the modern age of consent typically connotes the age at which a society deems sexual relations acceptable, rather than the age at which a young person has the capacity to have sexual relations".[52] This brings us back to the first pattern: reference to the collective harm, or violation of socio-ethical norms. This point leads us to consider the harm principle, first introduced by John Stuart Mill. The harm principle holds that criminal law should only prohibit actions that cause harm to others, rather than actions that are simply considered immoral. The rationale behind this is that criminal law severely restricts individual freedom and should only be used to prevent serious harm to society. However, when judgments frame harm as a violation of morality, the harm principle loses its edge.

Criminalizing Harmless Immorality?

To reflect on the danger of criminalizing harmless immorality, it is important to first examine how age of consent laws have been institutionalized to control adolescent sexuality. The previous discussions on the age of consent in the UK and in Canada reveal that raising the age of consent is often a 'safe' and conservative political decision.[53] Researchers have pointed out that the protection narrative is sometimes used to serve adults' concerns.[54] As Egan & Hawkes demonstrates, the need to protect children from sexuality sometimes acts as a smokescreen for other social interventions that go beyond the interests of the children themselves.[55] Dauda demonstrates that raising the age of consent was part of the agenda of the conservative political party to re-moralize the family, which precludes youth agency and reinforces inequalities of gender and generation.[56]

The control of adolescent sexuality is a concern not only for the states, but also for parents. All Indonesian, Japanese, and Dutch cases show that in most cases, parents report the case, not the young victims themselves. It is difficult to determine what exactly the young victims wanted in

[51] Sendai District Court, H30.02.08 (Japan). https://okumuraosaka.hatenadiary.jp/entry/2019/07/17/164723
[52] Ashwini Tambe, "Climate, Race Science and the Age of Consent in the League of Nations" (2011) 28:2 Theory, Culture & Society 109–130, at 121.
[53] Moore & Reynolds, *supra* note 11, at 85; Carol L Dauda, "Sex, Gender, and Generation: Age of Consent and Moral Regulation in Canada" (2010) 38:6 Politics & Policy 1159–1185.
[54] Egan & Hawkes, "Imperiled and Perilous", *supra* note 23; Jonathan Herring, "Law and Childhood Studies: Current Legal Issues Volume 14" in Michael Freeman, ed, *Vulnerability, Children, and the Law* (Oxford University Press, 2012) container-title: Law and Childhood Studies; Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (Yale University Press, 2004); Robinson, *supra* note 20.
[55] Egan & Hawkes, "Imperiled and Perilous", *supra* note 22, at 365.
[56] Dauda, "Sex, Gender, and Generation", *supra* note 53.

each case because the court decisions usually do not include such details. However, in some cases it clear that the victims themselves did not see the act as forced or violation of their bodily/sexual integrity and autonomy. Some even showed agentic acts, such as expressing their romantic feelings towards the defendant. This suggests that the parents filed the suit against the will of the victims, or the victims perhaps complied with their parents' initiative. Thus, the age of consent law allows parents to control their children's sexuality in the complicity of state authority.

At the law operationalization level, the age of consent law, when applied by state legal actors and left at their discretionary power, seems to criminalize 'deviant' sexual behaviour of teenagers.[57] These studies suggest that the law can be a form of repressive normalization[58] that restricts individuals' agency in engaging in the intimate relationships of their choice. The fear involved in moral violation can easily justify social and spatial control by the authority.[59]

Considering the danger of criminalizing these acts and the significant limitation of sexual and romantic freedom, it is crucial to reconsider whether adolescents are incapable to consent *at any time*. The challenge related to adolescent sexuality, as reflected in age of consent law, is that statutory sexual offences place the wrong entirely on the age of the victim.[60] This legal approach fails to allow for a more nuanced analysis of the presence or absence of sexual exploitation.[61]

Kitzinger argues that empowering children to resist abuse requires a delicate balance. It is important to make them feel they *can* resist abuse without making them feel guilty if they cannot or do not.[62] To empower children, they need to feel they can resist abuse, instead of being assumed that they are too vulnerable, weak, and immature to resist and say no.

Feminists' discussions of sexual consent emphasize the importance of considering power dynamics between partners. Even if there is no physical force or violence, the power relationship between the victim and perpetrator can affect whether or not there is meaningful consent. While age of consent laws assume that children cannot consent, it is important to recognize the subjectivity of individuals. If their consent is not taken seriously due to their identity (e.g., they are vulnerable or in a weak position), it undermines their subjectivity, ultimately undermining their dignity. Human dignity comes with responsibility for the decision and actions one takes.

Alcoff defines sexual subjectivity as an individual's engagement in practices of sexual self-making to gain freedom.[63] To achieve this, women may need to let go of imagery that promotes submissiveness and self-objectification, while men need to unlearn a form of sexual expressivity

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[57] Gooren, *supra* note 37.

[58] In the sense how Foucault talks about law and its power/knowledge. See for instance: Gerald Turkel, "Michel Foucault: Law, Power, and Knowledge" (1990) 17:2 Journal of Law and Society 170–193.

[59] Kazuaki Sugiyama, *DON'T SEX, JUVIE!: The policing of "covert" sex workers in urban spaces in Toyama prefecture, Japan* (Taegu: Taegu University, Korean Research Foundation, 2000), at 5.

[60] Andrea Slane, "Luring Lolita: The Age of Consent and the Burden of Responsibility for Online Luring" (2011) 1:4 Global Studies of Childhood 354–364, at 357.

[61] *Ibid*.

[62] Jenny Kitzinger, "Who Are You Kidding? Children, Power, and the Strugle Against Sexual Abuse" in Allison James & Alan Prout, eds, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (London: Falmer Press, 1997) 165, at 179.

[63] Linda Martín Alcoff, *Rape and Resistance*, 1st edition ed (Cambridge, UK: Polity, 2018).

that perceives women's desires as threatening.[64] Similarly, for young persons to engage in practices of sexual self-making to gain freedom and to be respected for their sexual subjectivity, we all need to unlearn the pre-fabricated sexual imagery that there is a child victim and the adult perpetrator. Cultural taboos and anxieties also prevent us from contextual analysis of the nature and circumstances of the relationship to determine whether the sexual act was exploitative.

Drobac states that age-of-consent law is complex and full of pitfalls.[65] If the state sets the age too high, it risks condemning consensual relationships of teenagers as well. While those cases may require adult intervention, they should typically not be criminalized.[66] Therfore, the strict, harsh, and general approach to age of consent law is not necessarily the best solution.

I am not arguing for the abolition of statutory age of consent law. Instead, I suggest that we need to look closely and critically at the types and the degree of harm the age of consent law claims to avoid and punish. In light of the harm principle, criminal law should not punish 'harmless immorality'. In an advanced liberal polity, we cannot agree on more than a minimum of allegedly uncontroversial values. The complex relationship between law and culture or sexual mores is particularly important in the realm of criminal law, which involves the moral condemnation of an act by punishment.[67] Zhu & van der Aa state that within criminal law, there is no room for legal paternalism or legal moralism.[68] While sexual and intimate lives of people require the state's intervention when their rights are violated, matters of sexual mores equally need to ensure individual's privacy and their freedom from the state and parental authorities. This requires a critical discussion of the necessity of punishment.

[64] Susan Bredlau, *The Other in Perception: A Phenomenological Account of Our Experience of Other Persons* (Albany: STATE UNIV OF NEW YORK PR, 2018), at 84.
[65] Jennifer A Drobac, "Age-of-consent laws don't reflect teenage psychology. Here's how to fix them." *Vox* (20 November 2017).
[66] *Ibid*.
[67] Elaine M Chiu, "Culture in Our Midst" (2006) 17:2 U Fla JL & Pub Pol'y 231–262.
[68] Guangxing Zhu & Suzan van der Aa, "Trends of age of consent legislation in Europe: A comparative study of 59 jurisdictions on the European continent" (2017) 8:1 New Journal of European Criminal Law 14–42, at 27.

There's No Fighting in the War Room

Tanya Monforte

"Thinking and judging are reduced to instrumental calculation in this 'polar night of icy darkness' -- there is no morality, no faith, no heroism, indeed no meaning outside the market." – Wendy Brown

"Perhaps [transgression] is like a flash of lightning in the night which, from the beginning of time, gives a dense and black intensity to the night it denies, which lights up the night from the inside, from top to bottom, yet owes to the dark the stark clarity of its manifestation, its harrowing and poised singularity."—Michel Foucault

I. Introduction

At the end of 2019, the UN noted a "three-fold rise on verified attacks on children" over the previous decade.[1] Despite good intentions, the creation of a more robust legal framework to protect children, and countless reports focusing on children in armed conflict, children continue to be killed, maimed, abducted, denied humanitarian access, and forced to serve in combat. International organizations have attempted to foreclose some of the worst things that happen to children in times of conflict and yet still attacks against them have tripled in the last decade.

The international body with the primary responsibility for international peace and security, the United Nations Security Council, has taken steps to protect children in armed conflict over the last decades by creating categories that thematically represent the worst abuses children experience during an armed conflict with a view to ending them. The Security Council began to look at children in armed conflict in 1999 and issued the first of a series of resolutions on the topic: Security Council Resolution 1261.[2] This was considered a significant indicator that concern for children's welfare in armed conflict had arrived as an issue for policy makers. Early resolutions on children and armed conflict were broad, covering the gamut of the deleterious effects armed conflict can have on children, but they were not particularly strong resolutions. The Security Council established in Resolutions 1612 and 1539 the first strong mechanisms to deal with the problems facing children in armed conflict.[3] They established a Working Group on Children and Armed Conflict as well as a Monitoring and Reporting Mechanism through which State and non-State parties who had recruited child soldiers or used children in combat were explicitly named in

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[1] UNICEF, Press Release, "2019 concludes a 'deadly decade' for children in conflict, with more than 170,000 grave violations verified since 2010" (30 December 2019), online: https://www.unicef.org/mena/press-releases/2019-concludes-deadly-decade-children-conflict-more-170000-grave-violations-verified.

[2] *Security Council resolution 1261 (1999) [on children in armed conflicts]*, UNSC, 54th Sess, UN Doc S/RES/1261 (1999) UNSC Res 1261 (1999) [*UNSC Res 1261 (1999)*].

[3] *Security Council resolution 1612 (2005) [on children in armed conflict]*, UNSC, 60th Sess, UN Doc S/RES/1612 (2005) UNSC Res 1612 (2005) [*UNSC Res 1612 (2005)*] ; *Security Council resolution 1539 (2004) [on children in armed conflict]*, UNSC, 59th Sess, UN Doc S/RES/1539 (2004) UNSC Res 1539 (2004) [*UNSC Res 1539 (2004)*].

the Annex to the Secretary General's annual report.[4] There was a mechanism established to both gather information and to produce a universal "list of shame" to be used to combat the worst dangers facing children in armed conflict. The list of shame was initially limited in scope to only naming the parties who recruited and used child soldiers. Four years later, parties who intentionally and systematically killed, maimed, or raped children were also added to the list of shame. In 2011, Security Council Resolution 1998 added parties targeting hospitals or schools to the list of shame.[5] These are all significant measures, but I want to highlight the *sequence* of the measures. The Security Council started with voluntary and involuntary recruitment into the military, and it took four years until any other measures were taken to protect children.

The rationalizing and categorizing of potential harms children face in armed conflict was sequential, with conscription given priority. The Security Council, tasked with the maintenance of international peace and security, began the strong measures for the protection of children in armed conflict with the issue of child recruitment as opposed to the systematic killing, maiming and raping of children, or even something much more widespread such as children being denied humanitarian access, being starved, or having their homes taken from them. We are still waiting for a security council resolution prioritizing affirmative state obligations of states to accept and protect child migrants and refugees as a form of protection. Children should not be fighting wars made by adults, but there is something curious about voluntary conscription (along with forced conscription) as a priority above the many terrible involuntary things that happen to children in armed conflicts.

The appearance of children as a relevant group on the security council's agenda was a moment of configuration of childhood and it gave it a particular meaning for international security. Erica Burman has claimed that as a category, childhood functions as a "repository of social representations" defined in relation to adulthood.[6] As a repository of meaning, the child can often represent opposing values and contradictory imagery even signifying the most extreme values and their opposites, as in pure innocence and absolute evil. Childhood is often understood in the critical literature as a relational concept, the meaning of which is derived from the context and what it is being contrasted against. Claudia Castañeda has persuasively argued that the child is potentiality, or becoming, an entity in the making.[7] A repository of meaning that is determined in extreme and relative *future* terms, the child can be a category used for political arguments and for projecting social goods.

I have previously argued that while the child is denied agency through protective measures in times of armed conflict, childhood functions in a political contest over meanings about adulthood that are unfixed and unstable in which adult rationality is given content.[8] I have argued that we regulate and exert control over the social world by regulating children; in a post WWII framework in which armed conflicts have not yet been eliminated despite Charter prohibitions on the use of force among states, we adults appear to be seeking collective control over conflict in the

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[4] *UNSC Res 1612 (2005)*, *supra* note 3.
[5] *Security Council resolution 1998 (2011) [on children and armed conflict]*, UNSC, 66th Sess, UN Doc S/RES/1998 (1998) Res 1998 (2001).
[6] Erica Burman, *Deconstructing Developmental Psychology* (New York: Taylor & Francis, 2016) at 67.
[7] Claudia Castañeda, *Figurations: Child, Bodies, Worlds* (Durham: Duke University Press, 2002) at 1.
[8] Tanya Monforte, "Razing Child Soldiers" (2007) 27 Alif: J Comp Poetics, online: <https://papers.ssrn.com/abstract=2009843>.

limited ways we can exert it. In the present paper, I want to suggest that in international security, the child as a legal category works to stabilize the overlapping categories of war and peace using childhood as a wedge to split the two in a world of perpetual conflict. In short, we manage conflict by managing children.

The area of analysis, children in armed conflict, is an important topic in security studies and in international relations. The field of inquiry is frequently analyzed as a problem solvable by better legal regulation that intervenes by moving children outside of conflict as "zones of peace" away from violence.[9] But they are not moved out of conflict zones, they are just themselves securitized. There are ways to protect children caught in conflict– as an example, state parties could prioritize humanitarian refuge to all children escaping war and ensure funding and adequate resources for IDPs –but they do not. Instead, sanctions have been created against those who perpetrate crimes against children and at the same time children are forced out of conflict as even voluntary conscription is prohibited and criminalized.

I want to suggest that the security frameworks designed by the same state parties who are the greatest manufacturers and marketers of weapons that drive conflict have constructed a system that only manages conflict rather than eliminate it. Responsibility over children's welfare then has translated into managing the way children live and die in armed conflicts without much input from children themselves. While children's agency is largely denied in the framework of security, understanding rationality as part of a larger framework can make the prioritization of certain adult choices more transparent. The present work will look at the political economic rationality of children in armed conflict using Foucault's work on governmentality. [10] I argue that this rationality is constitutive of the topic as a particular kind of security issue within "governmentality" in

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[9] *Impact of Armed Conflict on Children: Note by the Secretary General*, UNGA, 51st Sess, 1996, UN Doc A/51/306.

[10] The lectures were given in 1978 and 1979, and there are some nascent ideas of the role of international law in the emerging process of globalization. These lectures focused in part on the emergence of an "economic" Germany during the post WWII reconstruction, with the outline of a relationship in which the interests of external parties alter the internal rationality of Germany essentially for market and security interests. But the argument that international treaties direct the will and technologies of governance of states into the international plane in a way that creates a global market, opens the door to see how states appear to disappear through the mechanisms of international treaties and global markets which are particularly interesting for the art of global governance (see Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, 1st ed by Graham Burchell, Alessandro Fontana et al, translated by Michel Senellart (New York: Palgrave Macmillan, 2010) at 54-57 [Foucault, *The Birth of Politics*]). International trade agreements and economic relationships developing within Europe and then with other nations form an important though undeveloped part of the lectures Michel Foucault (see Foucault, *The Birth of Politics, supra* note 10 at ch 3). Although a more complete exegesis of the role of international law in Foucault's lectures would be useful, the present paper limits itself to taking international institutions as a given form in which governmentality operates. That is to say that states appear to be disappearing, yet through the complicated relationships of international agreements between states through treaties, the formation of treaty-based intergovernmental institutions and the emergence of networks of civil society on both the international and local levels, states exert power over and through individuals. In the end, the institutions are not the focus, but rather the analysis is directed towards the practices and the people who are governed. Foucault stated rather plainly, "Anyway, one thing clearly emerges through all these meanings [to govern], which is that one never governs a state, a territory, or a political structure. Those whom one governs are people, individuals, or groups" (see Michel Foucault, *Security, Territory, Population: Lectures at the College De France, 1977-1978*, ed by Francois Ewald et al, translated by *Graham Burchell* (New York: Palgrave, 2009) at 122 [Foucault, *Security, Territory, Population*]). Foucault claims that he does not mean to write a theory of the state, but rather a political theory of the art of government or governmental practices (see Foucault, *The Birth of Politics, supra* note 10 at 75-78).

Foucault's terminology, and children cannot be adequately protected by the neoliberal logic which has expanded as a system of governance. Further, we have given up on the utopic idea of eliminating conflict and are resigned to manage it. Couched in theories of economic rational choice, in conjunction with rules that manage armed conflict to protect children, children are managed by denying their agency in order to control armed conflict.

II. Investing in childhood: the child as human & social capital

> Investing in young people is smart economics and crucial for effective development. Countries that produce a skilled, healthy and productive workforce are better positioned in the global economy. … Since capacities built during youth largely determine adult outcomes, effective investments in young people provide important returns to the individual, the community and to society as a whole. With many competing demands for scarce funds, countries often do not fully recognize how critical young people are to their national economies, societies and democracies – both today and in the future – and consequently make too few public investments in programmes to harness their productive resources. … The accumulation of human and social capital must start at a young age, as the brain develops rapidly during early childhood and adolescence. Moreover, early investment in cognitive and non-cognitive skills and health capabilities lead to enhanced investment effectiveness later on in life. As a result, building a strong foundation, through investing in programmes tailored to children and youth, advances socio-economic development.[11]

This quote was part of a set of official talking points endorsed and distributed by the United Nations for speakers taking a UN line on global issues about a decade ago. Under the heading, "Youth," the argument makes the case for investing more resources at the national level in young people. The economized vision of youth and children represented here goes beyond a simple argument that spending resources on youth is the *right* thing to do, but rather it makes the case that in an economic calculation it is the economically optimal thing to do. As Aihwa Ong has noted, the way neo-liberalism functions internationally is complex and must be unpacked in different instances, "[t]he spread of neoliberal calculations and choices has been abetted by international agencies such as the World Bank…as an array of techniques centered on the optimization of life, neoliberalism migrates from site to site, interacting with various assemblages that cannot be analytically reduced to cases of uniform global condition of 'Neoliberalism' writ large."[12] It is not a coherent and fully encompassing logic, but the language migrates, the rationality migrates. The migration of neoliberal practices and logics that transform the ways we think about youth in relation to armed conflict are the object of inquiry.

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[11]The methodology of compiling the list of talking points on global issues was outlined as the following: "The Resources for Speakers have been designed to help you better understand …the work that is being carried out by the United Nations ... They have been contributed by various United Nations organizations, using the most recent statistics and official reports." (UN Resources for Speakers on Global Issues, Topic: Youth, briefing papers)

[12] Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty* (Durham, NC: Duke University Press, 2006) at 14.

As neo-liberal practices migrate from one site to another, childhood is being recast and reimagined within a neo-liberal imagery. Take as an example the way childhood is being recast in the following line from the 2011 *World Development Report* from the World Bank on the impact of violence on children, "In countries where children have been brutalized as victims or witnesses of violence, or worse yet, as perpetrators by being coerced to be child combatants, the lasting trauma and lost human and social capital become an impediment to future social progress."[13] Seen as human potential generally, but cast in economic terms, children are read as human and social capital, or worse, when in contact with violence they are viewed as "lost" capital. The harm done to the child by violence is calculable in terms of the lost income he or she would be able to generate in the future.

Foucault attributed the theory of human capital, as a key concept that permits economic analysis to migrate to previously non-economic areas of life.[14] In his account, the particularly American contribution to neo-liberalism was taking the idea of society as enterprise to an extreme through the concept of human capital. By theorizing the value added by labor not in a static equation defined in terms of time, but in terms of innovation and enterprise, Foucault argues that the neo-liberals posit labor itself as the central variable for understanding the progress of nations.[15] Capital becomes anything that returns an income, so capital-ability is the income one is capable of earning. The worker then "appears as a sort of enterprise for himself" so that society is made up not of persons, but of enterprise-units.[16] The theory of human capital is a theory of the entrepreneurial-self where even consumption becomes a productive activity because one produces satisfaction in the self.

The idea of human capital allows for activities previously understood as non-economic, such as a mother spending time with her child, be translated into an economic rationality. That is to say that time spent with a child translates into greater human capital and more earning power for the future worker. The concept of human capital is important as a neo-liberal governmental practice because although other theories of political economy, including Marx's, extend an economic grid to previously non-economic realms of life, it is the apparent neutrality within the concept of human capital that makes it particularly neo-liberal.[17] That is to say that it imposes a way of evaluating what appears neutral because it imports verifiability. So the amount of time a mother *should* spend with her child can be evaluated based on a cost benefits calculation. Once this activity is rendered rational and calculable, evaluations based on tradition, love, need or instinct become provincial or even nonsensical.

The concept of human capital assists in the practice of governing in a way that services the needs of the market without intervening in the market directly. It takes the market as the source of veridiction for cost benefits analysis and as such compels societies and individuals to make decisions based on market needs. Gearing human knowledge to the truth or falseness of the market means that human needs get tied to development analysis. That is human development then meets the needs of an expanding market, or rather it helps expand and develop a market, so states are directed to invest in their human populations to meet hte needs of the market rather than the other

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[13] World Bank, *World Development Report 2011: Conflict, Security, and Development* (2011) at 88–89.
[14] Foucault, *The Birth of Politics, supra* note 10 at 227–233.
[15] *Ibid* at 215–233.
[16] *Ibid* at 225.
[17] Wendy Brown, "Neo-liberalism and the End of Liberal Democracy" (2003) 7:1 Theory & Event.

way around. Human capital as a theory helps to perfect or drive the biopolitical practices to extremes. As forming part of biopolitical practices of governments, it marries the concepts of the market and populations and makes the regulation of markets through the manipulations of populations apparent. What is of particular interest is that it is precisely the youth that are most frequently referred to in such brutally economic terms as a kind of social capital. The investment in children is argued fully in terms of potentiality. They are seen as potential adults, potential citizens and a potential workforce. There is a double instrumentalization of children in the sense that even education, one of the most important social goods historically provided for young people for their benefit, is given as an investment for adults in children as future adults and again as future human capital in order to perfect the human enterprise. The youth are not only social capital – they are *potential* social capital.

> Failing to invest in children and youth triggers substantial economic, social, and political costs. …Negative outcomes resulting from misaligned investment strategies include truncated human and social capital accumulation (e.g. school drop-out, poor labor market entry) and negative conduct (e.g. substance abuse, crime and violence, risky sexual behaviors). …These outcomes and the resulting underutilization of human resources are costly for the individual and society, …For instance, teenage pregnancy, HIV/AIDS, early school drop-out, or unemployment can be associated with lower economic production and lower lifetime earnings.[18]

In the attempt to rationalize all conduct of a government, children and youth are made into targets of investment strategies so that all life activities can be translated into this economic grid and the future earning power of the individual. Even the contraction of AIDS is cast as a loss in terms of "lower lifetime earnings." It may be an objectively true, evidence-based statement that the contraction of AIDS without adequate treatment will lead to lower lifetime earnings, but this is presented as a value-neutral discourse. Inside this logic, it is nonsensical to even argue that the representation of humans as capital represents a loss, since the loss is intangible and outside a verifiable or market evaluation. Once policy makers believe that only evidence-based statements are useful for the art of government, then it becomes more difficult to argue outside this frame or to dislodge this knowledge-power.

It is not simply the World Bank that economizes human potential. Through the concept of human capital, the supposedly neutral economization of human life is spread across the board, migrating into other agencies and becomes part of the UN position on youth. That is not to say that the United Nations as an institution, or UNICEF, or whatever particular entity represents a neo-liberal ideology. In fact, the individual agencies are quite heterodox internally and across the UN. However, there are traces of political ideologies moving from one site to another in the international institutions as practices and as ways of knowing. The concept of human capital requires a different epistemology underpinned by the economic grid that includes different ways to assess normative claims. The concept of education as a way to increase human capital displaces other conceptions of education such as education for citizenship, or for moral or spiritual enrichment, or education as joy as an end in itself. Education is not only transformed into education for the purpose of fitting into a job market, but the young person is also transformed within this

[18] Kevin Hempel & Wendy Cunningham, "Investing in your country's children and youth today: Good policy, smart economics" (2020) IV:1 Child & Youth Development Notes, The World Bank 1 at 2.

epistemic universe. The income one will be capable of earning becomes a defining quality of the young person, and perhaps *the* defining quality for good global governance. Investment in children is an investment in human and social capital. The question of children's agency then gets subsumed into a larger social issue and instrumentalization of the person is not subtle in the concept of human capital.

Bringing this back to the issue of children and armed conflict, children are central to conflict in various ways. The child is often represented in international relations as a uniquely vulnerable subject. But vulnerability is a dubious concept. It shows both the marginality of a subject as well as its centrality. The child is considered to be one of the most vulnerable subjects during conflict not only because children are differently or especially dependent on adults and societal structures for their lives and wellbeing, but also because they are at times central to the aims of armed conflict. Children, like women, are often seen as the base of a population. That is to say, the biological aspect of the child as the fruit of reproduction and the future of society can make them targets. As the future of a nation, when they are killed, they are not merely collateral damage or unintended casualties, as they are often called, but they are sometimes directly targeted during conflict and even in times of peace by violent acts for their symbolic value. As Marc Sommers, writing in a paper commissioned by the World Bank has noted, "Unfortunately, although children may be 'incidental victims of armed warfare' whose war experience may have been momentary, children are more commonly caught in wars where 'an aggressor specifically tries to maim, kill, and spiritually destroy the enemies' children'"[19] That is, since children, like women, are seen as the biological foundations of a population, their destruction is sometimes central to the conduct of war. Children do not need to carry a gun to die by one.

Young people are linked to the future in a unique way. As the World Bank noted, "... a major episode of violence, unlike natural disasters or economic cycles, can wipe out an entire generation of economic progress… And violence begets violence: male children who witness abuses have a higher tendency to perpetrate violence later in life."[20] Children are cast as a societal fulcrum. As potentiality, children represent the extremes of humanity as vessels for the dreams and nightmares of adults. As human and social potential, children are both potentially socially productive and peaceful, and also potentially terrifyingly dangerous. "In countries where children have been brutalized as victims or witnesses of violence, or, worse yet, as perpetrators by being coerced to be child combatants, the lasting trauma and lost human and social capital become an impediment to future social progress."[21] When children are cast as human and social capital, the notion that children are central to the welfare of the nation is made more apparent and in fact quantifiable and manageable. The translation of childhood into a hyper-rationalized, economic field gives economically minded policymakers reasons for investing in children and staving off the potential for danger.

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[19] Marc Sommers, "Children, Education and War: Reaching EFA Objectives in Countries Affected by Conflict" (2002) World Bank, Conflict Prevention and Reconstruction Unit Working Paper No 1 at 8 (citing Roberta J Apfel & Bennett Simon, *Minefields in Their Hearts: The Mental Health of Children in War and Communal Violence* (New Haven & London: Yale University Press, 1996) at 5.).

[20] World Bank, *supra* note 13 at 6.

[21] *Ibid* at 89.

III. The Economic Rationale for War and Peace

In what follows, I put forward the argument that children are used as market levers to control and regulate conflict within an economic rationality in order to produce an efficient outcome that secures the global market. Simultaneously, decision-making is located away from individuals such as children who are most affected by conflict.[22] Since Clausewitz onwards, the line that war is the pursuit of state interests and a form of rationality in itself has been fairly well established. But a variation of the democratic peace thesis in liberal international relations theory proposes the antithetical argument that reason can overcome irrational drives to conflict. A more recent body of literature suggests that it is in fact capitalism that accounts for states not going to war with one another rather than the democratic forms. I want to investigate the relationship between the arguments made in the capitalist peace theory relative to children in armed conflict.I will demonstrate that rational choice theory is particularly myopic to the ways in which economic logics work at different levels of the global marketplace to produce and then regulate conflict.

A. Markets make peace

In the field of international relations, the capitalist peace theory[23] makes the case that there are "pacifying effects of commerce and economic freedom, of trade and capitalism," stating quite confidently that "Free markets promote peace."[24] There are different explanations for the mechanisms within capitalism which are supposed to promote peace such as interdependence or higher levels of prosperity that increase levels of opportunity costs.[25] What remains stable in the various versions is that the pursuit of individual self-interest has become a universal form of rationality in pursuit of economic prosperity, which drives the project. Under many of the contemporary theories, at the level of analysis of the international system, there is an economic grid that has peace and economic development on one side and war and underdevelopment on the other. The empirical research agenda is to prove the argument of capitalist peace that rational choice dictates an interest in peace as it leaves everyone better off. A sub argument here is that war is more costly than trading through open markets which is cheaper and more efficient.

International organizations have pursued the strategy of making the argument that states should opt for peace based on an economic calculation. The 2011 *World Development Report* from the World Bank entitled "Conflict, Security and Development" makes the case that war constitutes the opposite of development.[26] Conflict and violence are framed as irrational and based

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[22] It has to be affirmed that it is reprehensible when children fight in wars. This is especially the case when they are forced into combat and the impacts of active combat on children are often horrific even when voluntary, but the impact of conflict on children is itself the horror that underlies desperate choices and it is difficult to see the rationality of youth as significantly different from that of adults. Child combatants often make rational calculations similar to those of adults when deciding to enter a conflict (see especially Jason Hart, "The Politics of 'Child Soldiers'" (2006) 13:1 Brown J World Affairs 217).

[23] Generally in these theories, capitalism is equated with "free markets or smaller governments at home and abroad" (see Tim Krieger & Daniel Meierrieks, "The rise of capitalism and the roots of anti-American terrorism" (2015) 52:1 J Peace Research 46 at 48).

[24] Erich Weede, "The Capitalist Peace and the Rise of China: Establishing Global Harmony by Economic Interdependence" (2010) 36:2 Intl Interactions 206 at 211.

[25] See e.g. Michael Mousseau, "Coming to Terms with the Capitalist Peace" (2010) 36:2 International Interactions 185; Erik Gartzke, "The Capitalist Peace" (2007) 51:1 Am J Political Science 166; Weede, *supra* note 24.

[26] World Bank *supra* note 13.

on identity politics or new nationalisms that are founded on communal commitments, while peace is framed as part of a rational choice calculation that furthers state interests. The World Bank Report does not merely state that violence and conflict are irrational, it fills over 300 pages with graphs and statistics showing the economic irrationality of violence and conflict. The decision between conflict and peace is translated into an economic calculation to appeal to rational actors tasked with upholding the best interests of states.

Going back to the issue of children as armed combatants in conflict, there is strong evidence that when they are active combatants conflicts go on longer and are more destructive.[27] Certainly peace advocates will use whatever tools of argumentation at their disposal to push for peace. The use of economic arguments for peace says less about those making the case than it does about the nature of the system we work within. Perhaps one of the most striking translations of human experience into a neoliberal register refers to the benefits of peace in terms of "dividends." UNICEF Executive Director, Carol Bellamy, lamenting that donor funding for education and reintegration programs for child soldiers had dried up, stated that education is one of "the dividends of peace." She argued, "If we can't show proof of the dividends of peace to children, how can we prove the dividends of peace to adults…?"[28] Agencies frame their arguments to fit into a market logic for funders who speak in an economics jargon. The phrase the "dividends of peace," much like the often-used terminology of youth as "social capital," or the reference to people who will be impacted by a policy as "stakeholders" have become the norm in UN documents. Perhaps it is merely phrasing, but in a field increasingly dominated by an economic logic, it is not shocking that peace is being re-packaged in an economic logic as dividends to meet the needs of donors or the needs of markets.

The argument for or against war based on the rationality of the action due to economic calculations is part of the new liberal theory of the political economics of war and peace. Peace is rational and war is irrational. But the discourse of the political economy of war and peace has particular features as a development discourse. Although economic considerations have always been part of arguments for and against conflict, what may be new is the totalizing nature of economic considerations as a way to evaluate the value of peace. Expanding on these arguments, if the market is a site of veridiction, then to critique the decisions of states against an economic grid places the legitimacy of states with weak economies into question as rational actors *a priori*. Indeed, some proponents of the capitalist peace thesis are quite explicit about the market as a site of veridiction in relation to development even referring to underdevelopment as "backwardness"; as Erich Weede wrote, "The catch-up process of poor countries depends on the exploitation of the advantages of backwardness."[29] This development of states maps onto the development of children. Cannella and Viruru have argued that "childhood can be examined as a colonizing construct"; representation imposed on the young in relation to adults can be "oppressive, controlling, and even colonizing."[30] They mapped their insights in child development onto larger international relationships among peoples and states, arguing that the discourses of social and

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[27] Peter W Singer, *Children at War* (Berkley: University of California Press, 2006); Guy S Goodwin-Gill & Ilene Cohn, *Child Soldiers: The Role of Children in Armed Conflict* (Oxford: Oxford University Press, 1994).

[28] "Future of former child soldiers in Sierra Leone at risk - UNICEF", *UN News Centre* (22 July 2003), online: <https://news.un.org/en/story/2003/07/74962>.

[29] Erich Weede, "Geopolitics, Institutions, and Economics" (2016) 8:1 Geopolitics, History, and Int'l Rel. 177-220 at 186.

[30] Gaile Sloan Cannella & Radhika Viruru, *Childhood and Postcolonization: Power, Education, and Contemporary Practice* (New York: Routledge, 2004) at 83–84.

economic "development" similarly turn on the value of rationality and so are paternalistic, reinforcing geopolitical hierarchies and oppressive practices. Foucault proposed that the neo-liberal rationality assists in economic and efficiency calculations to permeate all areas of life.[31] The arguments against conflict and for peace are normatively determined based on the rationality or irrationality of the economic choice. The real neoliberal turn then is to make every actor aware of the economic calculation and refit their own choices based in this logic. And herein lies the paradox: as each individual actor is turned into a neoliberal subject for foreign policy, there is little attention paid to how they evaluate cases in which economic interests may in fact favor conflict.

B. Markets make war

Some versions of the capitalist peace theory concede that the general line that conflict is irrational doesn't capture the totality of all possibilities and economic rationality might make conflict a rational decision in some contexts and there is an already established literature explaining the political economic causes of conflict that the capitalist peace theory was intended to counter.[32] There are many instances in which especially internal group interests may make conflict more likely. As one example, "coups become more likely because elites make the rational decision that the costs associated with a risky coup are offset by the expected utility of the attempt."[33] Many of the conflicts today are internal conflicts in which different factions are fighting for control over the resources of the territory, including the natural resources of a country. The conflict is both over and financed by the resources of a nation.[34] Although society as a whole, especially those that internalize the costs of conflict on the youth into their calculations, do not benefit from conflict, many individuals and some groups most definitely do benefit economically by war.

Market forces also structure conflict not by eliminating it, but by locating it at the periphery of the global market. The framing of economic self-interest as a universal rationality enables or, probably more accurately stated, produces an economic system which displaces the conditions for conflict to an elsewhere through a process of remaking subjectivities. What I mean by this is that the celebration of the profit-seeking individual and the profit-seeking state as the universal model for rationality has raised war profiteering to a new level of legitimacy while simultaneously denying the rationality of war. This pushes the conflict to the outside of the core of economic interests. For example, French Prime Minister Macron met with Saudi Arabia in 2022 and secured a $19 billion dollar arms contract that was widely celebrated. Not only are these deals made by heads of state, but the legitimacy of a public individual selling arms for a country's private industry as an official part of state craft has become so normalized that when countries like Sweden do not

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[31] Foucault, *The Birth of Biopolitics* (2010) *supra* note 10; Weede, *supra* note 29 at 196 (For an example of this, take Weede's argument in respect of migration from the Balkans, Africa and "Muslim" countries in which he writes, "If migrants bring little human capital along, they must be a burden on host societies. It is hardly conceivable that home countries which suffer from poverty, political instability, civil war, or repression educate their emigrants in such a way that they become easily employable in more highly developed countries" at 196).

[32] See e.g. C Cramer, "Homo Economicus Goes to War: Methodological Individualism Rational Choice and the Political Economy of War" (2002) 30:11 World Development 1845; Paul Collier & A Hoeffler, "On the economic causes of civil war" (1998) 50:4 Oxford Econ Papers 563; Ismael Hossein-Zadeh, *The political economy of U.S. militarism*, 10th ed (New York: Palgrave Macmillan, 2007).

[33] Jonathan Powell & Mwita Chacha, "Investing in stability: Economic interdependence, coups d'état, and the capitalist peace" (2016) 53:4 J Peace Research 525 at 528.

[34] See e.g. Michael G Findley & Josiah F Marineau, "Lootable resources and third-party intervention into civil wars" (2015) 32:5 Conflict Management & Peace Science 465.

aggressively seek out military contracts, they are chided in foreign policy news for failure to promote their domestic arms industries.[35] In the meantime, Italy took the decision to halt arms sales to Saudi Arabia; the U.S. had also pulled back its arms support after internal debate began when it became clear that the Saudi government was targeting civilians, including children in Yemen.[36] The temporary ban on weapons sales was lifted and the U.S. decided only to sell defensive weapons until the completion of an inquiry.[37] The U.S. has a lot to lose if they pull out of the Saudi agreement in which they had promised $64.1 billion in weapons over a 5 year period.[38] The competition between states to sell weapons appears to trump considerations of morality as some states step back, others step in. Trade in the defense industry is economically significant in developed nations as the flow of arms is frequently from developed to developing nations. The U.S., France, and China are the top three arms exporters globally but exports from France have risen dramatically in recent years as the exports from China have dropped.[39] The fact that we discuss defense as its own industry is itself significant. Hossein-Zadeh puts it forcefully in relation to the United States arms industry which is aligned with defense companies that are privately owned but publicly curated as "market-driven"; this alignment produces the conditions of "imperial wars and demand for arms" which he argues, "are nowadays precipitated more by sales and/or profits than the other way around."[40] Unlike nuclear weapons, conventional weapons are designed to be used and so it is difficult to ignore the conclusion of these activities that it is profitable to make war possible around the world even if it were to hold true that countries with more "open" economies engaged less in conflict at least on their own soil. It is in France's economic interests that Saudi Arabia buys their weapons, and within a realist lens, Saudi Arabia's economic interests are bolstered by a geopolitical interest in hegemonic control of the region which requires destroying Yemeni resistance no matter what that does to Yemeni children. By late 2021, over 10,000 children had been killed or maimed in Yemen since the conflict escalated in 2015.[41] Despite the horrific, unimaginable suffering of children, war continues to pay for some while the pursuit of self-interest as an economic logic can rationalize these decisions.

There is a complex political economy of conflict that goes beyond business interests as private industries align with statecraft. I have to question the soundness of the empirical research that proposes that countries with more open economies do not engage in conflict. While this short piece cannot offer a complete refutation of the empirical work, I can simply point to what appears like a sleight of hand when counting conflicts rather than military interventions. I would be

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[35] Elisabeth Braw, "Why Can't Sweden Sell Its Fighter Jets?" *Foreign Policy* (25 Aug 2022), online: https://foreignpolicy.com/2022/08/25/sweden-gripen-sell-export-fighter-jets/ (She writes: "Since the end of the Cold War, the Swedish government has mostly been putting defense exports in the hands of the globalized market. But with other countries' leaders pitching their companies to governments now investing more in defense, it's a flawed strategy").

[36] Bruce Riedel, "It's Time to Stop US Arms Sales to Saudi Arabia", *The Brookings Institution* (4 February 2021), online: https://www.brookings.edu/articles/its-time-to-stop-us-arms-sales-to-saudi-arabia/.

[37] *Ibid*.

[38] *Ibid*.

[39] Stockholm International Peace Research Institute, Press Release, "Global Arms Trade Falls Slightly, but Imports to Europe, East Asia, and Oceania Rise" (14 March 2022), online: https://www.sipri.org/media/press-release/2022/global-arms-trade-falls-slightly-imports-europe-east-asia-and-oceania-rise#:~:text=(Stockholm%2C%2014%20March%202022),Oceania%20(%2B59%20per%20cent).

[40] Hossein-Zadeh, *supra* note 32 at 6.

[41] Geneva Palais, UNICEF, Press Release, "'Shameful Milestone' in Yemen as 10,000 Children Killed or Maimed Since Fighting Began" (19 October 2021), online: <https://www.unicef.org/press-releases/shameful-milestone-yemen-10000-children-killed-or-maimed-fighting-began>.

interested to see the empirical data and see if the U.S. and coalition force invasion of Iraq or the interventions in Afghanistan or other countries are counted. Military interventions from developed nations appear to disappear or are rendered invisible in the conflict calculation as the interventions happens on the soil of "other" nations. They appear almost as police operations and are argued to be "pacifying" forces in some of the literature.[42] Rather than disproving the thesis, military interventions by developed nations are used to make the case that these interventions cut short what could be otherwise prolonged conflicts.[43] That may in fact be the case as overwhelming military force can end a conflict more quickly, but it is still a military intervention.

Returning now to the relationship of children as social capital and security, we see how children are managed as zones of peace during an armed conflict and this fits into a security logic that looks for pacifying levers of power. What began as a designation to protect children has become a social resource to control conflict. In an interview Radhika Coomeraswamy, the Special Rapporteur for children in armed conflict, stated that schools must also be a "zone of peace."[44] Children and schools are united as inviolate and as such become secure zones. It is significant that the site of refuge for children cannot be the home in this model, and the site of refuge, historically a church or holy place, is now the schoolyard.

The arguments to provide an education to children or move them into schools are sometimes straightforward acts of social engineering. There is a value in moving children from battlefields to schoolyards that in the barest sense is protecting them and of course it enriches their lives. But when absorbed into a security logic, schools not only get children out of harm's way, but they also drain the war machine of potential recruits. As the report for Save the Children has noted, "Attending school or receiving vocational education services provides children and adolescents with a much-needed daily activity. With less time on their hands, they are too busy to engage in anti-social behaviour; … 'When children learn a trade, that will keep them busy; it won't give them the opportunity to go and get involved in conflict' (footnote omitted)."[45] Investing in childhood, as described by the World Bank, makes the child-future citizen one who better meets the overall needs of the global market and keeps the global market functioning.

Unfortunately, making children so blatantly part of the program to manage conflict has costs. In Afghanistan and Iraq, the U.S. used education as part of their "hearts and minds" campaigns, as part of a military strategy for defeating insurgents using aid as an incentive to transform mindsets.[46] When education becomes contentious politically or part of military strategy, schools are targeted. It is sometimes difficult to disentangle the assistance from the bodies offering assistance. Designating schools as zones of peace for the Security Council followed the targeting of U.S. funded schools which educate girls. In a UNESCO report, it was found that the "securitization of aid" has made aid workers – as well as schools, teachers, and students – potentially more vulnerable to attack by insurgent groups as the merging of development aid and

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[42] Powell & Chacha, *supra* note 33.
[43] *Ibid*.
[44] "Schools in Middle East Must be 'Zones of Peace' UN Envoy on Children Conflict", *UN News* (12 April 2007), online: <https://news.un.org/en/story/2007/04/215342>.
[45] Joanna Wedge, *Where Peace Begins: Education's role in conflict prevention and peacebuilding* (London: International Save the Children Alliance, 2008) at 12.
[46] Stuart Gordon, *Winning Hearts and Minds? Examining the Relationship Between Aid and Security in Afghanistan's Helmand Province* (Feinstein International Center, Tufts University, 2011).

military security projects have increased around schools.[47] Although schools are designated as zones of peace, and they are not a legitimate military targets, their prominence as visible secure zones may perversely contribute to the targeting of schools in some conflicts.[48]

In contrast to the drive to get children out of the military in developing nations and into schools, the reverse is the case in developed nations which need to draw them directly from schools into the military. Under international law, children can be recruited but just not deployed until they are of age. Governments in the Global North may resist the use of child soldiers when they face them on the battlefield, but recruitment practices rely on capturing youth for military service while they are still young.

Across the United States, but disproportionately in low-income areas, military recruiting officers often have direct access to schools: Military academies, strategically placed recruiting stations and school rallies all form part of a concerted effort to recruit under-aged and often underprivileged youth.[49] It is precisely because the U.S. military wants to recruit young people while still in school that the U.S. was resistant to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[50] In the UK there is evidence that child recruits into the UK armed forces suffer worse outcomes in terms of death and trauma than adult recruits.[51] As the former Ambassador and delegate to the United Nations Michael Southwick noted, in order to meet desired force levels, the U.S. needs to conscript seventeen-year-olds before they leave school and "drift off to other activities."[52] Economic anxiety makes the military a good economic option for young people in the Global North. Southwick has observed that "the military is sacred in American society"[53] and I would argue that reverence provides cover for the ways a degree of economic precarity is critical for feeding the military machine in the U.S. Children cannot fight in wars, but it is optimal to pull them in before they become adults. Conflict is managed through the management of children. In well-functioning wars there is a logic of well-functioning markets: developed economies intervene enough to keep the global economic machine moving as children are moved to the legally constructed outside of conflict and using just the right amount of precarity to keep them primed to be fed into the military machine for future use.

This does nothing, however, in re-allocating resources in many versions of the capitalist peace thesis, as the individual is made responsible for their success or failure in the market. Individualizing power is a technique that regulates conflict and the market efficiently but does not eliminate it, as economic inequality remains and remains a cause of conflict.[54] "The fundamental objective of governmentality will be mechanisms of security, or let's say, it will be state

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[47] Mario Novelli, "Political violence against education sector aid workers in conflict zones: A preliminary investigation into the possible link between attacks and the Increased Merging of Security and Development Policy" in *Protecting Education from Attack* (Paris: UNESCO, 2010) at 71.

[48] Margit van Wessel & Ruud van Hirtum, "Schools as Tactical Targets in Conflict: What the Case of Nepal Can Teach Us" (2013) 57:1 Comparative Education Rev 1.

[49] Majia Holmer Nadesan, *Governing Childhood into the 21st Century: Biopolitical Technologies of Childhood Management and Education*, 1st ed (New York: Palgrave Macmillan, 2010) at 108.

[50] Michael Southwick, "Political Challenges behind the Implementation of the Optional Protocol to the Convention on the Rights of a Child" (2004) 37:3 Cornell Intl LJ 541 at 543.

[51] Rhianna Louise, Christina Hunter & Sally Zlowitz, *The Recruitment of Children by the UK Armed Forces: A Critique from Health Professionals* (London: Medact, 2016).

[52] Southwick, *supra* note 50 at 543.

[53] *Ibid*.

[54] Wedge, *supra* note 45 at 13.

intervention with the essential function of ensuring the security of the natural phenomena of economic processes or processes intrinsic to population."[55] It is not about redistribution, but about social engineering to create economic spaces for individuals. In the end, the rules and interventions do just enough to secure the market, and certainly not enough to protect children as attacks against them continue to escalate.

IV. Conclusion

In an imperfect world, we try to protect what we can the only ways that appear available. This short comment is not intended to deride the work of activists who are doing the hard work of piecing together protections where they can find them in the midst of incomprehensible horrors. I do not want to suggest that children are only seen as social capital to the actors working on their behalf, but rather to lay out how the overall field has been constituted and emphasize the constraint advocates themselves are also facing as children are securitized. I imagine that making arguments in economic terms is simply the most logical way to get states to pay for children's schooling. But it remains extraordinary that child rights advocates are continuously in a position to beg for funds for the basic necessities when funds continue to flow freely to war machines.

War has not been stopped by Charter prohibitions nor by a capitalist peace. Although war profiteering has always existed, the economic logics of the day have institutionalized, legitimized, and even championed individual subjects seeking their own economic interests at the expense of the lives of others. Capitalism doesn't create peace, and at most what may be supported by evidence is that capitalism displaces conflict to the margins of a global economy. Fighting is often displaced to other spaces, outside the core economic nations to the periphery for the benefit of weapons companies and GDPs while children are forced to sit outside the rooms where these decisions are made. There is a political economy of conflict with strong economic incentives that produce war. With war all around, rather than deny the rationality of youth who sometimes choose to take part in the economy of war, we should endeavor to understand what their choices signal. Against a backdrop of unimaginable suffering, if children elect to fight in an armed conflict, then this act should be read as the transgression it is –one that illuminates the darkness we have created.

[55] Foucault, *Security, Territory, Population*, *supra* note 10 at 353.

Terrorist label and crimes: depriving people of their agency
Camille Marquis-Bissonette

Abstract

Human rights are often seen as resulting from the exercise of agency by various marginalized or vulnerable groups. The relationship between human rights and agency can also be seen in reverse: not only can agency advance the cause of human rights, but the deprivation of human rights can also deprive people of the possibility of exercising agency. This is the case of individuals or groups labeled as terrorists or assimilated to the concept of terrorism. The deprivation of agency of "terrorists" and "terrorist groups" takes the form of banning organizations, listing and sanctioning individuals and groups without due process guarantees, depriving individuals of their nationality, and criminalizing a wide range of activities. The activities targeted by such measures often include, for example, the legitimate exercise of human rights and freedoms, and humanitarian activities in armed conflicts. The whole discourse on terrorism that emerged after September 11, 2001, in which the terrorist is defined as the enemy and dehumanized, also deprives them of their agency. These policies and notions play with both aspects of agency: by restricting the subjectivity of "terrorists" and by diminishing the power granted to them. Yet these measures face important and legitimate concerns, compounded by the fact that terrorism is defined and construed differently in each State and that individuals and groups who do not engage in violence are often assimilated to terrorism, in some cases precisely to diminish their agency. Intentionally or not, terrorist labels and crimes thus become a way of depriving people of their agency because society disapproves of the way they exercise it. My paper seeks to explore how the discourse on terrorism as well as the counterterrorism framework, by restricting the human rights of people conceived as terrorists, also deprive them of their agency.

Introduction

Deprivation of agency is often examined through the lens of paternalism, according to which people who are perceived as less capable or different from the norm are in this sense partially deprived of their agency "for their own good". Another source of agency deprivation is not based on people's perceptions but on the lack of minimal means to claim and use agency; this is the case, for example, of people experiencing extreme poverty. Finally, some individuals or groups are deprived of agency because they are considered by the dominant group to be an inferior class of human beings who do not deserve to be heard and protected. Historically, this has been the case with slaves and colonized peoples around the world. "Terrorists" or people and groups labeled as such also fall into this latest category. Their disenfranchisement is motivated by their perceived "evilness", and justified on grounds of international and national security. In this sense, the media and political discourses on terrorism and counterterrorism allow for the embedding of such practices in

international and national law. Indeed, as a result of the "exceptional" legal framework on international security and counterterrorism, "terrorists" – or persons conceived as such – appear to be a group partially excluded from the benefit of human rights. In the process of selecting who is legitimate enough to exercise agency, society seems to have somehow globally accepted that "terrorists" are not deserving of their agency. Moreover, this labelling and disenfranchisement takes place without them having benefited from the regular guarantees of human rights, in particular because they are understood to have violated human rights themselves, especially the right to life.

The 9/11 attacks in the United States and the unambiguous national and international response that they provoked constitute the milestone in the development of an international legal framework to combat terrorism. Prior to 2001, the United Nations, for example, had little to do with terrorism. The UN Security Council devoted its first resolution to terrorism as late as 1999, while the UN General Assembly began referring to terrorism in 1972, treating it mainly from the perspective of state terrorism until 1993, and did not adopt a counterterrorism strategy until 2006[1]. For both bodies, 2001 was a turning point in terms of the number of resolutions devoted to terrorism. Since then, the UN Security Council has been the main actor in elaborating a legal framework on terrorism, imposing obligations on States to be adopted at the national level under Chapter VII of the UN Charter, and adopting its own counterterrorism mechanisms such as the sanctions regime against the Taliban, Al-Qaeda, and Daesh. This framework is unique and unprecedented because it uses the powers of Chapter VII in a permanent way – as terrorism in general was qualified as a threat to international peace and security in Resolution 1368 in 2001[2]– but also because it imposes strict and strong measures in relation to terrorism without defining it. This allows States to mobilize these powers for virtually anything they decide to qualify as terrorism, even if it entails important restrictions on the human rights of the persons qualified as such.

Accordingly, this article will focus on how this international legal framework on counterterrorism interacts with the agency of individuals and groups designated as terrorists or associated with "terrorism". It will first clarify the relationship between human rights violations and the deprivation of agency. It will then turn to the specifics of how and through what measures terrorists and terrorist groups are deprived of their agency. Listing, profiling, restriction of civil liberties and deprivation of citizenship will be used to show how measures adopted in the name of counterterrorism negatively affect their quality as agents.

1. Setting the stage: agency and human rights

Since counterterrorism measures have a direct impact on both human rights and agency, we will begin by briefly examining the relationship between these two concepts. The relationship between human rights and agency cuts both ways. On the one hand, the mere fact of having human rights has a positive impact on one's agency. On the other hand, being

[1] See *Measures to eliminate international terrorism*, UNGA, 49th sess, UN Doc A/49/60 (1995) GA Res 49/60; see also *United Nations Global Counter-Terrorism Strategy*, UNGA, 60th sess, Doc NU A/RES/60/288 (2006), GA Res 60/288.
[2] See *Resolution 1368 (2001)*, UNSC, UN Doc S/RES/1368 (2001), UNSC Res 1368.

an agent allows one to claim human rights. This reciprocal relationship is based in part on the link between vulnerability and agency. Thus, portraying individuals or groups as vulnerable tends to deprive them of their agency, as in the case of child soldiers, for example. By contrast, by "focusing less on their vulnerability and more on their resilience, actors can emphasize the agency of children and support them for better participation as 'full humans'".[3] In such cases, depriving groups or individuals of the full benefit of their human rights limits their capacity to act as agents.

Conversely, depriving people of their agency puts them in a situation of vulnerability where they cannot stand for themselves and for their rights. First, of course, agency plays an important role in the effective implementation of human rights, particularly through the claims and revendications of the human rights holders. Second, agency also plays a critical role in the development of human rights law, through a bottom-up approach. In both cases, being agents enables people to claim rights. Importantly, since "[r]ights are usually taken to be claims and/or entitlements that hold others to specific duties and obligations";[4] once you take away someone's entitlement to claim them, they lose an important dimension of their value. Going further, Jiwei Ci argues about the relationship between severe poverty and deprivation of agency that "[w]henever material deprivation leads to agency deprivation, it undermines the respect for oneself that is part and parcel of a self. More than merely debilitating and humiliating, agency poverty is positively dehumanizing."[5] It follows that agency not only allows for the claim of human rights, but humanity, and therefore human rights, are fundamentally based on the fact of having agency.

The inherent relationship between agency and human rights also emerges when we examine more closely what is meant by agency. According to Ann Cudd, agency is the fact of having choices as well as autonomy.[6] Similarly, for Michael Bratman, agency involves the capacity to reflect on and plan one's actions.[7] Thus, according to these views, agency involves freedom as well as the possibility and capacity to act as one wishes, to some extent. More narrowly, and from a political rather than an individual point of view, Amartya Sen sees agency as the capacity to act in ways that bring about change[8]. This conception of agency involves having or exercising power, or at least the ability to be heard. A third group of authors reconcile these two definitions of agency by conceptualizing it as the combination of power and subjectivity. For Ci, agency is indeed the "meaningful causality in which causal efficacy (or power, for short) is appropriated from, and in the interest of, a center of meaning (or subjectivity, for short, or self). To

[3] Sylvie Bodineau, "Vulnerability and agency: figures of child soldiers within the narratives of child protection practitioners in the Democratic republic of Congo" (2014) 72:4 Autrepart 111–128 at para 62.
[4] Duncan Ivison, "Human rights and political agency: on Pogge's analysis of human rights violations today" in David Kinley, Wojciech Sadurski & Kevin Walton, eds, *Human Rights: Old Problems, New Possibilities* (Edward Elgar Publishing, 2013) 73 at 75 [Human Rights].
[5] Jiwei Ci, "Agency and Other Stakes of Poverty" (2013) 21:2 Journal of Political Philosophy 125–150 at 134.
[6] See Ann E Cudd, "Agency and : How (Not) to Fight Global Poverty" in Diana Tietjens Meyers, ed, *Poverty, Agency, and Human Rights* (Oxford University Press, 2014) 0 at 198, 202, 204.
[7] See Michael E Bratman, "Reflection, Planning, and Temporally Extended Agency" (2000) 109:1 The Philosophical Review 35–61 at 61.
[8] See Amartya Sen, *Development as Freedom* (Anchor, 1999) at 18.

express this notion of agency in a formula, we can speak of agency as a matter of 'power organized as subjectivity' or 'subjectivity achieved through power'".[9] Agency thus rests on a certain legitimacy to act or to speak, granted by the society or by dominant actors.

In any case, agency is, or should be, inherent to human beings, since it "is what sets us apart from robots or other nonhuman sentient creatures".[10] As Redhead puts it, " Human beings are, among other things, agent-beings with the desire and capacity to act instead of merely being acted on".[11] Agency as an inherent component of the ideal of the political person is thus closely related to human rights, since human rights can be understood in this way as tools for making agency effective. Accordingly, social and economic rights would give a person the material capacity to act; while cultural, civil and political rights provide the means, protection and legitimacy to express oneself.

2. How counterterrorism deprives people and groups of their agency

Let us return to terrorists. Having briefly explored the relationship between human rights and agency, this section analyzes how counterterrorism measures affect agency both directly and through human rights violations.

2.1 Terrorist lists, sanctions and deprivation of agency

From 1999, the UN Security Council created an international list of terrorist entities associated with Al Qaeda, the Taliban and Daesh, which is accompanied with travel bans and asset freezes,[12] and in 2001 it required States to create national lists of terrorists and terrorist groups.[13] At the international level, listing is not associated with due process guarantees: listing is done by the Sanctions Committee – a committee of State representatives – on the proposal of a UN member State. The listing need not be justified by States in order to be implemented, the national State is not obliged to notify the group or individual concerned, and the sanctions are immediately enforceable. Since 2009, listed groups or individuals can challenge their listing, but the review process – which is nonetheless often successful – is conducted by the Ombudsperson, who emits a recommendation, to be followed – or not – by the Sanction Committee[14]. Throughout this process, the listed group or individual does not have full access to the evidence and to the reasons for listing, and delisting does not entail reparations for human rights violations suffered. Indeed, the Ombudsperson does not review the legitimacy of the listing, but its continued relevance at the time of the review. With regard to terrorist lists at the national level, States retain full discretion as to who and what organizations can be designated as terrorist, the modalities of listing and the opportunity to allow periodic review and

[9] Ci, *supra* note 5 at 132; see also Robin Redhead, "Agency and Practice" in *Exercising Human Rights* (Routledge, 2014) at 40.
[10] Cudd, *supra* note 6 at 202.
[11] Redhead, *supra* note 9 at 40.
[12] See *Situation in Afghanistan*, UNSC, UN Doc S/RES/1267 (1999) SC Res 1267.
[13] See *UNSC Resolution 1373*, UNSC, UN Doc S/RES/1373 (2001) SC Res 1373.
[14] See *Resolution 1904 (2009)*, UNSC, UN Doc S/RES/1904 (2009) SC Res 1904 .

delisting. In most States, listing is done by the executive, rather than an impartial body, and there is no delisting procedure.

Typically, listing has disproportionately affected groups associated with Islam and stigmatized national minorities – including indigenous activist groups in Asia and Latin America and human rights defenders of religious minorities in China and India, for example. To illustrate, before the Christchurch attack in New Zealand, and even until the attack on the Capitol in the United States in 2021, very few far-right groups were listed as terrorists on national and international terrorist lists. To take Canada as an example, groups from the Arab world or associated with Islam still constitute the overwhelming majority of the 77 listed entities on the current list, the remainder being sprinkled with a few groups that have been involved in hostilities in Asia, Africa and Latin America, such as the Tamil Tigers and other Tamil-affiliated groups, Boko Haram and the FARC, ELN, Sendero Luminoso and of a few right-wing groups such as Proud Boys and Combat 18.[15]

Listing entails significant restrictions on several human rights, which may amount to human rights violations. The freedom of association of both groups and individuals is crucially affected by listing, as it generally results in the banning and dissolution of associations. Freedom of expression, non-discrimination, the principle of legality and the presumption of innocence – in a global sense that goes beyond the strictly criminal context – can also be undermined by listing and the sanctions associated with it. But even beyond these specific human rights violations, the limited safeguards afforded to the listing process at both the national and international levels fundamentally deprive individuals and groups designated as terrorists of their agency to challenge their designation. In addition, in cases where financial sanctions and travel bans are imposed, or when groups are dissolved, being listed deprives them of their material ability to act freely as agents and as full members of society.

2.2 Profiling, Discrimination and Deprivation of Agency

In the aftermath of 9/11, a significant number of States have adopted – formally or informally – the practice of predictive profiling. It has been implemented as an official policy in Germany (the *Rasterfahndung*), in Russia,[16] in the United Kingdom,[17] in the United States,[18] and as an unofficial practice in many other countries, including Canada, as

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[15] See Public Safety Canada, "Currently listed entities", (21 December 2018), online: <https://www.publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> Last Modified: 2022-05-20.

[16] See Yakin Ertürk, *Integration of the Human Rights of Women and a Gender Perspective : Violence against Women. Report of the Special Rapporteur on violence against women, its causes and consequences. Addendum. Mission to the Russian Federation*, UNHRC, UN Doc E/CN.4/2006/61/Add.2 (2006) at para 56; see also *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UNGA, UN Doc A/64/211 (2009) at para 37.

[17] See Code A, 2005, as quoted in Daniel Moeckli, "Selective Use of Police Powers" in Daniel Moeckli, ed, *Human Rights and Non-discrimination in the "War on Terror"* (Oxford University Press, 2008) at 202–203 (UK Government official website only shows versions of Code A from 2009).

[18] See United States Department of Justice, *Fact Sheet Racial Profiling* (2003); Human Rights Watch & Colombia Law School, *Illusion of Justice. Human Rights Abuses in US Terrorism Prosecutions*, Human Rights Institute (2014) at 18–20, 23.

denounced by the Commission on Maher Arar.[19] Predictive profiling is the targeting of specific individuals at any level of governance, including by the police and intelligence bodies, on the basis of characteristics typically associated with a group conceived as having more chances of being involved in criminality – in this case, terrorism. Because such profiling is preventive, as it is associated with crimes not yet committed or identified, it is necessarily based on generalizations and stereotypes about the targeted group or community.

This practice is thus recognized as a violation of the prohibition on discrimination.[20] Such a distinction of treatment based on identification with a particular group cannot be objectively justified. Indeed, States generally rely on common sense rather than empirical facts to justify such practices.[21] Moreover, as is the case of terrorists lists, such profiling places the targeted persons in a more vulnerable position from which it is more difficult to exercise agency, not only to challenge and denounce the profiling or the (often) misplaced and unfair suspicion, but also to allow members of the targeted group to act freely, in all aspects of their life, without fear of being targeted by law-enforcement operations.

2.3 Denationalization as a severe deprivation of agency

There has also been a trend towards revoking the citizenship of persons labeled as terrorists.[22] In 2014, Canada amended its *Citizenship Act* to allow for the revocation of citizenship of dual citizens convicted of terrorist offenses and sentenced to at least five years in prison domestically or abroad.[23] This provision was criticized as violating equality as well as other rights and freedoms[24] and was repealed in 2017. Between 2007 and 2022, Australia could likewise deprive dual citizens from their citizenship on terrorism grounds.[25]

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[19] See *Report of the events relating to Maher Arar- Analysis and recommendations*, by Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Ottawa, 2006) at 356.

[20] See *Rosalind Williams Lecraft v Spain*, UNHRC, 96th Sess, UN Doc CCPR/C/96/D/1493/2006 (2009) Comm n°1493/2006 at paras 7–9; *Recommandation générale XXXI concernant la discrimination raciale dans l'administration et le fonctionnement du système de justice pénale*, Comité pour l'élimination de la discrimination raciale NU, 65e sess, UN Doc CERD/C/GC/31 (2005) at para 20; *The Situation of People of African Descent in the Americas*, Inter-Am Comm HR, OEA/Ser.L/V/II. Doc. 62 (2009) at paras 156–161; *Timichev c Russie, nº 55762/00 et 55974/00*, CEDH (2005) at para 58 [*Timichev (CEDH)*].

[21] See Moeckli, *supra* note 17 at 212; *R v Commissioner of Police for the Metropolis and another*, UKHL 12 (2006) Po LR 26 AC (HL (Eng)) at para 42; *Report of the Official Account of the Bombings in London on 7th July 2005, by Royaume-Uni, Report of the Official Account of the Bombings in London on 7th July 2005*, by United Kingdom House of Commons, London, 2006, HC 1087 at 31.

[22] For a more detailed analysis on this specific question, see Tufyal Choudhury, "The Radicalisation of Citizenship Deprivation : Citizenship, deprivation, revocation, failed citizens, counterterrorism" (2017) 37:2 Critical social policy 225–244.

[23] *An Act to amend the Citizenship Act and to make consequential amendments to other Acts, (S.C. 2014, c. 22)*, 2014, s art.10(2)(b) and (f).

[24] *Bill C-24, Strengthening Canadian Citizenship Act*, by The Canadian Bar Association at 19; "Court challenge slams new Citizenship Act as 'anti-Canadian'", (20 August 2015), online: *thestar.com* <https://www.thestar.com/news/immigration/2015/08/20/court-challenge-slams-new-citizenship-act-as-anti-canadian.html>.

[25] Leah Ferris, "Invalidity of the Minister's power to revoke citizenship", online: *Parliament of Australia* <https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/FlagPost/2022/June/Power_to_revoke_citizenship> Last Modified: 2022-07-06publisher:

From 1998 to the present, France has allowed naturalized dual citizens to be stripped from their citizenship by decree if they have been convicted of a terrorist offense, regardless of its seriousness and of the person's involvement[26]. Belgium, Denmark and the Netherlands could also be cited as examples of States that have adopted similar practices. It is worth taking the United Kingdom as one last example because it provides for a broader case of denationalization. Since 2014, in addition to the possibility of depriving any dual citizen of his or her citizenship in cases where "deprivation is conducive to the public good", people who only possess British citizenship can be deprived of it on the same grounds if they are naturalized citizens,[27] thus allowing the production of stateless persons.

Revoking citizenship – even if it doesn't make people stateless – is not banal; it places people outside the political community.[28] It is related to one's "national identity, belonging and values".[29] It is also a "method of permanent exclusion"[30] that has important consequences for people who suffer it, including the possibility of having their rights protected in the face of the international community. Citizenship, as a legal status, is also associated with reinforced protection of rights, especially economic and social rights. Importantly, as serious as these implications may be, deprivation of citizenship is not always accompanied by due process standards and is often not imposed by an impartial tribunal but rather by the executive. Denationalization is thus one of the most severe deprivation of agency. It affects agency in several ways : it deprives the persons concerned of their material capacity to exercise their agency by limiting their access to basic services such as the right to stay in the territory, access to health care and to the labor market; it limits their means of exercising agency, through the right to vote, for example; and it limits the possibility of standing up for oneself to get rid of the terrorist label and to challenge denationalization, because of the nature of the process that leads to it and the lack of guarantees.

2.4 Restriction, criminalization of civil liberties and deprivation of agency

In addition to criminalizing direct participation in terrorist acts, States criminalize a wide range of activities under the guise of crimes such as material support and collaboration, glorification, apology, and indirect incitement. These crimes, because they are mostly preventive and anticipatory in nature and because they weaken the link between the act of violence and one's participation, give greater importance to the affiliation, ideology, or identity of the person whose acts are criminalized. Most of the activities covered by these labels meet a low threshold of seriousness, and some of them are even protected as legitimate exercises of civil liberties, such as freedom of expression, freedom of association, and the right to participate in political life or to hold political office. In

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[26] *Code civil français (as amended by Loi n°98-170 du 16 mars 1998 - art. 23 (JORF 17 mars 1998 en vigueur le 1er septembre 1998)*, 3, s 25.

[27] *British Nationality Act 1981*, 1981, 61, s 40(2) et (4A).

[28] See Choudhury, *supra* note 22 at 4.

[29] *Ibid*.

[30] NR Motaung, "Revocation of Citizenship in the Face of Terrorism" (2017) 50:2 Comp & Int'l LJ S Afr 214–229 at 214.

addition, their use can, and in some cases does have a discriminatory effect. In the case of the restriction or criminalization of the exercise of civil liberties, the impact on agency is quite straightforward.

Let us take the example of speech crimes to illustrate this effect. Speech crimes in relation to terrorism do not only punish certain expressions; more generally, they limit the space available for free expression in society, leading to self-censorship. Indeed, these crimes are broader than incitation; they do not require a causal link between the discourse and an increase in the likelihood that a terrorist attack will be committed. But the looser their relation to violence, the more the crimes focus on the content of the discourse. By criminalizing some speech as such, States direct people's speech in a particular direction and banish unpopular ideas or thoughts that, even if they are shocking, are part of the democratic life of a society (as long, of course, as they don't constitute hate speech). Indeed, if civil liberties can be restricted, the restriction must be proportionate to a legitimate end. This is not always the case when, as has been the case in many countries since 2001, criminalization leads to the penalization of individuals who denounce certain practices, raise certain issues in public fora, or justify or defend terrorist attacks *ex post facto*. In Spain, for example, the film director Alex Garcia and twelve rappers from the group La Insurgencia were prosecuted for glorification of terrorism for their artwork.[31] Following their conviction, they were also banned from holding public office for 9 years. In a similar vein, all Basque newspapers have been banned by the Spanish government for their alleged collaboration with the group designated as terrorist ETA.[32]

Similarly, various activities, be they unpopular, critical, or disruptive, have been restricted or criminalized, using counterterrorism as a tool, thus restricting the public space available for the free exercise of civil liberties. Many other examples could be listed here : the banning of Kurdish political parties in Turkey, which has been thoroughly examined and denounced by the European Court of Human Rights as a violation of the freedom of association;[33] the creation in 2008 of the Specialized Criminal Court to prosecute terrorist crimes in Saudi Arabia, that ended up trying mostly acts of dissent;[34] and the listing of humanitarian organizations – especially Muslim ones – as terrorist groups in the United States, as well as the criminalization of contacts with armed groups designated as terrorist, even for legitimate humanitarian purposes, under the aegis of material support to terrorist organizations. Even when these practices do not directly lead to imprisonment or ban from political life – which inherently entails a loss of the ability to exercise one's agency – in

[31] See *Tweetez... si vous l'osez: les lois antiterroristes réduisent la liberté d'expression en Espagne*, by Amnistie Internationale, 2018 at 5–12.
[32] See for example *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide. A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights*, by Human Rights Watch (2003) at 20.
[33] See for example *Parti communiste unifié de Turquie et autres c Turquie, nº 19392/92*, [1998] CEDH at paras 9, 27, 51–61 [*Parti communiste (CEDH)*]; *Parti socialiste et autres c Turquie, nº 21237/93*, [1998] CEDH at paras 41–54 [*Parti socialiste (CEDH)*].
[34] See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on his mission to Saudi Arabia*, Conseil des droits de l'homme, Un Doc A/HRC/40/52/Add.2 (2018) at paras 26, 69 et 71(a); see also *Muzzling Critical Voices. Politicized trials before Saudi Arabia's Specialized Criminal Court.*, by Amnistie internationale (2020).

some national contexts people, such as journalists, politicians, or activists, are compelled not to use their agency as they would like in order to avoid being labeled as terrorists.

Before concluding, let us recall that human rights were first developed to protect the most vulnerable, to ensure a minimal protection of their humanity and dignity, and to guarantee them a minimum level of agency. The first human rights to be codified were basic guarantees for those accused of criminal offenses. In some respects, the counterterrorism framework adopted in the aftermath of 9/11 has bypassed these historic and most fundamental rights by using the alternatives of listing and immigration law to identify and sanction those deemed to be terrorists. However, regardless of the legal framework used, and irrespective of the merits of the current qualification of groups and individuals as terrorists, human rights are not and should not be granted or protected on the basis of merits. On the side of agency, it goes without question that groups and individuals who control the discourse on terrorism have more space to exercise their agency. At the other end of the spectrum, reducing someone to his or her – presumed – quality as a terrorist, with all the direct and indirect effects this entails, reduces agency in all its forms to a minimum.

Conclusion

We have seen that, in adopting a very strong and unambiguous international legal framework on terrorism, without defining the term, counterterrorism measures adopted after 9/11 have negatively affected the agency of individuals and groups labeled as terrorists. Counterterrorism measures have done so by directly impairing their agency or through human rights violations that, in turn, have impacted their capacity to exercise it. While many other examples could have been chosen, the measures that have been developed here to illustrate the deprivation of agency are the terrorist lists and sanctions, predictive profiling to prevent terrorism, directed or restrained exercise of civil liberties and the deprivation of citizenship on the basis of involvement in terrorist activities. All of this illustrates how being associated with the term "terrorism" locks people into a state of passivity, with few means to challenge the label and to exist, or to act beyond it; in sum, to be something else than a terrorist in the eyes of society.

Since agency is the possibility and capacity to stand up for oneself or for a cause, "those without agency are at risk".[35] Indeed, '"the lower the capacity of the human subject the greater the need for some form of external assistance,' yet the incapacity (lack of agency) of the subject makes the delivery of external assistance entirely arbitrary and by no means guaranteed".[36] Thus, by limiting agency, one is increasing the space for arbitrariness. An example of an arbitrary mobilization of the counterterrorism legal and political framework is the essentialization of the relationship between Islam and terrorism after 9/11, even though this relationship is not based on any empirical or scientific evidence. This assimilation of Muslim people to a greater risk of committing terrorist acts in the public perception and in the conception of public policies is counterproductive, not only in the sense that it tends to ignore an important part of political violence based on other ideologies, beliefs, or ideas, but also because it conceptualize certain values, faith, and even

[35] Redhead, *supra* note 9 at 38.
[36] *Ibid*.

certain cultures as evil on an arbitrary basis. Yet one of the key components of the rule of law, on which the concept of human rights is also founded, is the protection against submission to arbitrary power. In general, the possibility for human beings to conceptualize themselves as agents and to be able to exercise their agency is one of the safeguards that prevents a political society from falling into arbitrariness.

"Facilitating mobility" means banking on the considerable agency of migrant workers and reducing their precarity

François Crépeau – Idil Atak

Undocumented migrants and temporary migrant workers perform essential economic functions in all States that receive immigration. Some temporary migrant workers will occupy jobs commanding higher salaries: they wield higher levels of social capital and remain mobile, confident that they can find a job elsewhere should they not like the work environment. They are usually called "expats", not "migrants."

Most undocumented migrants and temporary migrant workers, however, will work in economic sectors where labour costs must remain low if the businesses are to remain profitable. They face huge constraints: they usually have little or no social capital, they often do not speak the local language or English, they frequently carry overwhelming debts due to having had to pay recruitment fees, and they are often expected to financially support a whole family at home.

Their precarious situation is not happenstance. It is politically, socially and economically constructed, in order to extract maximum work for minimal labour costs. Indeed, globalization has led to the relocation of manufacturing sectors to benefit from lower labour costs in low-income countries. For the non-delocalizable economic sectors – agriculture, construction, extraction, hospitality, fisheries, domestic and institutional care, services – States have relocated working conditions from low-income countries to more advanced economies. These transformations have come to define today's global political economy, in the North as in the South, and they affect many workers who are citizens (for example, those working with temporary labour agencies) and probably a majority of the 169 million migrant workers around the world.[1]

The combination of restrictive migration policies, repressive border controls, the absence of meaningful pathways to permanent resident status, and a lack of enforcement of labour rights for migrant workers has led to precarity for these workers, based on the fear of being sent back empty-handed to the country of origin. This 'constructed precarity' has allowed a considerable reduction in the cost of labour in non-delocalizable economic sectors, an indirect subsidy generated by state-enforced measures. This precarity is today structural and constitutes a conscious strategy of reduction of the cost of labour, everywhere in the countries receiving immigration, North and South. States have thus recreated a lumpenproletariat, in the niche previously occupied by the 19th century industrial workers, the indentured labourers of the British Empire, and the slaves of other regimes.

On the one hand, repressive policies against *undocumented migrants* have targeted these workers, not their employers. Yet it is precisely the pull factor of these underground job offers that attracts migrants. They would not come if there were no jobs for them. Undocumented migrants do not have a legal status and work in economic sectors in which States often refuse to recognize that

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[1] International Labour Organization, *Global Estimates on International Migrant Workers: Results and Methodology*, 3rd ed (2021) at 11, online: https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf.

they have labour needs. The absence of legal status means that those workers do not dare to stick their neck out and mobilize, protest, contest, or report to the authorities, when their rights are being trampled, for fear of being detected, detained, and deported. Their absence of immigration status deprives them of recourses against abuse, prevents their voice from being heard, and pushes them further underground, where they can be preyed upon by recruiters, smugglers, employers, lodgers, moneylenders, and other exploiters who know their situation and do not hesitate to threaten them with a denunciation to immigration authorities in order to keep them in check.[2]

On the other hand, States have developed temporary legal migration programs that all too often create the same precarity: Kafala in the Middle East, sponsorship in Canada or Australia, "closed" work permits, etc. *Temporary migrant workers* are often provided with a work and residence permit which is seasonal (for agricultural workers) or limited to one-year renewable, but which is often limited to one employer. This means that most of these migrants will do what they are told by the employer without protesting much, however outrageous the situation may be: long hours without overtime pay, late payment of wages, illegal deductions from the wages, inadequate lodging, psychological and verbal abuse, sexual harassment, and violence. Such illegal practices have been reported by many international and civil society organizations and are endemic in underground labour markets. These migrant workers do not dare alienate their employer for fear of being either fired and seeing their work and residence permit cancelled, which would signify returning home empty-handed or blacklisted for future years, preventing them from returning the year after. In both cases, it would be the end of the migration project, with no possibility to reimburse debts and to fund family expenses, such as education for the kids or healthcare for the parents.

The combination of migration policies that induce fear of deportation and practices of non-implementation of labour law in workplaces where migrant workers are a significant proportion of the workers results in the creation of lawless zones in which migrants are exploited without being able to protest. Racialized persons are disproportionately affected. Race and other intersectional factors, such as gender and class, operate as structures of oppression within migration policies.[3] The COVID-19 pandemic further exacerbated the precarity of undocumented migrants and temporary migrant workers who experienced unsafe working conditions, income loss, and lack of governmental support.[4] Legislation and regulations prohibit, either officially or in practice, these migrants to unionize, to negotiate their working conditions, to denounce the abuse to oversight mechanisms, and to fight for their rights in courts or labour boards. Labour inspections are often ineffective at protecting migrant workers' rights, when they are not colluding with migration authorities in hunting down undocumented migrants, thus pushing them deeper in the underground and into the hands of their exploiters. Migrants may not be aware of their rights, due to language barriers or isolation. For those who know their rights, speaking up is not really an option when it may lead to the end of their migration project, in which they and often their entire family have invested so much in time, money and energy, and which has entrusted them with the

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[2] *Report by the Special Rapporteur on the Human Rights of Migrants, Francois Crépeau: Labour Exploitation of Migrants*, HRC, 26th Sess. UN Doc A/HRC/26/35 (2014) at paras 57–58.

[3] Tendayi Achiume, "Race, Refugees and International Law" in Cathryn Costello, Michelle Foster & Jane McAdam, eds, *The Oxford Handbook of International Refugee Law* (Oxford: Oxford University Press, 2021) 43 at 44.

[4] See generally Graham Hudson, Chloé Cébron & Rachel Laberge Mallette, "Access to Health Care for Precarious and Non-status Migrants During COVID-19: Ontario and Québec" (2020) 17:3 Can Diversity 45, online: https://acs-metropolis.ca/wp-content/uploads/2021/11/canadiandiversity-vol17-no3-2020-d3549.pdf

duty to support their loved ones – a duty for which they will often prefer to suffer considerable abuse rather than "fail".

Despite all the agency they demonstrate to survive and support their families, the fear of dismissal and deportation prevents migrants from mobilizing, publicly protesting, suing in complaint mechanisms or the courts, or unionizing.

Yet, no marginalized group has ever had its rights handed to it by the majority on a silver platter: workers, women, indigenous peoples, the LGBTQ+ community, minorities, detainees and many others have had to fight publicly for the recognition of their rights. Migrants do not have the right to vote and therefore do not count in the context of public debate. Unlike citizens, they can neither reward nor punish politicians. The political class is free to say whatever is politically useful against them, since the electorate is not enlightened about the issues by the inclusion and effective participation of migrants themselves in the public debate. We cannot even blame most politicians: warts and all, electoral democracies are the best political system ever invented and politicians – even the best ones – are spurred by electoral pressure.

Migration policies are thus made by non-migrants – the politicians – for non-migrants – their electorate, just as policies towards women have long been made by committees of men. That is, those setting government agendas do not know what they are talking about, and migration policies are reduced to an electoral issue, being too often based on populist prejudices, myths, fantasies and fears that are conveyed in the public debate, without contradiction, for lack of meaningful opposition. This is particularly evident in the prominent role the 'security fantasy' plays in discussions of migration: migrants are increasingly framed as a pernicious – if not existential – threat, when all the research demonstrates lower levels of criminality in immigrant communities than in the native communities of similar social environment.[5]

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Even though precarity has become a strategy to reduce labour costs, most migrants manage to send money home, to reimburse debts, and to support their families. Since they cannot speak up, protest, contest, or make the reality of their lived lives known to all, they exercise considerable daily agency to avoid the pitfalls that precarity sets on their path: they need to if they are to survive. For an undocumented migrant, taking the subway (instead of the usual bicycle ride) to return home in order to see one's children before they go to bed means taking the risk of being arrested in a police ID check. For a temporary migrant worker, mobilizing in order to protest the fact that wages have not been paid for several months means taking the risk of being fired or blacklisted.

Migrants in precarity rely on underground solidarity networks, connecting with family members, friends, relationships, and other "operators" in order to respond to the daily challenges of their lives. Finding the cheapest way to reach their destination, avoiding the traps of an undocumented journey, choosing the "best" migrant smuggler, seeing a doctor when one is ill, buying groceries when the working hours are long – all these actions will be based on the information collected through the migrants' networks, thanks mostly to the use of smartphones and word of mouth.

It is remarkable that immigration States do not realize how much more these migrants could contribute to wealth creation and social transformation, were they not hobbled by precarity.

[5] Francesco Fasani et al, "Immigration and Crime: Perceptions and Reality" in Fasani et al, eds, *Does Immigration Increase Crime? Migration Policy and The Creation of the Criminal Migrant* (Cambridge: Cambridge University Press, 2019) 9 at 19.

Immigration States shoot themselves in the foot when they encourage and indirectly subsidize criminal networks to prey on those migrants, preventing them from deploying all their talents and energy, and leaving their agency in the shadows.

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Yet, another policy framework is possible and the 2018 *Global Compact for Migration*[6] outlines how this may be realized. This Compact is the first truly universal instrument on migration, 152 member states of the United Nations General Assembly approving it.

A soft law instrument, the Global Compact creates a conceptual framework – a long-term game plan for the coming decades. One should not expect major results in the short term. This is especially the case as it often suggests the opposite of what most States are currently doing. But this gap between the principles and values the Global Compact articulates and contemporary state practice should not be taken to undermine its importance. Consider the *Universal Declaration of Human Rights* of 1948, a similarly non-binding instrument which for the first time articulated the principles and values of human rights at the global level. It took 18 years to adopt the two *International Covenants*, then another 18 years for the *Convention against Torture*, then 22 years for the *Convention on Enforced Disappearances*, to take only these examples of how today's international human rights regime came into being. One hopes that the *Global Compact for Migration* will gradually engender a culture of migrants' rights, just as the *Universal Declaration* created a culture of human rights.

The central recommendation of the *Global Compact for Migration* is to "facilitate" mobility. In the negotiated English version, this term appears 62 times! Realizing this recommendation will be the greatest challenge for all of those who care about migrants' rights in the years to come. And this realization in great part means unleashing the power of migrants' considerable agency.

In unpacking how its recommendations ought to be realized, the *Global Compact* proposes twenty-three objectives. Most of them aim at integrating migrants, decriminalizing their activities and respecting their rights. Here are a few of the States' political commitments: to enhance availability and flexibility of pathways for regular migration;[7] to facilitate family reunification;[8] to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work;[9] to facilitate changes of employer and modification of conditions or length of stay, without unnecessary red tape, and without fear of arbitrary deportation;[10] to facilitate regularization of status;[11] to include migrants in crisis preparedness, emergency response, and evacuation measures;[12] to save lives;[13] to use immigration detention only as a measure of last resort and work towards alternatives;[14] to provide access to basic services for migrants, regardless of their migration status, including by instituting

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[6] *Global Compact for Safe, Orderly and Regular Migration*, UNGA, 73rd Sess, UN Doc A/RES/73/195 (2018) GA Res 73/195.

[7] *Ibid* at objective 5.
[8] *Ibid* at objective 5(i).
[9] *Ibid* at objective 6.
[10] *Ibid* at objective 6(g).
[11] *Ibid* at objective 7(h).
[12] *Ibid* at objective 7(j).
[13] *Ibid* at objective 8.
[14] *Ibid* at objective 13.

'firewalls' between public agencies;[15] to empower migrants and societies to realize full inclusion and social cohesion;[16] to eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration;[17] to invest in skills development and facilitate mutual recognition of skills, qualifications and competences, at all skill levels.[18]

States must therefore aim for a normally regulated labour market that allows migrants to come and look for work, provides equal protection for the rights of all workers regardless of their migration status, and gives all migrant workers a voice in negotiating their working conditions. Additionally, in line with the *Global Compact*, States must undertake regularization programs, develop accessible and expedient procedures that facilitate transitions to stable legal status and inform migrants of their rights, so as to prevent them from falling into an irregular status.[19] Banking on the migrants' agency is key, in the same way that States bank on their citizens' mobility in order to respond to labour needs throughout the country.

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However, such a mobility goal cannot be achieved overnight. Forty years of 'cheap labour' practices in non-delocalisable sectors cannot be erased instantaneously or else entire economic sectors will collapse under the weight of increased labour costs. These sectors will require a longer transition with investments to support them during this modernization process, as has been done for other industries.

The 152 states that adopted the *Global Compact* recognized the need to "empower" migrants. However, unless these migrants can exercise their agency without fear of arbitrary expulsion, and thus influence the elaboration of migration policies (ultimately gaining the right to vote after a few years of residence), non-migrant politicians will continue to want to please their non-migrant electorate by preferring to score short-term political points over achieving long-term economic and social gains.

Unfortunately, there is no long-term strategic planning for human mobility in any country. Governments plan strategically for 20, 30 or 50 years in all other areas of governance: infrastructure, urban development, transport, energy, food security, health, education, environment, etc. In contrast, migration policies are almost always reactive to current events: "we need IT workers now" or "we need to stop illegal aliens now". Such changes thus depend on the mood of the mobilizable electorate. For the most part, the constituency that is most vocal on migration issues is essentially made up of citizens who oppose immigration, an electorate courted by all politicians, left and right. Most citizens have other priorities when elections come around.

The absence of long-term strategic planning of mobility is strikingly indicative of how migrant workers are still considered in most societies. Indeed, States do strategically plan for their citizens' needs, as there could be electoral consequences in not preparing for the future. Migrants in precarity are considered as temporary workers, as people who should return home when not needed anymore, as an 'expendable' labour force, and States thus do not fear an electoral backlash should migrants be unhappy with their conditions. Moreover, precarity is precisely the means through

[15] *Ibid* at objective 15.
[16] *Ibid* at objective 16.
[17] *Ibid* at objective 17.
[18] *Ibid* at objective 18.

[19] *Ibid* at objectives 7 i)–h).

which States keep the prices of essential goods and services low: any significant increase would trigger an electoral reaction from citizens. Therefore, States still seem to consider that short term policies, geared towards electoral results by keeping employers happy and prices for goods and services low is a winning electoral tactics.

However, current labour shortages in many Global North countries and the realization that they are not a temporary feature of the economic landscape are starting to create conversations regarding migration policies: it is anticipated that their labour force will need a growth rate that birthrates will not provide. Such conversations are much better informed than was the case even twenty years ago, due to several factors. Societies are diversifying considerably: younger urban generations have family and friends of many ethnicities, creeds, or languages, and they will not accept the kind of discrimination that previous generations have accepted. Employer associations are currently lobbying governments to increase immigration rates to respond to labour needs, a push that many governments are still resisting. Except for the 'yellow press' everywhere, the media are doing a much better job at informing their readership on migration policy issues, having specialized journalists, producing feature reports on migrants, their families, their contributions to society, and their role in the economy, especially at regional level. An international dialogue between States started with the creation in 2007 of the *Global Forum on Migration and Development*, an annual meeting where state representatives and civil society organizations meet to discuss migration policy directions and outcomes, and it was enhanced with the inclusion of the *International Organization for Migration* in the United Nations family in 2016 and the preparation of the 2018 *Global Compact for Migration*. Such conversations are hopefully the start of a generational change that will bring most citizens to regard migration as mostly a benefit for their societies if well governed.

As the *Global Compact* invites States to do, they will therefore need to think about human mobility in the long term, as they do for most other fields of governance. To do so, societies will have to collectively ask themselves some difficult questions. What population do we want to have in 20 or 50 years, in terms of numbers for geopolitical reasons, but also in terms of skills for economic and cultural reasons? How should we account for the loss of creativity of an aging population, as well as growing needs for care-work? How can we ensure the maintenance of the standard of living and compensate for the differences in wealth? How do we better manage social diversity in all its components: age, gender, ethnicity, religion, etc.? How should we respond to migration emergencies, caused by violence or the environment?

This kind of debate requires the participation of all those affected by these issues: all ministries, all social actors, all institutions, all citizens. This is what the *Global Compact* calls "whole-of-government" and "whole-of-society" approaches. Most importantly, one needs to hear from migrants themselves – whatever their status – to bring their lived experience into the debate and as a reality check against myths, stereotypes, and fantasies. Migrants also need a *MeToo* movement, in the sense of a broader societal reckoning with perspectives and experiences that have remained marginalized and ignored for far too long. A key condition for enabling this debate is to reduce the constructed precarity of migrants and to ensure their empowerment, to bring migrants out of the margins and give them "papers" and a regularized status, to recognize the legitimacy of their "voices", to provide them with the means to express themselves, to participate in public debates, and to showcase their considerable agency – without fear of deportation. As suggested above, today's migrant workers correspond exactly to the industrial workers of the 19th century whose collective efforts invented trade unions and brought about the much-needed reform

of labour law. Together with other actors – NGOs, lawyers, social workers, health care workers, educators – unions could powerfully carry the voices of migrant workers and migrants' inclusion could trigger a welcome renewal of a currently weakened labour movement.

From this concern to hear the 'voices' of migrants, States will have to develop a strategic plan extending over one or more decades, with precise benchmarks, and foresee the necessary investments to reach these goals. Important components of this agenda should include: progressively applying labour laws to all migrant workers in all sectors; strengthening the mission of labour inspectorates and public officials responsible for monitoring working conditions; effectively sanctioning exploitative employers, considering that the short-term inconvenience to a small number of businesses will be beneficial to the economy as a whole over the long term; offering more and more work and residence permits to foreigners who request them and allowing them to look for work; not discouraging unionization, but actively enabling migrant worker organization; regularizing most undocumented workers; seriously reforming the temporary migrant worker recruitment industry; doggedly combatting negative stereotypes; facilitating access to permanent residence and to nationality, in order to recognize social integration.

These objectives should of course be developed with the input and participation of those most directly affected by them, especially migrants themselves. The *Global Compact for Migration* serves as a benchmark and a framework in this endeavour. States should undertake an overview of existing domestic policies and practices to assess their consistency with the *Global Compact* and re-evaluate them at regular intervals. They should also take steps to ensure the *Global Compact* objectives are accounted for when new policies are adopted in order to ensure the greatest level of protection for migrants.

Such a thoughtful and collective approach necessary to implement the *Global Compact* will allow to take maximum advantage of the migrants' agency and achieve several goals: meeting the demographic needs of many countries; gradually increasing the economic and social contribution of migrants; easing pressures on asylum systems by facilitating refugees' access to immigration mechanisms; diminishing the power of criminal networks by reducing precarity; increasing border control capacity as most migrants will have travel documents, thus allowing to focus security resources on intelligence about individual threats; and reducing anti-immigration sentiments across societies through more enlightened public debates.

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Human mobility will not abate. Growing inequality and environmental challenges will increase the migration pressure. Closing borders is and will remain a costly and ineffective response. To get out of the repressive spiral, States must accept that governing mobility is not about prohibiting it. It means legalizing, regulating and taxing it. It means investing in a governance infrastructure that accelerates the response to the many needs of societies by relying on the ingenuity of migrants themselves and that offers them pathways to integration, for the benefit of all. This transition must take place in the context of regional and international cooperation. No State can liberalize mobility alone. The role of free movement areas such as the EU, Mercosur, ECOWAS, SADC and the African Union will be decisive as models of what needs to be done on a global scale.

'Facilitating mobility' means progressively banking on the migrants' agency and making migration simpler, safer, faster and cheaper, for both migrants and host societies.

"We have had enough": The Protest Agency of Independent Migrant Children

Laurence LeBlanc

Introduction

"We have had enough," reads a protester sign in front of the United Nations High Commissioner for Refugees (UNHCR) office in Tunis. A boy who looks to be about 16 years old holds the cardboard sign written in Arabic, chanting in a line with other single young men demanding to be resettled in Europe. He wears a t-shirt, jeans, and flip flops. Behind him are tarps flapping in the wind, made of garbage bags covering make-shift shelters held down by rope. Like the 50 other unaccompanied male minors who lost track of their families on their journeys from Somalia, Eritrea, Chad, Sudan, and Libya he joined this protest alone.[1]

The past decade has seen a growing body of literature documenting the agency of children and the agency of migrants, yet in mainstream international law and international relations literature the political agency of migrant children is still largely overlooked.[2] This is partly because international law looks to other actors, including states and sometimes intergovernmental institutions, as the primary actors in this sphere. Far from being passive subjects in the higher-level governance of migration, however, this essay argues that migrant children can confront and even alter migration governance through protest informed by their social identities. Specifically, I focus on children who migrate without their parents or have been separated from their parents, defined here and elsewhere as independent migrant children (IMCs)[3], or by migration institutions as 'unaccompanied migrants.'[4] In taking a middle ground approach between conceiving of children as completely autonomous actors and actors wholly influenced by adults,[5] this paper seeks to deepen discussion about IMCs as political actors constrained by and impacting the constraints which affect them.

The objectives of this essay are twofold in scale. Firstly, I focus on IMCs aged 15 to 17 who engage in protest to understand how the agency of migrant children is informed by their social identities. I argue that the way child migrants exercise agency is dependent not only on age, but on migration status, nationality, race and gender which inform their desires and abilities to advocate for themselves and their communities. Secondly, I outline the relationship between IMC agency and the global governance of migration. The global governance of migration refers to the conglomeration of complex international networks of governance which together comprise a meta-

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[1] See "Refugees protest for rights in Tunis", *InfoMigrants* (3 May 2022), online: <www.infomigrants.net/en/post/40251/refugees-protest-for-rights-in-tunis>.

[2] See Arita Holmberg & Aida Alvinius, "Children's protest in relation to the climate emergency: A qualitative study on a new form of resistance promoting political and social change" (2020) 27:1 *Childhood* 78 at 79.

[3] See Aida Orgocka, "Vulnerable yet agentic: Independent child migrants and opportunity structures" (2012) 2012:136 New Directions for Child & Adolescent Development 1 at 1–11.

[4] Since the former emphasizes their agency and the latter implicitly points to their lack of capacity, this essay employs IMC throughout to refer to these children, understanding of course that even this category simplifies the extreme variations within this class.

[5] See Madeleine E Dobson, "Unpacking children in migration research" (2009) 7:3 *Children's Geographies* 355 at 356.

system of rulemaking in the field of migration. By claiming that IMC protesters are actors in global governance, I defend that their participation in protests have the potential for shaping and altering institutional responses to migration in contradictory ways.

I explore these tensions through a case study of migrant protest in Tunisia. From February to June of 2022, a group of around 220 Sub-Saharan asylum seekers and refugees organized a sit-in[6] against the UNHCR in the Tunisian towns of Zarzis and Tunis after the institution's announcement of reduced direct financial assistance.[7] The group demanded immediate relocation (or "evacuation") of all group members to a third country.[8] Approximately ninety percent of the protesters were men, and about a quarter of them were under the age of 18, many of whom lost track of their families on their journeys from Somalia, Eritrea, Chad, Sudan, and Libya.[9] I witnessed this *Evacuation* protest while living in Tunis from May to August 2022 and conducted informal interviews with protest participants and NGO actors. I build this essay by relying on these interviews, as well as news sources about the protest and personal observation of two conferences about child migrants in Tunisia. The first was organized by the International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR) involving governmental and international non-governmental organizational actors,[10] and the second was organized by the International Bureau for Children's Rights (IBCR) involving local civil society groups.[11]

Understanding the reasons for and reactions to IMC protest contributes to childhood studies and international governance because it challenges assumptions about passive migrant children in contradictory ways. Institutions and governments simultaneously embrace IMC agency while pushing back against it when it conflicts with the goals of major players in migration governance. In some ways, IMCs face even more challenges than accompanied child migrants in being perceived of as full political actors[12] but in other ways, their lack of parental supervision legitimizes their claims of agency and agenda-setting capacities.

IMC Agency in the *Evacuation* Protest

[6] See "Tunisie: manifestation de réfugiés contre leur 'marginalisation'", *Arab News* (14 February 2022), online: <https://www.arabnews.fr/node/205376/monde-arabe>.
[7] See "UNHCR Tunisia Operational Update" (28 February 2022), online: *Reliefweb* <reliefweb.int/report/tunisia/unhcr-tunisia-operational-update-28-february-2022>.
[8] See "African refugees in Tunisia demand evacuation to different countries", *Africanews* (19 April 2022), online: <www.africanews.com/2022/04/19/african-refugees-in-tunisia-demand-evacuation-to-different-countries>.
[9] See "Refugees protest for rights in Tunis", *supra* note 1.
[10] See Ministry of Women, Family, Children and Seniors, Child Protection Delegate, International Organization for Immigration, United Nations High Commissioner for Refugees, United States Agency for International Development, *Atelier pour renforcer la protection des enfants migrants en Tunisie* (Tunis: 17, 24, 31 May 2022) [Inter-ministerial & INGO Conference].
[11] See International Bureau for Children's Rights (IBCR) as part of the Projet de renforcement intégral des droits de l'enfant, *Atelier de formation et d'échanges sur les droits des enfants migrants* (Tunis: 19–20 May 2022) [IBCR Civil Society Conference] (with participation from Tunisian Association for the Defence of Rights of the Child, Africa Intelligence Association, African Leadership and Development Association, Tunisian Forum For Youth Empowerment, Federation of Churches, Association of African Students and Trainees in Tunisia, Diaspora Association Camerounaise, Lion Heart association for humanitarian aid, Solidarité Laïque, Association of Ivorians in Tunisia, Amal Association for the family and the child).
[12] See Theresa Catalano & Jessica Mitchell-McCollough, "Representation of unaccompanied migrant children from Central America in the United States: Media vs. migrant perspectives" (2019) in Lorella Viola & Andreas Musolff, eds, *Migration and Media: Discourses about identities in crisis*, (Amsterdam: John Benjamins Publishing Company, 2019) 239 at 249.

This section explores the agency of IMCs by focusing specifically on those participating in the *Evacuation* protest. Factors including migration status, nationality, race, and gender directly impact the social identities of IMCs, influencing how their agency manifests. Conceiving of agency on a 'continuum'[13] is useful in theorizing IMC agency as it clarifies the fluctuations in IMC manifestations of agency. After providing context into the *Evacuation* protest and hypothesizing as to the individual trajectories of IMCs, I question why IMCs are treated uniformly as 'children' despite vast differences in experience and aspirations. The conflicting institutional reactions to protesting IMCs underscores the complexities of the hybrid child/adult space in which IMCs exist.

A group of around 220 asylum seekers and refugees who were living in Zarzis, Tunisia organized a sit-in in February 2022 to contest how UNHCR's implementing partner was handling various aspects of their asylum seeker claims, including the claims themselves and the support and services offered at shelters.[14] The protest stemmed in large part from UNHCR's announcement of reduced direct financial assistance from February 2022 onwards,[15] due to UNHCR budget cuts in Tunisia.[16] After unsuccessfully protesting outside the UNHCR field office in the southeastern city of Zarzis for two months demanding resettlement to Europe,[17] the protesters found their way to Tunisia's capital in mid-April and set up camp in front of the UNHCR office in the diplomatic district of Lac Biwa.[18] The protesters demanded immediate relocation (or "evacuation") of all group members to a third country. For this reason, the protest was self-proclaimed as the *Evacuation from Tunisia* movement.[19] About a quarter of protesters were under the age of 18, thus legally defined as children under the *United Nations Convention on the Rights of the Child (CRC).*[20] The majority of them were traveling without their families, thus were categorized into UNHCR's 'Unaccompanied and Separated Children' category of vulnerability.[21]

Agency has been defined in a multitude of both individualistic and relational ways,[22] essentially boiling down to the ability "to make and enact choices that potentially affect outcomes."[23] Professor of Childhood studies Tatek Abebe's approach of conceptualizing agency as a 'continuum' is a fitting way of understanding the agency of IMCs. Abebe advances that children's agency changes depending on a myriad of factors, including one's position vis-à-vis others and their socio-legal environment, considering they 'move back and forth along a

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[13] See Tatek Abebe, "Reconceptualising Children's Agency as Continuum and Interdependence" (2019) 8:3 *Social Sciences* 1 at 1.
[14] See "Tunisie: manifestation de réfugiés contre leur 'marginalisation'", *supra* note 6.
[15] See "UNHCR Tunisia Operational Update" (28 February 2022), *supra* note 7.
[16] See "UNHCR Tunisia Operational Update" (31 March 2022), online: *Reliefweb* <reliefweb.int/report/tunisia/unhcr-tunisia-operational-update-31-march-2022>.
[17] See "UNHCR Tunisia Operational Update" (31 May 2022), online: *Reliefweb* <reliefweb.int/report/tunisia/unhcr-tunisia-operational-update-31-may-2022>.
[18] See "African refugees in Tunisia demand evacuation," *supra* note 8.
[19] See Melting Pot Europa, Press Release, "Tunisia is not a safe country for us," (21 June 2022), online: *Comunicati stampa e appelli* <www.meltingpot.org/en/2022/06/tunisia-is-not-a-safe-country-for-us>.
[20] See *Convention on the rights of the child*, 20 November 1989, 1557 UNTS 3, 28 ILM 1456, art 1 (entered into force 2 September 1990).
[21] See "Inter-agency Guiding Principles on Unaccompanied and Separated Children" (2004), online (pdf): *UNHCR* <www.unhcr.org/media/inter-agency-guiding-principles-unaccompanied-and-separated-children>.
[22] See Cath Larkins, "Excursions as corporate agents: A critical realist account of children's agency" (2019) 26:4 *Childhood* 414 at 414–427.
[23] See Megan Bradley, *The International Organization for Migration: challenges, commitments, complexities* (New York: Routledge, 2020) at 83.

continuum of diverse experiences and changing degrees of independence-dependence.'[24] In other words, IMCs should not strictly be understood as rights-bearing individuals, but as complex human beings with conflicting desires and influences, whose experiences of agency shift depending on their place in time and space.

The IMCs I spoke to were all 15 to 17 year-old boys living in temporary shelters set up in front of UNHCR headquarters in Tunis. They were all part of the *Evacuation* protest by virtue of participating in the sit-in, though their active participation varied. Our conversations as well as conversations with those working in direct contact with the protesters clarified the utility of Abebe's 'continuum' approach.[25] As a simple example, after making a joke one yelled, "Je suis un enfant! (I'm a kid!)," while another showed frustration in not being treated "…comme un homme (as a man)" when explaining his migration trajectory.[26] This is a clear indication that IMCs conceive of their maturity on a spectrum depending on their needs and desires at the time.

This brings us to a discussion of IMCs and their social identities, which influence how they articulate and understand their positions in demanding solutions to the challenges they are facing. As Karras, Ruck and Peterson (2022) state, 'how young people come to engage with society is informed by the intersection of their social identities.'[27] It is therefore relevant to theorize agency as part of wider social processes.

The identities of IMCs are not homogenous, even in a relatively small protest in downtown Tunis. Four axes of social construction impacted their identities and protest participation, including migration status, nationality, race, and gender.

'Migration status' refers to legal categories of belonging defined by states. Although the policy space is complex, one of the most obvious responses to migration has been to institutionalize categories of migration based on visa access, economic stream, and personal circumstances.[28] Increasingly since the 1990s, people have come to be defined as either 'regular' (i.e., 'legal') or 'irregular' (i.e., 'illegal') based on factors largely beyond their control, such as place of birth or degree of violence suffered when leaving or fleeing their countries.[29] All IMCs were acutely aware of their status as irregular migrants, and many if not all had applied for refugee status at UNHCR.[30] It is unlikely they would have joined this migrant protest if they had not internalized their migrant status and the 'protection limbo'[31] associated with being irregular migrants. Civil society

[24] See Abebe, *supra* note 13.
[25] *Ibid* at 1.
[26] See Informal interviews of protest participants and NGO actors (May to August 2022), taking place in Lac Biwa, Tunis.
[27] See Juliana E Karras et al, "Being and becoming: Centering the morality of social responsibility through children's right to participate in society" in Melanie Killen & Judith G Smetana, eds, *Handbook of moral development,* 3rd ed (New York: Routledge, 2022) at 118.
[28] See Sarah Marsden, "The New Precariousness: Temporary Migrants and the Law in Canada" (2012) 27:2 CJLS 209 at 214.
[29] See Catherine Dauvergne, "Security and Migration Law in the Less Brave New World" (2007) 16:4 Soc & Leg Stud 533 at 543. See also Ainhoa Ruiz Benedicto & Pere Brunet, "Building walls: Fear and securitization in the European Union" (2018) Transnational Institute. See also Idil Atak & François Crépeau, "The securitization of asylum and human rights in Canada and the European Union" in Satvinder Singh Juss & Colin Harvey, eds, *Contemporary Issues in Refugee Law* (Cheltenham: Edward Elgar Publishing, 2013).
[30] See IBCR Civil Society Conference, *supra* note 11.
[31] See Adnen El Ghali, "The protection of sub-Saharan migrants in Tunisia: community responses and institutional questioning" (2022) 10:s3 J Brit Ac 145 at 150.

participants to the IBCR conference noted that like other irregular migrants, IMCs internalized fear of authority and lack of access to government services associated with their migration status.[32]

Nationality also played a significant role in the identities and socialization of *Evacuation* IMCs. Like other protesters, the majority were coming from countries south of Libya, such as Somalia, Eritrea, Chad and Sudan.[33] Without biological parents, IMCs create peer groups influenced by nationality with important consequences on their migratory decisions,[34] considering linguistic or other ties.[35] The experiences of IMCs in the protest differed depending on their nationalities, including where they slept and which support networks they relied on. Beyond only impacting the identities of IMCs, migration and development Researcher Adnen El Ghali found that nationality played a role in the general Sub-Saharan migrant population in Tunisia, facilitating 'protection from below' strategies.[36]

Race is another important factor impacting migratory journeys in Tunisia.[37] All IMCs I spoke to were black and living in a country with systemic racism,[38] especially towards Sub-Saharan migrant populations.[39] A recent speech by the President of Tunisia suggests views against Sub-Saharans are systemic.[40] Some IMCs were particularly attuned to discrimination associated with their race, articulating claims of "racism" and not belonging in Tunisia as a reason for continuing their migratory journeys to Europe.[41] This echoed similar claims by adult protesters.[42]

Finally, gender played a role in the identities of IMCs. Researchers Iman Hashim and Dorte Thorsen's work highlights how gender plays a significant role in the experience of IMCs and how they assert their agency.[43] There were only a handful of girl IMCs who participated in the *Evacuation* protest in Tunis. The overwhelming number of adolescent boys in this protest may suggest a tendency for families to send boys to migrate on behalf of their families for reasons associated with income earning potential.[44] However, studies show there are a similar number of boy and girl IMCs in Tunisia.[45] Therefore, it is possible that boy IMCs demonstrate their agency through protests, whereas girls employ other strategies for survival. This is not to diminish the agency of girl IMCs who participated in the protest, however, as they equally supported the needs

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[32] See IBCR Civil Society Conference, *supra* note 11.
[33] See "Refugees protest for rights in Tunis," *supra* note 1.
[34] See Orgocka, *supra* note 3 at 5.
[35] See IBCR Civil Society Conference, *supra* note 11.
[36] See El Ghali, *supra* note 31 at 157.
[37] See Ahlam Chemlali, "A Mother's Choice: Undocumented motherhood, waiting and smuggling in the Tunisian–Libyan borderlands" (2023) 26:1 Trends in Organized Crime 30 at 30–47.
[38] See Sophie-Anne Bisaux et al, "Politiques Du Non-Accueil En Tunisie" (2020) Forum Tunisien pour les Droits Économiques et Sociaux & Migreurop.
[39] See Marta Scaglioni, "I Wish I Did Not Understand Arabic! Living as a Black Migrant in Contemporary Tunisia" in *Shadows of Slavery in West Africa and Beyond* (2017) 1 at 1–22.
[40] See Simon Speakman Cordall, "Tunisia's president calls for halt to sub-Saharan immigration amid crackdown on opposition", *The Guardian* (23 February 2023), online: <www.theguardian.com/global-development/2023/feb/23/tunisia-president-kais-saied-calls-for-halt-to-sub-saharan-immigration-amid-crackdown-on-opposition>.
[41] See IBCR Civil Society Conference, *supra* note 11.
[42] See Riccardo Biggi, Valentina Lomaglio & Luca Ramello, "Tunisia, living and dying in Rue du Lac: no dignity and no rights", *Melting Pot Europa* (3 June 2022), online: <www.meltingpot.org/en/2022/06/tunisia-living-and-dying-in-rue-du-lac-no-dignity-and-no-rights>.
[43] See Imam Hashim & Dorte Thorsen, *Child Migration in Africa* (Upsala: The Nordic Africa Institute, 2011).
[44] See IBCR Civil Society Conference, *supra* note 11.
[45] See Ana-Maria Murphy-Teixidor & Flannery Dyon, "Migrating and displaced children and youth in Tunisia: Profiles, Routes, Protection, and Needs" (2021) Mixed Migration Centre at 14.

of the protest albeit in different ways. For example, I never saw girls engaged in chanting twice per day, like boys. This may demonstrate the internalization of gender norms even in protest behavior.

The social identities of IMCs impact which techniques they utilize in their everyday realities. To provide a few examples, IMCs may decide to live in areas where migrants of their nationality live in order to receive protection and cultural support; girl IMCs may be more likely to engage in informal jobs associated with their gender rather than traditionally 'masculine' jobs; IMCs may avoid health centers where others have reported racism; IMCs may refuse to report their nationality when they are unsure if they will be expulsed.[46] Conversations with IMCs themselves clarified that these identities influenced participation in the protest in various ways. Some were encouraged to participate when people from their nationality joined; others mentioned living in Europe was the only way to make money for their families; others said being black in Tunisia would not open doors to a future they wanted.[47] Ultimately, the precarity of irregular migration status was the main reason for participating in the protest.[48]

In addition to highlighting the matrix of identities negotiated by IMCs, foregrounding their diverse migrant trajectories emphasizes their diverse lived experiences. Considering the geographical origin of many *Evacuation* protesters, it is statistically likely that some IMCs who engaged in the protest were first detained in Libya on their migratory routes and vulnerable to torture, confirmed by news reports about these particular protesters.[49] This journey would entail crossing a trench in the Sahara Desert between Tunisia and Libya[50] past a two-kilometer 'buffer zone'[51] on the Tunisian side where civilians are not allowed to be, but where soldiers "have a right to shoot."[52] Of those who crossed through Libya, some may have walked across this hyper-surveilled ditch–complete with thermal cameras and controls[53]–or relied on smuggling networks to facilitate their arrivals.[54] Perhaps more likely than crossing to Tunisia from Libya by land, however, is arriving to Tunisian territory after being intercepted or rescued at sea in an attempt to cross the Mediterranean. A UNHCR September 2022 update found that sea interceptions/rescues were a common way to arrive to the territory,[55] confirmed by news reports of the *Evacuation* protest.[56] Finally, it is possible that some crossed into Tunisia from Algeria, or flew to Tunis on a plane, overstayed their visas, and claimed asylum in Tunisia. These last possibilities are unlikely, however, considering the protests emanated in Zarzis, in the South of the country.

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[46] See IBCR Civil Society Conference, *supra* note 11.
[47] See informal interviews, *supra* note 26.
[48] *Ibid*.
[49] See "Refugees protest for rights in Tunis", *supra* note 1.
[50] See "Tunisia builds anti-terror barrier along Libya border", *BBC News* (7 February 2016), online: <www.bbc.com/news/world-africa-35515229>.
[51] See Hamza Meddeb "*The Volatile Tunisia-Libya Border: Between Tunisia's Security Policy and Libya's Militia Factions*" (2020) Carnegie Endowment for International Peace at 8.
[52] See Michel Cousins, "The Tunisian border barrier with Libya", *LibyaHerald* (7 February 2016), online: <libyaherald.com/2016/02/the-tunisian-border-barrier-with-libya>.
[53] *Ibid*.
[54] See Meddeb,, *supra* note 51 at 10.
[55] See "Situation Map-Refugees and Asylum Seekers" (October 2022), online (pdf): *UNHCR* <data.unhcr.org/en/documents/details/97843>.
[56] See Nissim Gasteli, "De Zarzis à Tunis, les exilé·es manifestent contre le manque de protection du HCR", *Inkyfada* (23 April 2022), online: <inkyfada.com/en/2022/04/23/demonstrations-demanding-asylum-hcr-zarzis-tunis-tunisia>.

The differences in lived experiences underscores the many difficulties associated with homogeneously theorizing IMC agency. While some IMCs had escaped wars, others decided to migrate for job opportunities with the support of their parents.[57] While some left their families intentionally, others lost their family members on route to Tunisia.[58]

Regardless of their trajectories, a significant number of IMCs who arrived in Tunis did not live easy lives. Since protesters had come from Zarzis after budget cuts in cash-based assistance,[59] many were likely reliant on this 'exceptional and temporary' measure afforded to 'only the most vulnerable refugees and asylum seekers' registered with the UNHCR, totaling approximately 0.04%.[60] Registration with UNHCR does not mean all the protesters were registered refugees, however, as only 35% of those registered in September 2022 were registered refugees and 65% were still asylum seekers awaiting confirmation or rejection of refugee status.[61] Even still, taking into account the contextual factors above, many were likely practically if not legally vulnerable, given that the UNHCR's refugee assessment procedures[62] consider age and parental accompaniment as factors of vulnerability.[63]

Although vulnerability has a place in conversations about IMCs, simplistically labeling all 15 to 17-year-old IMCs as 'vulnerable children'[64] fits uncomfortably with their lived experiences. IMCS live in a messy terrain of quasi-adult/quasi-child autonomy and decision-making. In order to make it to Tunis, many had made hundreds of decisions before joining the protest.[65] Their migratory trajectories should by no means romanticize their agency, but rather underline that chronological age is not always the best proxy for maturity, decision-making ability, or what International Affairs Professor Christina Clark-Kazak calls 'social age.'[66] On the one hand, IMCs live without their parents in foreign countries, which is behavior generally associated with 'adulthood.' On the other hand, IMCs can be accused of stealing candy bars from the convenience store to impress their peers, which is behaviour generally associated with 'childhood.'[67] Without entering the contested debate interrogating 'adulthood' and 'childhood,'[68] IMCS do not fall squarely within clean-cut categories, but rather within and between them.

Just as IMCs have complex perceptions of themselves, so too are institutional perceptions of them. Outside of this protest context, IMCs have been considered the paradigm of victimhood,

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[57] See Inter-ministerial & INGO Conference, *supra* note 10.
[58] See Informal interviews, *supra* note 26.
[59] See "UNHCR, Tunisia Operational Update" (31 May 2022), *supra* note 17.
[60] See "Frequently asked questions", online: *UNHCR Tunisia* <help.unhcr.org/tunisia/faq>.
[61] See "UNHCR, Tunisia: Registration factsheet" (26 September 2022), online (pdf): *UNHCR* <https://data.unhcr.org/en/documents/details/95809>.
[62] See "Refugee Status Determination", online: *UNHCR* <www.unhcr.org/what-we-do/protect-human-rights/protection/refugee-status-determination>.
[63] See "Unaccompanied and Separated Children (UASC)" (2021), online (pdf): *UNHCR* <www.unhcr.org/handbooks/ih/files/2021-06/PDF%20insert%20link%20for%20download%20Unaccompanied%20and%20Separated%20Children%20_.pdf>.
[64] See Julie C Garlen, "Interrogating innocence: 'Childhood' as exclusionary social practice" (2019) 26:1 *Childhood* 54 at 54–67.
[65] See Informal interviews, *supra* note 26.
[66] See Christina Rose Clark-Kazak, "Towards a Working Definition and Application of Social Age in International Development Studies" (2009) 45:8 J Dev Stud 1307 at 1307–1324.
[67] See Informal interviews, *supra* note 26.
[68] See Dina Kiwan, "Constructions of 'Youth' and 'Activism' in Lebanon" in Andrew Peterson, Garth Stahl & Hannah Soong, eds, *The Palgrave Handbook of Citizenship and Education* (Cham: Springer International Publishing, 2020) at 567.

sometimes falling into human trafficking discourses.[69] Other times they criminalized on par with full adult migrants.[70] This can vary depending on age and how agency is exercised. Stanford Taonatose Mahati of the African Centre for Migration & Society found that humanitarian aid workers have "multiple, contradictory, negotiated and contested representations of independent migrant children."[71] It is no wonder IMCs internalize their vulnerability in uneven and scattered ways.

As for the *Evacuation* IMCs in particular, I heard staff members across a dozen NGOs and local businesses referred to them as "criminals", "troublemakers," "uneducated," "disciplined," "resourceful," "survivors," and "victims."[72] These categories span the spectrum from malevolent to disciplined migrants and encompass categories from resourceful individuals to passive children influenced by adult protesters. Depending on what behaviour they witnessed, adults changed their perceptions as to the level of agency IMCs could possess. Notably, IMCs were always referred to as a group regardless of differences in protest participation.

IMC motivations to participate in the *Evacuation* protest, as well as what their participation looked like, were quite varied. As for motivations, some had the objective to continue migrating to Europe, so joining the *Evacuation* protest was conceived of as a strategic way of obtaining that objective.[73] For others, the protest was a means of being included in a social network of protection for the immediate time being.[74] Finally, others genuinely felt they had been unfairly treated by UNHCR and its partners, and the protest was conceived as one way of resolving this.[75] Participation manifested varyingly among different IMCs. Protesters lined up in rows of about 20 to 40 individuals most mornings, chanting in unison. Many of the IMCs participated in these chants, but others were less vocal. Some IMCs were actively involved in informal networks of communication, including cell phone networks, which past studies have shown are very much part of local-level organizing.[76] Others amplified the voices of their group by interacting with local NGOs and media channels. Some found cardboard to write protest signs, others confronted migration officials, and still others played and cared for younger children of other protesters.

Eventually, in June 2022, negotiations between the protesters, UNHCR, civil society organizations, and local authorities[77] resulted in the temporary relocation of the protesters to a shelter facility,[78] with the goal of 'temporarily relocating them from the streets to a safe and secure shelter facility and by addressing urgent health needs.'[79] Part of the justification for this was the specific vulnerabilities of the protest group in question. IMCs tipped this vulnerability exercise in

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[69] See Roy Huijsmans, "Child Migration and Questions of Agency" (2011) 42:5 Development and Change 1307 at 1307–1321.

[70] See Chiar Galli, "No Country for Immigrant Children: From Obama's 'Humanitarian Crisis' to Trump's Criminalization of Central American Unaccompanied Minors" (2018) California Immigration Research Initiative (CIRI).

[71] See Stanford Toantose Mahati, *The representations of childhood and vulnerability: Independent child migrants in humanitarian work* (PhD Dissertation, University of the Witwatersrand, 2015) [unpublished].

[72] See Informal interviews, *supra* note 26.

[73] See IBCR Civil Society Conference, *supra* note 11.

[74] See Informal interviews, *supra* note 26.

[75] *Ibid.*

[76] See Maurice Stierl, "A sea of struggle–activist border interventions in the Mediterranean Sea" in *The Contentious Politics of Refugee and Migrant Protest and Solidarity Movements*, 1st ed (Abingdon: Routledge, 2018) 35 at 35.

[77] See "UNHCR Tunisia Operational Update" (31 May 2022), *supra* note 17.

[78] See Emma Wallis, "Months-long sit-in outside UNHCR Tunis ends", *InfoMigrants* (21 June 2022), online: <www.infomigrants.net/en/post/41361/monthslong-sitin-outside-unhcr-tunis-ends>.

[79] See "UNHCR Tunisia Operational Update" (31 May 2022), *supra* note 17.

favor of the protest group, considering one of UNHCR's justifications for opening a shelter for these protesters–and not the 6000 other refugees living in Tunis–was due to the 'vulnerabilities' of the protest group.[80] Therefore, IMCs contributed to protest response, if only for institutional perceptions of their vulnerabilities.

This section attempted to demonstrate that the agency of IMCs is not easily theorized because homogenization of experience diminishes important individual factors in driving decision-making. Even so, IMCs can collectively articulate political positions through protest. Pushing beyond narratives of 'victim' and 'child' to constructions of IMC agency which include political factors is key to engaging with IMC agency.[81] Cognizant of the particular challenges faced by IMCs, the following section demonstrates that IMCs can alter their surroundings not only at the local scale, but have the potential to confront global mainstream migration governance.

IMC Protest as Global Governance

This section explains the global governance of migration, the Tunisian state's participation in mainstream migration policy, and reactions to these policies by migrants themselves. Since mobility is a realm of contested global politics,[82] migrants who engage in protests about mobility must be understood as players in that global realm of politics,[83] including IMCs engaged in protest. Of the studies that focus on child agency, the vast majority center on the micro-scale of family and school relations rather than discussions of global politics.[84] Similarly, while there are studies on migrant agency, these studies overwhelmingly focus on immediate survival techniques and everyday resistance of migrants more so than conceiving of migrants themselves as political actors that shape migration governance more structurally.[85] This section attempts to respond to both gaps by demonstrating that IMCs are political actors who can alter the global governance of migration through their protest agency, challenging institutional assumptions about the security threats posed by migrants. The *Evacuation* protesters did this in three ways. They challenged assumptions that migrant children are passive recipients of migration policy; demonstrated the limitations of stringent categories used to classify migrants; and advanced choice-first objectives in a system not designed to accommodate them.

Before diving into these examples, context is helpful. The global governance of migration goes beyond specific conventions to include meta-norms, principles, policies and expectations for the multitude of actors involved in cross-border movement and regulation. While the most obvious actor in international law is the state, other actors include intergovernmental organizations, civil society, and individuals, who collectively shape and alter global governance in messy ways. In short, governance can be thought of as spaces of "contestation" more so than functional

[80] See Informal interviews, *supra* note 26.
[81] See Patti Tamara Lenard, "Refugees as (Political) Agents: A Review of Three Recent Books in the Political Theory of Refugees" (2020) 26:3 Res Publica 451 at 451–459.
[82] See Ċetta Mainwaring, "Migrant agency: Negotiating borders and migration controls" (2016) 4:3 Migration Stud 289 at 289–308.
[83] See Jonathan Kent, "Looking back and moving forward: the research agenda on the global governance of mixed migration" (2021) 59:1 Intl Migr 89 at 90.
[84] See Holmberg & Alvinius, *supra* note 2.
[85] See Ilker Ataç, Kim Rygiel & Maurice Stierl, "The Contentious Politics of Refugee and Migrant Protest and Solidarity Movements: Remaking Citizenship from the Margins" (2016) 20:5 Citizenship Stud 527 at 527–544.

structures,[86] especially for migration which is entangled in a complex network of actors, motivations, and strategies, and draws from various legal regimes, regional agreements, and international organizations to piece together how to regulate it.

Migration management has increasingly seen an expansion of securitization methods. Securitization refers to state policies that securitize social phenomena, like migration, into a security agenda.[87] This results in states employing techniques used in national defense, policing, and militaristic settings to subdue migratory 'threats.'[88] The perceived magnitude of irregular migration is disproportionate, considering international migrants, including refugees, comprise only about 3.6% of all people at any given time.[89] Regardless, the threat justifies higher surveillance[90] due to a 'palatable political response'[91] of fear.[92] One contemporary policy response which builds from securitization logic is external control policies which attempt to expand borders beyond territorial boundaries.[93]

North Africa has played a significant role in extending the security reach of European policies.[94] Mediterranean space is now patrolled by EU-funded Libyan military and disciplined through Italian-funded Tunisian detention centers, with surveillance involving drones, heat-sensing underground technologies, and biometrics databases,[95] facilitated by conditionalities tied to development funding.[96] These responses are rooted in repressive migration policy based in restrictive legislation criminalizing irregular migrants, coinciding with political discourse[97] labeling migrants as threats.[98] Even though findings suggest that migrants and refugees can have

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[86] See Jean Grugel & Nicola Piper, *Critical Perspectives on Global Governance: Rights and regulation in governing regimes,* 1st ed (London: Routledge, 2007) at 19.
[87] *Ibid* at 12.
[88] See Alison Mountz, "In/visibility and the securitization of migration: Shaping Publics through Border Enforcement on Islands" (2015) 11:2 Cultural Politics 184 at 190.
[89] See Marie McAuliffe and Anna Triandafyllidou, "World Migration Report 2022" (2021) at 3, online (pdf): *International Organization for Migration* <publications.iom.int/system/files/pdf/WMR-2022-EN-CH-1_0.pdf>.
[90] See Franck Düvell & Bastian Vollmer, "European security challenges" (2011) Robert Schuman Centre for Advanced Studies at 19.
[91] See Dauvergne, *supra* note 29 at 543.
[92] See Didier Bigo & Elspeth Guild, "International Law and European Migration Policy: Where Is the Terrorism Risk?" (2019) 8:4 *Laws* 1 at 8.
[93] See Rutvica Andrijasevic, "From exception to excess: detention and deportations across the Mediterranean space" in Nicolas de Genova & Nathalie Peutz, eds, *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement* (Durham: Duke University Press, 2010) at 7. See also Leiza Brumat, Andrew Geddes & Andrea Pettrachin, "Making sense of the global: A systematic Review of Globalizing and Localizing Dynamics in Refugee Governance" (2022) 35:2 J Refugee Stud 827 at 827–848.
[94] See Anastassia Tsoukala, "Looking at Migrants as Enemies" in Didier Bigo & Elspeth Guild, eds, *Controlling frontiers: Free movement into and within Europe* (Burlington: Ashgate Publishing Limited, 2005) at 161.
[95] See Raluca Csernatoni, "Constructing the EU's high-tech borders: FRONTEX and dual-use drones for border management" (2018) 27:2 European Security 175 at 175–200.
[96] Two examples include the European Neighborhood Policy (ENP) and the EU Emergency Trust Fund for Africa (EUTF).
[97] See Idil Atak & François Crépeau, *supra* note 29 at 231.
[98] See Georgios Karyotis, "European Migration Policy in the Aftermath of September 11: The security–migration nexus" (2007) 20:1 Innovation: Eur J Soc Sci Research 1 at 4.

long-term benefits for economies,[99] reduce unemployment,[100] and reduce crime,[101] today most states are building walls–physical and administrative–to keep migrants out,[102] including Tunisia.

The place of IMCs in Tunisian migration policy is interesting. Tunisia sometimes detains 16-year old Sub-Saharan migrants traveling without family or belongings,[103] yet also provides legal protection for IMCs through the collaboration of Tunisian institutions,[104] including le Ministère de la famille, de la femme de l'enfance et des personnes âgées; le Bureau du Délègue Général à la protection de l'enfance, and l'Institut national de protection de l'enfance.[105] Internationally, Tunisia has ratified a number of international conventions to protect migrants and children.[106] All the while, Tunisia ascribes to global trends in restrictive migration governance,[107] evidenced by its key role in expanding Europe's borders through deals with the EU,[108] detaining and deporting migrants,[109] restricting visa access,[110] and passing laws criminalizing irregular entry[111] and criminalizing humanitarian efforts to host and transport irregular migrants.[112] These contradictory positions, from rhetorically victimizing and providing IMCs with institutional support, to criminalizing their entry and preventing them from accessing services they legally have rights to, is emblematic of Tunisian as well as other states' responses to IMCs.

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[99] *Ibid* at 10.

[100] See Christoph Basten & Michael Siegenthaler, "Do Immigrants Take or Create Residents' Jobs? Evidence from Free Movement of Workers in Switzerland" (2019) 121:3 Scandinavian J Econ 994 at 994–1019.

[101] See Stephen H Legomsky, "Portraits of the Undocumented Immigrant: A Dialogue" (2009) 44:65 Ga L Rev 65 at 147 who states "[f]or every ethnic group without exception, incarceration rates among young men are lowest for immigrants, even those who are the least educated... especially for the Mexicans, Salvadorans, and Guatemalans who make up the bulk of the undocumented population."

[102] See Ruiz Benedicto & Brunet, *supra* note 29.

[103] See IBCR Civil Society Conference, *supra* note 11.

[104] See *Code de la Protection de l'Enfance*, adopté par la loi n.1995-92 du 9 novembre 1995, arts 1 (enfants en danger) & 4 (l'intérêt supérieur de l'enfant) ; See also *Loi Organique n.2016-61* du 3 Aout 2016 (relative à la prévention et à la lutte contre la traite des personnes).

[105] See "Note Conceptuelle," Ateliers pour renforcer la protection des enfants migrants en Tunisie (17 May 2023) IOM at 2 → Unable to retrieve this source.

[106] Tunisia is party to the *1951 Refugee Convention*, the *1967 Protocol*, the *1969 Organization of African Union (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa*, the *1989 Convention on the Rights of the Child*, and its *Optional Protocol on a Communications Procedure to the Child Rights Convention*. Tunisia's 2014 constitution states "political asylum is guaranteed in accordance with the provisions of the law" as per article 23, and "the State must protect all children without any discrimination, in accordance with their best interests" as per article 47. See *Constitution de la République tunisienne*, 2014 (Tunisia), c 23.

[107] See François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, UNHRCOR, 23rd Sess, Agenda item 3, UN Doc A/HRC/23/46/Add.1 (2013).

[108] See EC, *Commission Decision 98/238/EC of 26 January 1998 on the conclusion of a Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part*, [1998] OJ, L 97/1; See Christos Trapouzanlis, Kirsten Jongberg & Camelia Oaida, "Southern Partners" (April 2023), online: *Fact Sheets on the European Union External Relations* <www.europarl.europa.eu/factsheets/en/home>; See "Plan d'Action UE-Tunisie 2013-2017" (2016), online (pdf): *Délégation de l'Union européenne en Tunisie* <www.eeas.europa.eu/delegations/tunisia/plan-daction-ue-tunisie-2013-2017_fr>.

[109] See Crepeau, *supra* note 107.

[110] See Glenda Garelli & Martina Tazzioli, *Tunisia as a Revolutionized Space of Migration* (New York: Palgrave Pivot, 2016) at 22.

[111] See *Loi N. 68-7 de 1968, relative à la condition des étrangers*, 1968 (Tunisia).

[112] See *Loi N. 2004-6 du 3 février 2004, modifiant la loi n°75-40 du 14 mai 1975, relative aux passeports et aux documents de voyage–6*, (2004) Tunisia, c. 38-5.

IMCs are not passive in this exercise, but actively confront their positions in this matrix of subject/object constructions and demonstrate their agency on an autonomous/dependent 'continuum' as shown above. Protests are one manifestation of collective agency, which carve space for broader discussions about why things are the way they are, from long-standing regulations and taken-for-granted assumptions to more concrete and recent policy shifts. Embedded in larger networks, then, protests can be thought of as nodes of micro-governance which can alter existing models of rulemaking. This is relevant for understanding global politics because local articulations of needs can reinforce or challenge structural policies at wider scales. When IMCs are involved in protest, they participate in these nodes of governance.

IMC participation in the *Evacuation* protest challenged the global governance of migration in three ways. Firstly, the protest challenged assumptions that migrant children are passive recipients of migration policy. By articulating their dissatisfaction with the way they were received in shelters, or the way their applications were being processed by UNHCR, IMCs reacted and acted, rather than passively accepted their circumstances. Through their protest, IMCs influenced NGO discussions about adequate protest response and verbalized their discontent with existing structural barriers including institutional response and racism. [113]

The protest created shockwaves in terms of political pressure and media attention, considering it was just a few streets from the IOM, the European Union, various embassies, and upper-class hotels. IMCs understood that when the protest moved from Zarzis to Tunis, it effectively shut down UNHCR building access to visitors, which had the primary impact of paralyzing UNHCR from carrying out refugee status determination interviews with asylum seekers and refugees already in Tunis.[114] With UNHCR at a stand-still and government authorities facing pressure to address the situation,[115] this led to wider policy response. Various international organizations from Save the Children and Médecins du Monde, to local NGOs like the Tunisian Scouts, the Arab Institute for Human Rights, and la Conseil Tunisien pour les Refugiés, worked on the ground with various levels of engagement. Tunisian ministries, including health and foreign affairs, as well as local municipalities, had to react. One IMC said, "at least now everyone is talking," which demonstrates an understanding that being heard by various sectors was key to having their demands addressed.[116]

Secondly, IMCs stood in defiance of assumptions that certain categories of people are more vulnerable than others, challenging taken-for-granted assumptions that people categorized as 'refugee' 'asylum seeker' or 'migrant' want/need/deserve different things, and policy should be based on migrant status. While some IMCs were escaping wars and likely fit into the 1951 Convention's definition of 'refugee,' others had left their families with the primary goal of finding a job or education elsewhere, fitting closer to legal definitions of economic migrant.[117] By protesting together, they demonstrated that IMC aspirations are not dependent on externally constructed migration statuses.

This challenged not only local level response, but higher levels of global governance which rely on these classifications for regulatory decision-making. If taken seriously by policymakers,

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[113] See IBCR Civil Society Conference, *supra* note 11.
[114] See "UNHCR Tunisia Operational Update" (30 April 2022), online: *Reliefweb* <reliefweb.int/report/tunisia/unhcr-tunisia-operational-update-30-april-2022>.
[115] See Inter-ministerial & INGO Conference, *supra* note 10.
[116] See Informal interviews, *supra* note 26.
[117] *Ibid*.

this affront to migration status, led in part by IMCs, could lead to a reconsideration of the differentiation of rights based on differentiated legal status in a territory.

Thirdly, IMCs advanced choice-first objectives, demanding their aspirations and objectives be considered in where they wound up. Even if UNHCR kept repeating to protesters that resettlement was not an option for meeting group demands,[118] protesters refused statistics and vulnerability categories, demanding to know why they needed to be accepted by sovereign states in order to cross borders. "Why can't we choose where we go?" was an excellent question posed by IMCs,[119] demonstrating that IMCs are not passive in the deployment of migration management strategies, but that they actively question them.

Even after individual vulnerability assessments, some of the IMCs repeated their objectives to NGOs.[120] While many NGOs are aimed at helping IMCs with integration in Tunisia, NGO representatives made clear that some IMCs have no interest in staying in Tunisia but want to continue migrating to Europe. This means that even if intricate programs are created to teach IMCs Tunisian Arabic, provide them with food, and support them financially, some IMCs are likely to continue migrating to Europe anyway, perhaps by paying smugglers on dangerous trips across the Mediterranean.[121] Recognizing the agency of IMCs means recognizing that current integration policies are not sufficient in providing for their safety.

Challenging securitization responses to global governance comes at a cost. Being overly celebrative of IMC agency obscures that these children were spending hours at a time in 40-degree Tunisian heat protesting an agency with a narrow mandate. There were slim chances they would be successful in their evacuation, considering states ultimately decide whether to resettle particularly vulnerable refugees and not the UNHCR.[122] Therefore, there are dangers in romanticizing IMC agency, 'considering the contradictory aspects and effects of agency in their lives.'[123] Conference participants noted IMCs experience social exclusion due to language barriers in school settings, irregular work with unsteady pay, and abuse at the hands of traffickers.[124] When coupled with separation from family and scattered support, IMC protest should in no way reduce these serious impingements on their human rights. Rather, recalling the above, the protest paints a picture of IMC agency combining difficult realities and vulnerabilities alongside strategic decision-making capacities.

Still, the demands of IMCS in the *Evacuation* protest highlights how diverse trajectories can complement one another in refusing to engage in constraints set by government and international actors. Protesting against the UNHCR was a manifestation of IMC agency in demanding alternatives to governance. By protesting, IMCs pressured, reacted to, and ultimately altered their local political realities,[125] dismantling global assumptions about passive subjects and offering insight into altering the current geopolitical and legal landscape moving forward to better address their needs.

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[118] See UN High Commissioner for Refugees, "Refugee Resettlement. An International Handbook to Guide Reception and Integration" (September 2002) at 3, online (pdf): *UNHCR* <https://www.refworld.org/docid/405189284.html>.
[119] See Informal interviews, *supra* note 26.
[120] See IBCR Conference, *supra* note 11.
[121] *Ibid.*
[122] See Meltem Ineli-Ciger, "Is Resettlement Still a Durable Solution? An Analysis in Light of the Proposal for a Regulation Establishing a Union Resettlement Framework" (2022) 24:1 Eur J Migr & L 27 at 27–55.
[123] See Abebe, *supra* note 13 at 8.
[124] See Inter-ministerial & INGO Conference, *supra* note 10.
[125] See Ataç, Rygiel & Stierl, *supra* note 85.

Conclusion

IMCs are conceived of on a spectrum from 'innocent children' to 'problematic migrants' depending on their claims and behaviours, which results in contradictory self perceptions and institutional response, especially when expanded to national and global migration policy. IMCs will continue to cross borders regardless of the barriers erected to prevent them from migrating. When their voices are not heard through protest, they may continue their migratory journeys in precarious ways regardless of which actors pay attention.

In addition to protesting for different reasons linked to their social identities, IMCs who participated in the *Evacuation* protest engaged in behaviours which UN International Consultant Aida Orgocka considers an "expression of agency as a process of self-identity formation and articulation."[126] In other words, by virtue of their participation in the protest, IMCs were empowered, hopeful, frustrated, or excluded, and most faced a mix of these and other emotions. By articulating claims of (not) belonging in Tunisia, their sentiments grew and changed, and their identities developed and were articulated publicly. Although IMCs are considered as falling within the category of 'children' and within the category of 'migrants,' their belonging in other socially constructed categories impacts how their agency manifests, including nationality, gender, and race. Addressing the problems IMCs face requires considering the unique challenges when these categories overlap, and recognizing the individual trajectories of IMCs cannot be addressed homogeneously.

Despite the massive challenges associated with curtailing models of migration governance based on securitization of migratory 'threats,' IMCs in Tunis influenced local protest response and contributed to their community of protesters by appealing to institutional actors in contradictory ways. If local protest can be considered a node of micro-governance in the larger discussion of migration governance, especially when objectives are articulated in ways which contest the way migration governance is done, then IMCs must be understood as actors actively questioning and contesting structural barriers to their movement. Migrant children are not passive subjects in migration management, but defy assumptions associated with migrant categories used in global governance and demand their objectives be considered when conceiving of solutions to their vulnerabilities.

Taking a step back from this particular protest makes clear that both migrants and children engage in protest, demanding to be included in governance. Studies have shown that migrants can influence municipal bylaws,[127] and children can foster climate change concern among parents,[128] which suggests the agency of migrants and children can influence their surroundings. When migrant and children categories overlap, so too do questions about how to incorporate their insight into global policy. While studies have long focused on local-level changes, far fewer have focused on the role of IMCs in influencing wider global governance regimes. By using protest agency to articulate demands collectively, IMCs in Tunis demanded to be included in structural levels of policymaking.

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[126] See Orgocka, *supra* note 3 at 4.
[127] Ataç, Rygiel & Stierl, *supra* note 85.
[128] Danielle F Lawson et al, "Children can foster climate change concern among their parents" (2019) 9:6 Nature Climate Change 458 at 458–462.

Ultimately, it is not the responsibility of IMCs to challenge global governance, but of governments and institutions. In order to foster healthy realities for IMCs, it is necessary to legitimize their protests even as they challenge global migration controls.

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Atelier de formation et d'échanges sur les droits des enfants migrants, Hôtel Occidental Lac Tunis, Tunis, 19 et 20 May 2022 (Le Bureau International Des Droits Des Enfants (IBCR) dans le cadre du Projet intégral des droits de l'enfant (PRIDE) avec participants incluant Association Tunisienne de Défense des droits de l'enfant (ATDDE), Association Afrique Intelligence (A.A.I), African Leadership and Development Association (ALDA), Tunisian Forum For Youth Empowerment (TFYE), Federation Nationale des Eglises, Association of African Students and Trainees in Tunisia (AESAT), Diaspora Association Camerounaise, Lion Heart association for humanitarian aid, Solidarité Laïque, Association des Ivioriens actif en Tunisie (ASSIVAT), l'Association Amal pour la famille [IBCR Civil Society Conference]
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Human Rights Pedagogy for Empowering the Agency of students: An assessment of IHRIP through the Capabilities Approach Framework

Nandini Ramanujam and Kassandra Neranjan

Abstract

This paper interrogates the potential of the Capability Approach informed legal pedagogy in empowering the agency of students. In assessing the experience of McGill University Faculty of Law's International Human Rights Internship Program and its companion course Critical Engagements with Human Rights, this paper posits that the Capability Approach to teaching and learning about human rights, in the context of legal education, empowers future jurists and enables them to engage with global human rights in an ethical and professional manner. Analyzing every step of the process from advertising, selection, internship, class discussions, and more, this paper reverse theorizes how students' capabilities are enhanced by empowering their agency to action-oriented engagement with human rights dilemmas in diverse contexts The philosophical underpinnings of the Capabilities Approach are effective in fostering a nuanced and pluralistic understanding of the real-world challenges of advancing human rights.

Introduction

This paper attempts to assess the International Human Rights Internship Program (IHRIP) and its companion course "Critical Engagement with Human Rights" through the lens of agency. The paper argues that right from the recruitment process to the writing of the capstone research paper, students are encouraged and supported to pursue their interests in human rights work and exercise their agency to shape this learning experience, which for many is a transformative one. The short yet immersive experience not only contributes to students gaining rich insights into the complex realities of human rights work, but it also facilitates the development of professional skills and personal resources, which serves them well in their future work as jurists. The Capabilities Approach[1] provides an ideal theoretical framework to assess this multi-dimensional programme. IHRIP has been in existence since 1996, but this is the first attempt to evaluate the philosophical underpinnings of the programme and its pedagogical principles using a theoretical framework – here being reverse theorizing. This qualitative analysis assesses the value of the Capabilities Approach informing legal pedagogy in empowering students to carve out their own paths to engaging with human rights work. The paper posits that this approach also allows students to

[1] See generally, Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22.

develop a more sophisticated and granular understanding of human rights discourses and practices in a diverse world.[2]

International Human Rights Internship Program: Contextual Overview

Since 1996, the International Human Rights Internship Program has been offering opportunities to law students to acquire practical experience working with human rights organizations in Canada and abroad. The Centre for Human Rights and Legal Pluralism (CHRLP) assumed the responsibility of steering the programme in 2005. The Centre aims to serve both the academic and wider community "with a locus of intellectual and physical resources for engaging critically with how law impacts upon some of the compelling social problems of our modern era".[3] Part of this mission includes "enrich[ing] the nexus of scholarship and teaching by engaging undergraduate and graduate students in human rights research projects, human rights internships, international clerkships and advanced scholarship".[4] The Centre's commitment to critically engaging with plural human rights discourses and practice has influenced the evolution and expansion of the IHRIP.

The International Human Rights Internship Program opens applications in the fall of every academic year to McGill law students (across all years of study of the undergraduate Bachelor of Civil Law/Juris Doctor degree) for a full-time 12-week experiential placement to be conducted in the summer following. These internships are conducted with various partner organisations that seek to promote and protect human rights including non-governmental organisations, courts, and other public institutions.[5] These organisations are located locally and globally – – from organisations in Montreal such as the Commission des droits de la personne et des droits de la jeunesse to others across the world such as the Inter-American Court of Human Rights in Costa Rica, UNHCR in Tunisia, and Ateneo Human Rights Centre in the Philippines.[6] Once students are competitively selected (the intricacies of this selection process will be discussed in further detail later in this paper), they are onboarded to prepare for their placement including requiring the completion of web modules for cultural sensitivity and health and safety best practices for international travel. Students are provided some funding for a stipend to support financial costs

[2] Due to structural, research, and confidentiality constraints, this paper will predominantly focus on students' experiences and less upon the role of partner organisations and their insights. There are several questions that remain such as how partner organisations are chosen, how they work to promote and/or hinder students' agency and capabilities. Much of the research accessed to create this paper includes mostly psotive experiences with the IHRIP. Recognizing this is the first of its kind of analysis of the program, further research and investigation are called for to develop greater insights about the Capability Approach and program outcomes.

[3] See Centre for Human Rights and Legal Pluralism, "Objectives, Mission and History" (2023), online: *McGill* <https://www.mcgill.ca/humanrights/aboutus>.

[4] See Centre for Human Rights and Legal Pluralism, "Objectives, Mission and History" (2023), online: *McGill* <https://www.mcgill.ca/humanrights/aboutus>.

[5] See Centre for Human Rights and Legal Pluralism, "International Human Rights Internships" (2023), online: *McGill* https://www.mcgill.ca/humanrights/clinical/internships

[6] See Centre for Human Rights and Legal Pluralism, "Current Internships" (2023), online: *McGill* https://www.mcgill.ca/humanrights/clinical/internships/current-internships. NB: Students can also find their own internship placements independently with the help of the CHRLP or otherwise. Some of these placements have included positions with the UN Khmer Rouge Tribunals, the International Centre for Transitional Justice in Cote d'Ivoire, and others See also Centre for Human Rights and Legal Pluralism, "Independent Internships" (2023), online: *McGill* mcgill.ca/humanrights/clinical/internships/independent-internships.

during their placement but are required to pay the registration fees for the course.[7] This can be said to impede agency, however, as students may be drawn to other opportunities that may provide better financial gains which may be a necessity for some students depending on their financial needs. The funding for the program is derived from donors to the Centre and program.[8] Students are also to complete two blogs by the end of their placement to be posted on the CHRLP's website, for students to reflect upon their experiences as they carry out their assignments.

Upon completion of the field placement, students must complete the 3-credit companion course during the academic year. This course, 'Critical Engagements with Human Rights' examines "theoretical, ethical and strategic issues related to human rights discourse, advocacy and activism, and critically examines fact finding, monitoring and reporting, litigation, grass roots mobilization and media engagement in advancing human rights".[9] The seminar includes: mandatory and supplementary readings to be completed for each class which are debated amongst students, a group presentation in which students who have completed field placements in similar fields of human rights deliver an interactive class on a particular theme (discrimination, disability rights, restorative justice are some examples of the themes), and an 8-10 000 word term paper critically examining a human rights issue explored during students' internships.[10]

One of the authors who is the Director of the Programme since 2011 is greatly influenced by the work of Amartya Sen on Capabilities theory. The influence of Capabilities philosophy has permeated through the programmatic and pedagogical dimensions of IHRIP. The conception of functionings and agency in the Capability Approach may lend an understanding of the enabling environment fostered by the programme, which may be perceived through agentic behaviour performed by students throughout their interactions in the Programme.

Capability Approach and Agency

Amartya Sen conceived the 'Capability Approach' in the 1990s to push understandings of international development beyond narrow confines of economic development towards a more holistic human development paradigm. He defines 'capability' as "the opportunity to achieve valuable combinations of human functioning – what a person is able to do or to be".[11] This element of functioning is just one of three key prongs of the capability approach; Alkire and Deneulin write that capabilities address an individual's functionings defined as "being or doing what people value and have reason to value".[12] Capabilities is understood as the freedom to pursue desirable

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[7] See Centre for Human Rights and Legal Pluralism, "International Human Rights Internships" (2023), online: *McGill* https://www.mcgill.ca/humanrights/clinical/internships [see funding]

[8] See Centre for Human Rights and Legal Pluralism, "International Human Rights Internships" (2023), online: *McGill* https://www.mcgill.ca/humanrights/clinical/internships [see funding]

[9] See Enrolment Services, "LAWG505 Critical Engagements with Human Rights" (2023) online: *McGill* <https://www.mcgill.ca/study/2022-2023/courses/lawg-505#:~:text=It%20explores%20theoretical%2C%20ethical%20and,engagement%20in%20advancing%20human%20rights>.

[10] See generally Professor Nandini Ramanujam, *Intl. Human Rights Internships Seminar: Critical Engagements with Human Rights* syllabus (Faculty of Law, 2021).

[11] See Amartya Sen, "Human Rights and Capabilities" (2005) J Hum Dev 6:2 151 at 153.

[12] See Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22 at 32.

opportunities which allow for the enjoyment of a life one values .[13] Finally, agency is a critical element of the Capability Approach as it constitutes a "person's ability to pursue and realize goals one values".[14] Martha Nussbaum attempts to typify capabilities into central categories: "life, bodily health, bodily integrity, sense, imagination, thought, emotions, practical reason, affiliation, friendship, respect, other species, play, control over one's environment, political, and material" capabilities.[15] Although these are non-exhaustive and somewhat contested, they provide a foundation for understanding capabilities and their imagined applications in diverse social settings. One of the most compelling elements of this approach is that it recognizes human diversity in terms of differing functionings and capabilities. According to this approach, an enabling environment ought to empower the agency of individuals with diverse abilities and in pursuit of different goals.

Sen distinguishes capabilities from functionings through physical and mental heterogeneities, variations in non-personal resources, and environmental diversities, among others.[16] Furthermore, he argues that "there is no difference *as far as the space is concerned* between focusing on functionings *or* on capabilities. A functioning combination is a *point* in such a space, whereas capability is a *set* of such points".[17] Individuals have different starting positions in their functionings, but this should not prevent them from realizing their goals and what they value – their agency must be enhanced to render them capable of achieving and enjoying these objectives. This normative argument derives from the imperfect world capabilities are situated within. This provides a springboard for many applications of the Capability Approach in tandem with a Human Rights- Based approach – which applies international and domestic human rights norms to normatively advance equity and justice in the promotion of individual capabilities; it consequently nuances agency by putting it in dialogue with structure – it forces a reckoning with institutional and systemic change in favour of ameliorating human rights as prerequisites to empowering individual agency and capabilities.[18] At the core of the Capabilities Approach is ethical individualism, in which each individual is responsible for their actions.[19] However ethical individualism can flourish only when supported by institutional structures and processes.

In Focus: Opportunity and Process in Freedom and Human Rights

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[13] See Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22.

[14] See Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22 at 22.

[15] See Martha C Nussbaum, "Capabilities and human rights" (1997) *Fordham L Rev* 66, 273 at 287-288.

[16] See Amartya Sen, "Human rights and capabilities" (2005) *J Hum Dev* 6:2 151 at 154.

[17] See Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22 at 37.

[18] See generally, Peter Uvin, "From the right to development to the rights-based approach: how 'human rights' entered development" (2007) *Dev in Practice* 17:4-5 597.

[19] See Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22 at 35.

Indeed, Sen writes that for any theory of human rights that considers the Capability Approach, *opportunity* and *process* aspects of *freedom* are critical. These elements of opportunity and process will be core to understanding the notion of agency in this paper. Sen writes that opportunity, when read with the definition of capabilities, draws one's attention away from an individual's existing means as they may vary per differing socioeconomic status, (dis)ability, etc. and instead focus on the actual opportunities one has to realize one's goals and values.[20] For example, "freedom in the form of capability, concentrates on the *opportunity* to achieve combinations of functionings" such as being well-nourished or in good health; one does not have a general freedom to good health.[21]

Process as a component of freedom, conversely, operates in a way that explicates societal structures and institutions and how they may impose on an individual's agency and access to opportunities. Alkire and Deneulin explain that the process aspect of freedom pays attention to "the freedom involved in the process itself".[22] Sen outlines examples such as curfews and due process in justice systems under the rule of law. He shares that the capability approach cannot "possibly deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us enough about the fairness or equity of the processes involved, or about the freedom of citizens to invoke and utilize procedures that are equitable".[23] These two elements of opportunity and process are fundamental to the agency individuals are able to exercise within an investigation of the Capability Approach.

Capability Approach in Pedagogy

Although the Capability Approach was envisioned as an indicator for human development in poverty and economic analyses, Sen writes that the goals of the Capability Approach are flexible.[24] It can be explored as a metric. In this vein, it can apply to how one examines pedagogy and the advancement of agency in these spaces to promulgate human rights. This provides an apt paradigm from which to analyse the IHRIP at McGill.

The Capability Approach has been examined within theories of education and particularly social justice education. Unterhalter and Walker write that the Capability Approach provides a lens from which to rethink not only justice in education but broader societal dilemmas from gender equality to economic redistribution that also bear on education.[25] Similarly, Walker in another text articulates that the Capability Approach in curriculum design that centers on human development allows a "richer perspective on what it means to be human and hence on the kinds of graduates

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[20] See Amartya Sen, "Elements of a theory of human rights" (2017) in Amartya Sen, *Justice and the Capabilities Approach*,1st (London: Routledge, 2017) 221 at 238.
[21] See Amartya Sen, "Elements of a theory of human rights" (2017) in Amartya Sen, *Justice and the Capabilities Approach*,1st (London: Routledge, 2017) 221 at 240.
[22] See Sabina Alkire & Séverine Deneulin. "Chapter 2: Introducing the Human Development and Capability Approach" in Sabina Alkire & Séverine Deneulin, eds, *An Introduction to Human Development and Capability Approach* (London: IDRC) 22 at 37.
[23] See Amartya Sen, "Elements of a theory of human rights" (2017) in Amartya Sen, *Justice and the Capabilities Approach*,1st (London: Routledge, 2017) 221 at 242.
[24] See Amartya Sen, "Human rights and capabilities" (2005) *J Hum Dev* 6:2 151 at 159
[25] See Elaine Unterhalter and Melanie Walker, "Conclusion: Capabilities, Social Justice, and Education" in Elaine Unterhalter & Melanie Walker, eds, *Amartya Sen's Capability Approach and Social Justice in Education* (New York: Palgrave MacMillan, 2007) 239.

universities should educate".[26] This focus on curriculum allows for different aspects of capabilities to be augmented in their fostering through key tools such as critical inquiry and discussion and goals that are 'other-regarding' per Sen's conception of capabilities as central to human obligation to support all.[27] Wood and Deprez also focus on the Capability Approach in curriculum-building by acknowledging its marriage with other critical approaches to pedagogy -- including feminist and democratic paradigms – to ultimately conclude that the Capability Approach to education can be "a powerful antidote to disturbing and dehumanizing past conditions, present realities, and current trends in education".[28] These trends are specifically in relation to the fundamental nature of education as taking place in institutions. They write:

> educational institutions, like most other institutions, are steeped in inequities, competing values, and dehumanizing forces endemic to contemporary cultures. Current trends toward commodification, quantification, standardization, and globalization encourage marketplace aims for education, suffocating competing aims like personal and moral development and democratic citizenship.

The Capability Approach, in their view, provides greater critical thinking and engagement in the face of these inequities. For example, "Because [the Capability Approach] demands a focus on each student becoming increasingly able to be and to do what they have reason to value", this resulted in greater reflective discussion and deliberate dialogue about competing values and social power relations better equipping students to understand their own agency while empowering them to share their views and beliefs.[29] Thus, this approach has a multitude of applications.

It is also important to consider these applications across global contexts and intersectional identities. Unterhalter examines the Capability Approach in addressing gendered education in South Africa. With over 56% of those living with HIV/AIDS in South Africa being women, younger girls are at high risk, while also facing high rates of sexual violence in schools from teachers and pupils.[30] The institutions in which education is housed can diminish the enhancement of agency, freedom, and capability if they enact trauma and violence.[31] Process elements of freedom in creating safe institutions can be key to enhancing capabilities. In contrast, Reindal writes that the Capability Approach provides an ethical framework for inclusive education for those with (dis)abilities as "At the heart of the capabilities approach is equal respect for dignity"[32] which is critical for recognising young people with (dis)abilities as capable contributors with unique experiences worthy of respect, as opposed to "an asset to be traded off for the sake of

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[26] See Melanie Walker, "Universities and a human development ethics: A capabilities approach to curriculum" (2012) *Eur J Ed* 47:3, 448.
[27] See Melanie Walker, "Universities and a human development ethics: A capabilities approach to curriculum" (2012) *Eur J Ed* 47:3, 448.
[28] See Diane Wood & Luisa S Deprez, "Teaching for Human Well-being: Curricular Implications for the Capability Approach" (2012) *J Hum Dev & Capabilities* 13:3, 471 at 472.
[29] See Diane Wood & Luisa S Deprez, "Teaching for Human Well-being: Curricular Implications for the Capability Approach" (2012) *J Hum Dev & Capabilities* 13:3, 471 at 477-8
[30] See Elaine Unterhalter, "The capabilities approach and gendered education: An examination of South African complexities" (2003) *Theory & Res Ed* 1:1, 7.
[31] See Elaine Unterhalter, "The capabilities approach and gendered education: An examination of South African complexities" (2003) *Theory & Res Ed* 1:1, 7.
[32] See Solveig M Reindal, "Discussing inclusive education: an inquiry into different interpretations and a search for ethical aspects of inclusion using the capabilities approach" (2016) *Eur J Sp Needs Ed* 31:1, 1 at 8.

economic growth".[33] The Capability Approach, when applied to different contexts, can have different drawbacks and advantages. How the approach manifests through the IHRIP, and what impacts it has, will formulate the basis of this next section of the paper.

IHRIP and Capabilities: Prioritising Functionings at Every Step

Selection Process

Internships are advertised in the fall. This application procedure is rooted in values of enhancing freedom in process and opportunity for students. One way this is sought to be achieved is through transparency. Former interns volunteer themselves as a resource to new applicants creating a support structure for students to make informed decisions about their potential participation. Interested students are provided application packages which outline essential and desired requirements of students for each human rights internship placement. For example, the Legal Clinic on Human Rights and Disability in Lima, Peru requires Spanish language skills.[34] How applications are evaluated is also listed in the application through a series of 5 factors: *Demonstration of initiative, dynamism, resilience, and ability to work independently; Clear interest in engaging with human rights; Relevant paid or unpaid work experience; Excellent writing and communication skills; and other relevant extra-curricular activities*. Students can thus tailor their applications to highlight their fulfilment of these considerations. It is important to note that these factors are considered equally while simultaneously balancing concerns of equity.

Process freedom is also attempted to be ascertained through creating a uniform application. With a strict word limit, students are asked to answer short essay questions with their application questioning what human rights means to them, why they are applying, what skills they would like to achieve, how they may respond to challenges on the job, and investigating their understanding of human rights across different cultural and global contexts.[35] Students are invited to information sessions to ask questions, are connected with alumni upon request, and have access to internship blogs to learn more about past student experiences. Each year two or three former interns work as student coordinators to support the programme Director in running the programme and provide insights to the Director and applicants.

The selection process pays particular attention to circumstances which may have prevented the applicant from gaining relevant experiences to be competitive in the process. (ex. financial difficulties, rural community background, disability etc). Only incomplete or unfocused applications are eliminated in the first round. All other applicants are invited to a short in-person interview which allows the selection committee to gain a more holistic understanding of the candidate's personal trajectory, their aspirations and ambitions as well as their fears and limits. They are interviewed by diverse panelists including alumni of the IHRIP, the Program Director, and other human rights professional. Students are asked to express their preferences so they can

[33] See Solveig M Reindal, "Discussing inclusive education: an inquiry into different interpretations and a search for ethical aspects of inclusion using the capabilities approach" (2016) *Eur J Sp Needs Ed* 31:1, 1 at 7.
[34] See Centre for Human Rights and Legal Pluralism, "International Human Rights Internships Program Application Package 2022-2023" (2022) McGill Centre for Human Rights and Legal Pluralism.
[35] See Centre for Human Rights and Legal Pluralism, "International Human Rights Internships Program Application Package 2022-2023" (2022) McGill Centre for Human Rights and Legal Pluralism

be matched with a partner organisation that meets their interests as well as their abilities. Many students are placed to existing organisational partners through this process. Many others who show promise and potential but are interested in working on an area of human rights which fall outside partner organizations' purview are assisted by the CHRLP to locate placements with suitable organizations. Evident within this approach is a valuing of students' individual values and functionings, respecting the diversity of these 'starting points' such that they can act as a springboard for enhancing students' capabilities as future jusrists. Every step is conceived with the aim of supporting students' agentic decision-making towards their goal of acquiring hands-on human rights experience.

Internships: Human Rights Work in Diverse Settings

Students work around the world for different organisations ranging from nongovernmental organisations, regional courts, government entities, human rights commissions, indigenous communities, and grassroots human rights organizations. The work conducted by students is incredibly varied. Tasks can range from analyses of human rights law in different contexts including domestic, regional, and international human rights law; human rights advocacy; human rights in crafting government policy; and much more. Students feel empowered in taking on new challenges and develop a deeper understanding of the agenda and strategy of their host organization as well as critical perspectives on the complexities of human rights work.

There is significant skill acquisition and skill enhancement in these different organisations. For example, Hannah Reardon writes of the revelation in crafting Gladue Reports for the Cree Nation Department of Justice and Correctional Services that "many of the most severe instances of colonial violence in Eeyou Istchee have occurred within the past century and are the direct result of malicious policy initiatives spearheaded by the federal and provincial governments…it flies directly in the face of the false… belief of many Canadians that the colonial oppression of Indigenous peoples occurred in a distant past and under a different political regime".[36] This understanding of history acts in contrast from dated but standard education in Canada, and was only acquired on the job due to the research requirements of the human rights work necessary for Gladue Reports. These insights can be critical to situating human rights in the specific discourse of truth and reconciliation with Indigenous communities in Canada. These sensitivities and background knowledge enhance the capabilities of young jurists. Similarly, Renée Lehman writes of the importance Avocats sans frontières Canada placed upon "principles of subsidiarity and complementarity" during her work drafting the amicus curiae for court proceedings supporting the families of human rights defenders in Colombia.[37] Lehman learned that the "voices and input of local actors are not merely a factor which must be consulted and considered, but that positive long-term relationships with local actors are crucial to both the existence and success of any project involving western organizations operating abroad".[38] This strategizing of human rights work to collaborate with other actors is borne of relational experience acquired, again, only from

[36] See Hannah Reardon, "Dismantling 'Bureaucratic Colonialism' (8 August 2022) online: *McGill Human Rights Internship Program Blog* <https://humanrightsinterns.blogs.mcgill.ca/2022/08/6634/>.
[37] See René Lehman, "Subsidiarity and Complementarity: Guiding Principles in International Human Rights Work" (1 August, 2022) online: *McGill Human Rights Internship Blog* <https://humanrightsinterns.blogs.mcgill.ca/2022/08/6588/>.
[38] See René Lehman, "Subsidiarity and Complementarity: Guiding Principles in International Human Rights Work" (1 August, 2022) online: *McGill Human Rights Internship Blog*

experiential learning. Students are provided real avenues to apply human rights expertise and knowledge acquired on the job to further the work of the organisations they support. Moreover, students wield their agency in opportunities and processes that allow for their critical thinking of how best to conceptualize and operationalize human rights knowledge to promote social justice while working in large networks of stakeholders.

The efficacy of law, and how human rights and advocacy can be strategized is commonly explored within human rights internship work. Many students have questioned the value of international law when the legal systems that govern it are riddled with accountability gaps and contradictions of state sovereignty as barriers to global cooperation. Poonam Sandhu, during her experience at Human Rights Watch, writes that budgetary constraints with the International Criminal Court and state compliance with these provisions can pose barriers to ensuring justice for survivors of international crime. She argues that domestic criminal and human rights legislation can be key tools, as determined through her research attempting to strategize around gaps in accountability.[39] Noémie Richard also writes of her experience with the Kenya-Canada Remote Legal Aid Project, that even with robust laws, absent a culture of human rights or robust rule of law, corruption in local institutions through forms of bribery prevent the protection of rural farmers' property rights.[40] She argues that making legal information accessible enhances local communities' rights-based knowledge to better protect themselves when met with corruption.[41] A thread of strategizing around the failures of human rights law across international and domestic settings presents itself through the Capability Approach. Students applied textbook law to real-world situations only to realize its inadequacy. Applying themselves to question how creatively one can circumvent these institutional pitfalls promotes students' agency to think originally and explore creative solutions to real world problems in a collaborative manner. This is a clear example of the manifestation of ethical individualism which is concerned for the common good. Students are provided the opportunity to understand the different innovations and changes taking place in fast-paced justice-seeking workplaces, to which they can contribute through their own reflexive thoughts and ideas borne of the work they conduct.

Seminar: Companion Course

Students complete a three-credit course upon completion of their summer internships the following fall. The syllabus explains that the overarching goal of this course is "To link experiences and learning from the field/summer placement to formal learning in the classroom".[42] Among several other learning objectives, the course seeks to ensure students "learn new strategies to communicate human rights issues" and "reassess one's understanding of the law, institutions

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[39] See Poonam Sandhu, "International Criminal Justice, what's it good for?" (15 September, 2022) online: *McGill Human Rights Internship Program Blog* < https://humanrightsinterns.blogs.mcgill.ca/2022/09/6934/>.
[40] See Noémie Richard, "Knowledge is Power: How Access to legal Information Can Protect Human Rights (19 August, 2022) online: *McGill Human Rights Internship Program* <https://humanrightsinterns.blogs.mcgill.ca/2022/08/6676/>.
[41] See Noémie Richard, "Knowledge is Power: How Access to legal Information Can Protect Human Rights (19 August, 2022) online: *McGill Human Rights Internship Program* <https://humanrightsinterns.blogs.mcgill.ca/2022/08/6676/>.
[42] See Professor Nandini Ramanujam, *Intl. Human Rights Internships Seminar: Critical Engagements with Human Rights* syllabus (Faculty of Law, 2021).

and justice".[43] The premise of the course situates the expertise and knowledge acquired through the experiential internship and previous life experience as critical to learning. Collaborative and peer-supported learning is one of the key pedagogical principles of the course.

For the first half of the semester, meeting twice a week, students discuss and engage in interactive activities that apply lessons, theories, and questions posed in readings. These materials are interdisciplinary ranging from texts in political science, economics, jurisprudence, and more.[44] They are thematically grouped; for example, Sen's Capability Approach itself is discussed in relation to economic justice and issues of global economic inequality. Pertinent global case studies which are adjusted yearly, are also examined for students to apply theory to ground realities.[45] The instructor facilitates critical conversations which allow students to link their field and lived experiences to the course materials. Past students have described the course instructor, Professor Nandini Ramanujam's approach as creating "a collegial, enriching, dynamic and always encouraging – yet sober – environment for students".[46]

The Capability Approach and students' agency is evident in this methodology as individuals approach the discussion through their different functionings and experiences (internships and other roles) shaping class discussion where they are empowered to share their ideas respectfully and deliberatively. Provided with similar opportunities of human rights internships and the same mandatory readings to review for class, students are provided common ground from which to share their ideas, questions, values, and counterarguments. There is yet space for challenge and debate as students bring their own unique experiences and identities to the discourse. Indeed, as Unterhalter and Walker propose the Capability Approach as a means in education to illuminate thinking about questions of justice, the seminar does just this through engaging students to share their own substantive ideas and knowledge and debating competing ideas of what justice may mean for different communities, positioning oneself in relation to their classmates, the communities they have served in their human rights internships, and as individuals with unique experiences.

The diversity of students is also noteworthy. Applicants to the programme range from 19 years old students who entre the Faculty straight from CEGEP to individuals with a doctorate in a social science discipline. A small number of LLM students can also take the course, further diversifying the demographic of students and experiences. This pedagogical approach fosters an enabling environment for the expression of diverse voices and perspectives. Each student has their unique experience which levels the playing field in the class and creates an inclusive environment for learning while maximizing their potential and benefit from the experiential learning opportunity.

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[43] See Professor Nandini Ramanujam, *Intl. Human Rights Internships Seminar: Critical Engagements with Human Rights* syllabus (Faculty of Law, 2021).

[44] See generally Professor Nandini Ramanujam, *Intl. Human Rights Internships Seminar: Critical Engagements with Human Rights* syllabus (Faculty of Law, 2021).

[45] Past cases include examining the Open Society Justice Initiative for questioning strategic litigation of human rights and the role of Hybrid Tribunals in advancing human rights for the hard to reach. See generally Professor Nandini Ramanujam, *Intl. Human Rights Internships Seminar: Critical Engagements with Human Rights* syllabus (Faculty of Law, 2021).

[46] See Centre for Human Rights and Legal Pluralism, "CHRLP Collaborator Testimonials" (2022) at 21 (pdf): *McGill University*.

After a few weeks, students are grouped together to teach different themes relating to human rights. Students are selected to present together based off their field placement experience so that those students who completed similar work can converse with each other about their experiences and deliver a lecture they deem fit on a particular human rights issue. There are general guidelines for designing a class and students are provided core readings, but the students are encouraged to exercise originality and integrate their field experience in their presentation. The Professor meets with the student group to go over the expectations of the class and shares materials developed for that class theme by the previous cohorts of students. This approach to supporting the students in designing and leading a class equips them to exercise agency in a classroom setting. The class presentation includes insights from scholarly literature and often strives to explore solutions to improve human rights puzzles.

The Capability Approach can be assessed in this model as empowering students to make use of the knowledge and skills acquired during their field placements and share them with their peers. It sees them as more than students, but teachers as well. This echoes the model Wood and Deprez promote of the Capability Approach in which students are asked to reflect upon their own range of values and how this connects with social power relations. This discourse empowers students to question their functioning and agency in relation to opportunity and process aspects in ideas of freedom (and limitations therein) to conceptualize how human rights manifest in their internship organisations' work and their own lives. This process also allows students to understand the notion of relational agency vis a vis the peers who they are teaching. This dialogical and collaborative process of teaching and learning nudges students to step away from the simplistic binaries of universalist/relativist human rights and focus on the flourishment of human agency in diverse societies.

The Jewel in the Crown:

The crown jewel of students' experiences manifests in their deliverable of an 8000-to-10000-word term paper written on a human rights issue that relates to their internship experience. Students have complete freedom to choose a topic alongside applied theoretical and methodological frameworks. Often the topic is informed by a concern or dilemma the student may have encountered during their field placements. As a result, students problematize questions of justice in human rights work, and often devise and propose solutions and lessons for human rights moving forward. The process of writing is supported both by the instructor. A peer review process is also built into the syllabus to support different stages of the writing process including 'drafting' and 'review' classes.

These papers can be published in the Centre for Human Rights and Legal Pluralism's Working Paper Series, allowing academics and the public free access to these thoughts as well. Irrespective of the grade received, each author is encouraged to publish their paper which demonstrates the ethos of celebrating diverse abilities and outcomes. This access is key to positioning these future jurists as critical thinkers valued in their analytical insights. Students can also continue to work on these papers with feedback from their final grade to publish with journals

and law reviews as several have including with the *Revue quebécoise de droit international, Windsor Yearbook of Access to Justice,* and the *Oxford Journal of Human Rights Practice*.[47]

The term papers provide key insights into opportunities provided for students to critically engage with, a plural landscape of human rights puzzles presented during their internships. In these diverse global settings, human rights can be conceptualized and applied with nuance to the goals and cultures from which the missions of each organisation are situated within. That is, the normative promulgation of human rights can look different depending on where one exists. In this vein, students are encouraged to critically assess competing conceptions of human rights, NGO practice, and how these interact and manifest. Take, for example, issues in gender justice. Feminism, although some would argue can be easily defined as simply equality and justice for gender minorities, when applied in different cultures can spark debates about how such a vision may unfold practically. Alexandre Recher, in their final term paper from their internship, writes about the relationship between "harmful cultural practices and what it reveals about the underlying relationship between women's rights and culture".[48] They argue that "the universalist aspirations of" CEDAW "obscures assumptions grounded in one geographically specific ideology – Western liberalism – to the exclusion of others.[49] The paper attempts to reconceptualize the discourse around harmful cultural practices to one that "recognizes culture as a medium to facilitate gender justice aspirations in a manner that centralizes the role of women in shaping priorities and actions towards achieving those goals within their communities".[50] On the flip side, Julia Green explains the advantages and disadvantages of faith-based organisations in sub-Saharan Africa in both undermining and advancing LGTBQ human rights.[51] Green writes in a blog post about her experience, "I know that the lessons I learned in Mombasa have helped me to better understand the many human rights challenges that persist around the world. I came away with an understanding of gender inequality, poverty, and corruption that I simply could not have gotten in a classroom or from a book."[52] Stripped away from the privileged academic environment, future jurists are faced with competing understandings of human rights and must exercise their agency in

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[47] See Centre for Human Rights and Legal Pluralism, "CHRLP Collaborator Testimonials" (2022) at 19 (pdf): *McGill University;* David Matyas, "Short Circuit: A Failing Technology for Administering Justice in Nunavut" (2018) *Windsor YB Access Just* 35, 379; Riley Klassen, "Doing Good and Feeling Good: A Critical Analysis of Human Rights Research" (2022) *J Hum Rts Prac* 14:2 513.

[48] See Alexandre Recher, "What's the Harm? CEDAW and the Relationship Between Human Rights and Culture" (2021) McGill Centre for Human Rights and Legal Pluralism Working Paper 10:1 Summer 2021 online (pdf): <https://www.mcgill.ca/humanrights/files/humanrights/alex_recher_-_whats_the_harm_cedaw_and_the_relationship_between_hr_and_culture.pdf>.

[49] See Alexandre Recher, "What's the Harm? CEDAW and the Relationship Between Human Rights and Culture" (2021) McGill Centre for Human Rights and Legal Pluralism Working Paper 10:1 Summer 2021 at 4 online (pdf): <https://www.mcgill.ca/humanrights/files/humanrights/alex_recher_-_whats_the_harm_cedaw_and_the_relationship_between_hr_and_culture.pdf>.

[50] See Alexandre Recher, "What's the Harm? CEDAW and the Relationship Between Human Rights and Culture" (2021) McGill Centre for Human Rights and Legal Pluralism Working Paper 10:1 Summer 2021 at 8, online (pdf): <https://www.mcgill.ca/humanrights/files/humanrights/alex_recher_-_whats_the_harm_cedaw_and_the_relationship_between_hr_and_culture.pdf>.

[51] See Julia Green, "Faith-Based Organizations in Sub-Saharan Africa: Negatives, Positives, and Recommendations for Effective Promotion of Human Rights" (2020) McGill Centre for Human Rights and Legal Pluralism Working Paper 8:1 Fall 2020 online(pdf) <https://www.mcgill.ca/humanrights/files/humanrights/green_julia_ihrip_v8_2020.pdf>.

[52] See Julia Green, "Mombasa: Sun, Sea, and a Study of Sexual Violence" (14 August, 2019) online: *McGill Human Rights Internship Program Blog* <https://humanrightsinterns.blogs.mcgill.ca/2019/08/5246/>.

relation to the human rights structures in the location of their internship. Embracing the Capability Approach-informed principles of IHRIP, students exercise their agency to critically think about ideas of justice and engage with contentious debates of competing rights and norms. Student research papers reflect this nuanced understanding of a pluralistic landscape of human rights discourses and practices. Flourishment of individuals living in diverse contexts with diverse capabilities is at the heart of the Capability Approach. This is the point of departure for all research papers written in the CEHR seminar. Ultimately these papers further students' capabilities through critical thinking, reasoning, and reflection upon their personal and professional experiences in conjunction with hard research skills employed in writing the paper.

Conclusion

The Capabilities Approach-informed pedagogy of IHRIP supports students to gain a deeper understanding about the power and limits of the law in advancing human rights. It also helps students gain insights into context-specific particularities which shape human rights discourses and human experiences. Most importantly the Programme empowers and supports students to exercise their agency in exploring feasible and innovative approaches to address the enforceability and accountability gaps preventing marginalized populations from enjoying fundamental human rights. Opportunities and exposure that foster a deeper understanding of challenges and ethical quandaries of human rights work contribute to a well-rounded legal education. Irrespective of final career choices, the skills and insights acquired through the IHRIP experience informs the work of its alumni.